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19 Cal.2d 755

DE GARMO v. GOLDMAN et al.

L. A. 17346.

Supreme Court of California.

March 5, 1942.

1. Action 🔑22

In determining whether action is one in equity, the equitable characteristics of the relief sought must be considered, since the courts of chancery have always claimed and exercised the right to provide a remedy for every wrong not cognizable by courts of law.

2. Courts 🔑212

An action, by stockholder and director, to remove other directors for alleged fraudulent acts based upon the statute authorizing removal of a director for acts authorizing the removal of a trustee under the broad principles of equity and which is based upon the breach of the director's fiduciary duty to the corporation, is an "action in equity" within the appellate jurisdiction of the Supreme Court and is not an "action at law", since plaintiff director in order to be entitled to relief was required to have clean hands. Civ.Code, §§ 310, 2230; Const. art. 6, § 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Action at Law" and "Action in Equity".

3. Equity 🔑65(1)

Court of equity must, upon any suggestion that a plaintiff has not acted in good faith concerning matters upon which he bases suit, inquire into facts in that regard.

4. Equity 🔑65(2)

It is not only fraud or illegality which will prevent a suitor from obtaining equitable relief, but any unconscientious conduct upon his part which is connected with the controversy will repel him from the forum whose very foundation is good conscience.

5. Equity 🔑65(2)

Equity will not aid one who is guilty of breach of contract connected with the transaction concerning which he asks for a decree in his favor.

6. Equity 🔑65(1), 66

The principle that one seeking equitable relief must come into equity with "clean hands", differs from the maxim "He who seeks equity must do equity", in that latter assumes that different equitable rights have arisen from same subject matter or transaction, some in favor of plaintiff and some in favor of defendant, so that plaintiff is required to recognize and provide for defendant's rights, and his relief is granted only upon a showing that defendant's rights are protected.

See Words and Phrases, Permanent Edition, for all other definitions of "Clean Hands" and "He Who Seeks Equity Must Do Equity".

7. Equity 🔑65(1)

Any really unconscientious conduct connected with the controversy to which one is a party is sufficient justification for the court to close its doors to him, and the fact that one does not have an adequate remedy at law does not justify disregarding the maxim.

8. Equity 🔑65(1)

The burden is on the one coming into a court of equity for relief to prove, not only his legal right, but his clean hands, and he may not rely on any deficiencies that may be laid at door of the defendant.

9. Appeal and error 🔑1071(6)

Where stockholder and director of corporation seeking removal, in equity action, of certain others as directors introduced evidence showing that defendant directors collected rebates from certain employees and made incomplete returns to an association, and made false reports to lessor so that lessor would accept smaller amount of rent than should have been paid, but evidence also showed that plaintiff, owning one-half the stock, personally benefited by every alleged fraudulent act of defendants that increased assets of corporation and that as corporation's president plaintiff was being paid salary to supervise its office, handle its accounts, and take care of its tax matters, court's failure to find upon material issue of plaintiff's good faith required reversal. Civ.Code, § 310.

10. Appeal and error ⊂⇒**870(2)**

In action by director to remove certain other directors of corporation, in which corporation was made defendant, action of trial court in striking corporation's cross-complaint and refusing to hear evidence thereon could not be reviewed on appeal from a judgment removing defendants as directors, since court had rendered no "judgment" determining rights of parties in that regard. Civ.Code, § 310.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment".

11. Appeal and error ⊂⇒**138**

Corporation was "necessary party" to action by one director against certain other directors to remove defendant directors from office and as such party corporation could appeal from judgment rendered, although its rights were not specifically determined by that judgment. Civ.Code, § 310.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party".

12. Appeal and error ⊂⇒**442**

Appeal of directors of corporation from judgment removing them from office in action by another director and barring defendants from re-election before December 1, 1940, stayed judgment appealed from, and a subsequent resolution of March 15, 1940, a year after judgment, directing substitution of attorneys, was ineffective for that purpose. Code Civ.Proc. § 949.

13. Appeal and error ⊂⇒**671(1)**

Record on appeal was not such as to enable Supreme Court to rule upon motion to substitute attorneys for corporation in action to remove certain persons as directors, where judgment removing defendants as directors barred them from re-election only until December 1, 1940, and, according to plaintiff's affidavit, a meeting of stockholders was held on December 5, 1940, at which time new board of directors was elected, and thereafter meeting of directors was held at which resolution expressing desire of corporation to substitute counsel was approved, but answering affidavit on corporation's behalf stated facts at variance with those presented by plaintiff concerning election of directors, so that issue of fact concerning validity of election was presented. Civ.Code, § 310.

14. Appeal and error ⊂⇒**776**

An appellant may not dismiss his appeal as a matter of right, but whether he may do so is within discretion of court, and, where dismissal of appeal of one of several appellants will prejudice his co-appellants, it may properly be refused.

15. Appeal and error ⊂⇒**776**

Court should not allow litigant to dismiss his appeal where it appears that effect of such order would make it possible for respondent to obtain benefits of judgment to which, in equity and good conscience, he is not entitled.

16. Appeal and error ⊂⇒**776**

Appeal from judgment removing defendants as directors of corporation and barring them from re-election until December 1, 1940, would not be dismissed pursuant to stipulation of substituted counsel for one of defendants where affidavit showed that since September 1, 1939, such defendant had been employed by corporation as manager of its business department with title "Assistant to the President" and where, upon a retrial, court might determine that because of plaintiff's own derelictions of duty as president and director, plaintiff should not obtain equitable relief, and record also showed that when suit was commenced the other defendant was employed under contract and that the determination of his appeal might affect the rights thereunder, since a decision on the merits would be required.

SHENK, CURTIS, and CARTER, JJ., dissenting.

◆

In Bank.

Appeals from Superior Court, Los Angeles County; W. Turney Fox, Judge.

Action by G. C. DeGarmo, a stockholder and director of a corporation, against A. Goldman and another, for the purpose of removing defendants as directors, in which the Golden State Glass Corporation was also made a defendant. The defendant corporation and defendant Goldman filed cross-complaints. The order allowing the corporation to file a cross-complaint was vacated, and, from a judgment for plaintiff, defendants appeal.

Dismissal of appeal of defendant Goldman pursuant to stipulation of counsel denied; permission to file supplemental affidavit upon motion of defendant corporation to substitute counsel and the answer thereto denied; motion to substitute counsel denied without prejudice to application to renew same in superior court, and judgment reversed.

See, also, DeGarmo v. Shenberg, Cal. Sup., 102 P.2d 522.

Rehearing denied; SHENK, CURTIS, and CARTER, JJ., dissenting.

Frank M. Gunter, of Los Angeles, for appellant Shenberg.

O. C. Sattinger, of Los Angeles, for appellant Golden State Glass Corporation.

Newby & Newby and Mitchell, Silberberg, Roth & Knupp, all of Los Angeles, for appellant Goldman.

Glen Behymer and Biby & Biby, all of Los Angeles, for respondent.

EDMONDS, Justice.

The controversy between the parties to this litigation concerns the affairs of the Golden State Glass Corporation. G. C. DeGarmo, one of its stockholders, and also a director, under the authority of section 310 of the Civil Code, brought a suit against N. E. Shenberg and A. Goldman for the purpose of removing them as directors. As grounds for such removal, DeGarmo alleged that they had grossly abused their authority and had committed certain fraudulent and dishonest acts. In a second count of the complaint, it was alleged that the conduct of these directors had damaged the corporation in the sum of $10,000, and that the suit was prosecuted by the stockholder, on behalf of the corporation, because a demand upon its board of directors to sue would be useless.

The corporation was also named as a defendant, as required by the statute.

Upon the allegations of the complaint and evidence presented by affidavit, a receiver of the corporation was appointed, but the orders made in that regard were set aside. Golden State Glass Corporation v. Superior Court, 13 Cal.2d 384, 90 P.2d 75. The case is again before this court upon the separate appeals from the judgment prosecuted by each of the defendants, and a motion by the corporation, to substitute attorneys.

The corporation not only answered the allegations of the complaint but later filed a cross-complaint, pursuant to an order made upon motion, alleging that DeGarmo was indebted to it in the sum of $22,000 paid to him for services which were not rendered. Later, the order allowing the filing of this cross-complaint was vacated. Goldman also filed a cross-complaint for declaratory relief concerning the rights and duties of the directors generally and under certain agreements made by them in regard to control of the corporation. He asked the court to determine whether the corporation has three or four directors, and to dissolve the corporation in the event that it has four directors who are so deadlocked that the corporation cannot carry on its business.

Upon trial of these issues, judgment was rendered against Goldman upon his cross-complaint; also, that he and Shenberg each be removed from his respective office as a director of the corporation, and barred from re-election during the period prior to December 1, 1940.

The first question requiring consideration concerns the nature of the action, for unless it is one in equity, this court has no jurisdiction of the appeal. Const. art. VI, sec. 4. The respondent urges that his action is one at law and that he has invoked a statutory remedy; the appellants take the position that section 310 of the Civil Code, as amended, only enlarged the equitable jurisdiction of the superior court.

[1] Since the distinctions between actions at law and proceedings in equity have been abolished, considerable difficulty has often been encountered in defining them, and with the enlargement of statutory remedies, it is unfortunate that the Constitution places jurisdiction upon such a theoretical basis. The doctrine that when classification is necessary, a court should look to the historical basis of the plaintiff's right under the English law in the light of such modifications as have taken place in this country (Philpott v. Superior Court, 1 Cal.2d 512, 36 P.2d 635, 95 A.L.R. 990), is not always an accurate one. The equitable characteristics of the relief sought must be considered, for the courts of chancery have always claimed and exercised the right to provide a remedy for every wrong not cognizable by courts of law, and the complexities of the present social order have brought about conditions which were unknown when the English courts of equity were established. For example, statutory remedies to quiet title are said to be within the court's equitable jurisdiction. Thomson v. Thomson, 7 Cal.2d 671, 62 P.2d 358, 117

A.L.R. 1; Benson v. Shotwell, 87 Cal. 49, 25 P. 249, 681.

An example of a statutory equitable remedy is section 315 of the Civil Code. Under this section, upon the filing of an action therefor by a shareholder of a corporation, the superior court shall have the power to try and determine the validity of the election or appointment of any director. Forty years ago, it was held that this statute enlarged the historical jurisdiction of chancery and provided an equitable remedy. Whitehead v. Sweet, 126 Cal. 67, 58 P. 376; see, also, Simpson v. Nielson, 77 Cal.App. 297, 246 P. 342.

Section 310 of the Civil Code, as originally enacted, fixed the conditions under which individual directors, or the entire board of directors, of a corporation may be removed from office by the stockholders. In 1931, this section was amended by the addition of subdivision 3, which provides that: "The superior court of the county where the principal office is located may at the suit of any shareholder or shareholders holding at least ten per cent of the number of outstanding shares with or without voting rights remove from office any director or directors in case of fraudulent or dishonest acts or gross abuse of authority or discretion with reference to the corporation, and may bar from re-election any director so removed for a period prescribed by the court. The corporation shall be made a party to such actions."

Although, strictly speaking, directors of a corporation are not trustees, it has been held that section 2230 of the Civil Code relating to trustees is also applicable to them. Bainbridge v. Stoner, 16 Cal.2d 423, 106 P.2d 423; Snediker v. Ayers, 146 Cal. 407, 80 P. 511. The statute invoked by the respondent not only provides for the removal of a director found to have been guilty of acts which would be cause for the removal of a trustee under the broad doctrines of equity, but also authorizes the court to "bar from re-election any director so removed for a period prescribed by the court." A determination to this effect is in the nature of an injunction. It is also closely analogous to the equitable remedy for the removal of a trustee provided by section 2283 of the Civil Code, and the relief which may be obtained is characteristic of a court of equity in that it acts on the person of the defendant. See Pomeroy's Equity Jurisprudence, 4th ed., vol. 1, page 163; Story's Equity Jurisprudence, 14th ed., vol. 1, page 91. Moreover, the statutory action against directors for misconduct is based upon a breach of their fiduciary duty to the corporation and it is said that under such circumstances equity has concurrent jurisdiction with law. 3 Fletcher Cyc. Corp., Perm. Ed., sec. 1270, page 749; see, also, Morawetz, Private Corporations, sec. 543, page 517.

[2] The respondent relies upon Neall v. Hill, 16 Cal. 145, 76 Am.Dec. 508, where this court denied that equity had jurisdiction with regard to the removal of corporate officers of any description. But the court also said that "in all cases where this power has been exercised by a Court of Chancery, the jurisdiction has been expressly conferred by statute." 16 Cal. at page 149, 76 Am.Dec. 508. Section 310 of the Civil Code, enacted many years after this decision has supplied the statutory authority, although it may be noted that two later cases considered the right of a court to remove directors as being within the historical jurisdiction of equity. In the first of these, Wickersham v. Crittenden, 93 Cal. 17, 28 P. 788, a stockholder brought suit for the purpose of protecting his interest in a corporation against certain acts of its directors which, it was alleged, were unauthorized. This court held that the relation of directors to the corporation which they serve is a fiduciary one, and "If a trustee is shown to have been unfaithful, the court * * * may remove him from his trust." 93 Cal. at page 32, 28 P. at page 791. At a later time the District Court of Appeal observed that "a court of equity may remove directors of a corporation, if deemed necessary, when they have proven unfaithful." California, etc., Ass'n v. Superior Court, 8 Cal.App. 711, 712, 97 P. 769, 770. Although each of these statements is dictum, they express the broad concept of equitable jurisdiction which is both historically justified and presently required in judicial administration if courts consider the protection of rights as of first importance.

A consequence of this holding is that the respondent is not entitled to the relief sought by him unless he came into the court of equity with clean hands. And this rule is applicable even if the evidence supports the findings of fact, which are favorable to him and in almost literal accordance with the allegations of the complaint.

The court found that Goldman, with the knowledge of Shenberg, in violation of an agreement made between the corporation and a glass workers' union relating to rates of pay, collected rebates from certain employees; that a certain employee was discharged for refusal to consent to such practice and a new employee employed who agreed to and did make such rebates. It also found that prior to July, 1935, Shenberg and Goldman instructed the corporation's bookkeeper to keep two sets of books, and make incomplete returns to a glass contractors' association, under which the corporation did not pay certain amounts due from it upon the basis of the true amount of business done.

Another finding of the court is that Goldman, as secretary of the corporation, with the knowledge of Shenberg, made false reports to the lessor of the premises upon which the business was carried on for the purpose of deceiving the lessor, and that upon the basis of such reports the lessor accepted a less amount of rent than should have been paid. Also, that in a number of reports made by Shenberg under contracts for work performed by the corporation in connection with projects of the Public Works Administration of the United States, he certified, on its behalf, that certain employees were not truthfully classified in accordance with the work performed by them and that the amount of their wages was misstated.

The court further found that Shenberg and Goldman proposed to some employees that they would be paid at the prevailing rate for work done on government jobs and at the union scale for other work, but that they could not work for the corporation unless they rebated to Goldman, for the benefit of Goldman and Shenberg, the amount paid over a specified sum each week. Some employees accepted this proposal and made payments accordingly, and Shenberg, knowing the facts, certified to the government agency that wages had been paid at the prevailing rate, concealing the refunds.

The acts enumerated in these findings certainly are contrary to those principles of honesty and fair dealing which should be followed by an officer or director of a corporation. But in determining whether the respondent should have the equitable relief which he seeks, the court of equity will also consider the facts concerning his conduct.

By their answers, Shenberg and the corporation denied that DeGarmo had been either ready, able or willing to perform the duties of his office. They pleaded that in 1936, he and the other officers entered into a contract concerning the management of the corporation, which included the amount of salary to be paid to each of them for his services. The salary of DeGarmo was fixed at $500 per month, and from 1935 through 1938 the corporation paid to him approximately $23,000, although he failed and refused to render any services therefor.

In this connection, they asserted, for almost three years prior to the commencement of the present suit, Shenberg and Goldman requested DeGarmo to perform his duties, but he refused to do so, in consequence of which such duties were performed by them. His salary, it is alleged, was discontinued solely because of his refusal to perform the duties prescribed for him as the president of the corporation.

In his cross-complaint Goldman alleged that DeGarmo had entered into certain contracts in writing by which he agreed that the number of directors of the corporation should be reduced from four to three and to cancel certain stock. According to Goldman, DeGarmo has refused to comply with this contract and contends that he is not bound by it although the other parties to it have fulfilled all of its terms.

Answering DeGarmo's charges concerning the use of false records of sale to deceive the glass association in regard to the amount of money due to it, Shenberg and the corporation pleaded that, according to the advice given them by DeGarmo, the agreement was void from its inception and in restraint of trade and no payment should be made under it. Concerning the assertedly false sales tax returns, both alleged that under an agreement concerning the division of duties between the officers of the corporation, the supervision of all of the financial records of the corporation, including the duty to make tax returns, was vested in DeGarmo and at no time did he alter the method of filing sales tax returns or the manner of maintaining the books of the corporation.

These answers present two issues as to the good faith of DeGarmo. One of them concerns his asserted failure to comply with the contract under which he agreed to perform certain services for the stipulated salary. The other relates to the charges made by him in which he asserted that his co-directors had been guilty of fraudulent practices.

Upon the first one, the trial court found in favor of DeGarmo, but the finding in this regard is not supported by the evidence. When called as a witness, in his own behalf, DeGarmo testified that he did not agree to perform any duties: "It was never intended that I should spend any particular time there except such time as I saw fit." He admitted that in a deposition he had replied to a question asking what he did for his salary: "It didn't make any difference whether I did anything or not * * * it was not the intention that I should do anything in particular."

But of even more importance is the fact that the trial court excluded evidence tending to prove that, for a long period of time, DeGarmo had not performed his duties as the president and director of the corporation. Upon cross-examination, he was asked: "Well, Mr. DeGarmo, since July 5, 1935, to the present time you have drawn from the corporation approximately $22,000 in salary, haven't you?" When the court sustained an objection to this question, counsel offered to prove that in the years 1936 and 1937 the respondent rendered no services of any appreciable nature for the corporation. This offer was rejected by a similar ruling of the court. In conclusion, counsel for the appellants asked DeGarmo whether since July, 1935, he had been ill a great part of the time and practically incapacitated from taking care of any business. This question was also held to be improper.

The exclusion of this evidence was error of a most serious nature. If the court had permitted DeGarmo to answer the questions propounded to him and other questions of the same nature relating to his own conduct and had found that he was guilty of willful and deliberate breach of contract, this would have been tantamount to a finding of bad faith within the meaning of the doctrine of clean hands.

[3-5] Upon the second issue of good faith, the court made no finding although it is the duty of a court of equity, upon any suggestion that a plaintiff has not acted in good faith concerning the matters upon which he bases his suit, to inquire into the facts in that regard. For it is not only fraud or illegality which will prevent a suitor from obtaining equitable relief. Any unconscientious conduct upon his part which is connected with the controversy will repel him from the forum whose very foundation is good conscience. Johnston v. Murphy, 36 Cal.App. 469, 172 P. 616. Nor will equity aid him who is guilty of breach of contract connected with the transaction concerning which he asks for a decree in his favor. Harrison v. Woodward, 11 Cal.App. 15, 103 P. 933.

The rule in this regard is a fundamental one. Bennett v. Brown, 206 Cal. 424, 274 P. 532; Young v. Young Holdings Corp., Ltd., 27 Cal.App.2d 129, 80 P.2d 723; Baar v. Smith, 97 Cal.App. 398, 275 P. 861. It was succinctly explained in Allstead v. Laumeister, 16 Cal.App. 59, 64, 116 P. 296, 297, where the court, quoting from Pomeroy's Equity Jurisprudence, said that "'whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.'" See, also, Richman v. Bank of Perris, 102 Cal.App. 71, 282 P. 801.

[6-8] The action of equity courts in their interposition on behalf of suitors for any and every purpose and in their administration of any and every species of relief, is guided and regulated by this principle. It differs from the maxim, "he who seeks equity must do equity" in that the latter assumes that different equitable rights have arisen from the same subject matter or transaction, some in favor of plaintiff and some in favor of the defendant so that the plaintiff is required to recognize and provide for defendant's rights and his relief is granted only upon a showing that defendant's rights are protected. Therefore, as the very foundation of an equity forum is good conscience, any really unconscientious conduct connected with the controversy to which he is a party is sufficient justification for the court to close its doors to him, nor does the fact that a plaintiff may have no adequate remedy at law justify disregarding the maxim. Miller v. Kraus, Cal.App., 155 P. 834. The burden is on the one coming into a court of equity for relief to prove not only his legal rights but his clean hands, and he may not rely on any deficiencies that may be laid at the door of the de-

fendants. Richman v. Bank of Perris, supra.

[9] According to the respondent's own testimony, approximately two years before he filed his suit, he was told that two sets of books were being kept for the purpose of defrauding the Glass Jobbers Association. About the same time, he discovered that false sales tax returns were being made to the state. Not long after, he was given information that the corporation was defrauding its lessor by means of false reports concerning the volume of business transacted upon the leased premises.

What did he do upon receiving this information? He testified that he talked with Shenberg, and once or twice with Goldman. He mentioned some of the matters to the bookkeeper but he did not ask her to show him the books. And although the corporation then employed an auditor who made monthly reports of its business, DeGarmo did not ask him to make any investigation of these matters.

The respondent says that he told Goldman and the bookkeeper that the irregularities must not continue. But he never made any investigations to determine whether or not his demands had been carried out, even though Shenberg told him that Goldman was continuing to make false reports for sales tax purpose. He did not communicate with the corporation's lessor or the state or the sales bureau in an attempt to rectify the fraud practiced upon them. And he permitted Goldman to negotiate a new lease with the lessor when he knew that it had been falsely informed concerning the income of the company.

During all of this time, DeGarmo was not only a director of the corporation; he was also its president. As holder of one-half the stock he personally benefited by every fraudulent act of Shenberg or Goldman that increased the assets of the company. And as the corporation's president, he was being paid a salary to supervise its office, handle its accounts, and take care of its tax matters. Under these circumstances, the failure of the trial court to find upon the material issue of DeGarmo's good faith requires a reversal of the judgment. Tucker v. United Railroads, 171 Cal. 702, 154 P. 835; Matthiessen v. Grand, 92 Cal.App. 504, 268 P. 675.

[10, 11] Concerning the appeal of the corporation, the action of the trial court in striking its cross-complaint from the files and refusing to hear evidence thereon may not be reviewed on this appeal because the court has rendered no judgment determining the rights of the parties in that regard. But the corporation is a necessary party to the action authorized by section 310 of the Civil Code and, as such party, it may appeal from the judgment rendered although its rights are not specifically determined by that judgment. The allegations of its answer are substantially the same as those made by Shenberg and present the same issue as to the good faith of the respondent.

The motion to substitute attorneys for the corporation was made by Newby and Newby, who claim to represent it under a resolution authorizing their employment which was adopted on March 15, 1940, approximately one year after the judgment was entered. It is opposed by counsel who represented the corporation upon the trial of the action and is its attorney of record in this court, and also by counsel for Shenberg. Each assert that the judgment was not self-executing; that it was stayed when the appeals of Goldman and Shenberg were perfected; that DeGarmo and Crane, whom the complaint alleges were directors with Goldman and Shenberg when the suit was instituted, not constituting a majority of the board of directors, could not elect successors to Goldman and Shenberg; and that any purported action for that purpose is invalid.

[12] The effect of an appeal from a judgment is a matter of statutory regulation. Section 949 of the Code of Civil Procedure provides that in cases such as the present one "the perfecting of an appeal stays proceedings in the court below upon the judgment or order appealed from * * *. But such appeal does not stay proceedings, without a writ of supersedeas, where it adjudges the defendant guilty of usurping, or intruding into, or unlawfully holding a public office, civil or military, within the state * * *." It has been held that the exception in this statute does not apply to the judgment in an action to determine the validity of an election of a director of a corporation. Foster v. Superior Court, 115 Cal. 279, 47 P. 58. Also, in an earlier action to set aside the election of a director, this court decided that the effect of an appeal was "to leave the parties in the same situation, with reference to the rights involved in the action, as they

were prior to the rendition of the judgment." Dulin v. Pacific Wood & Coal Co., 98 Cal. 304, 308, 33 P. 123, 125.

Considering the exception of the statute, the court at an early date reached the conclusion that an appeal from a judgment ordering a sheriff removed from office operated as a supersedeas because he was not charged with usurping or intruding into or unlawfully holding a public office. Covarrubias v. Board of Sup'rs of Santa Barbara County, 52 Cal. 622. And when the members of the board of supervisors were ordered removed from office the court declared that "the appeal, when well taken, 'ipso facto operated a supersedeas.'" Restating this determination more fully it said: "Whether, then, the judgment in such a case be considered a self-executing judgment or not, the appeal is equally self-executing, and restores the officer to his rights of office until its final determination." Morton v. Broderick, 118 Cal. 474, 485, 50 P. 644, 647.

The code provision is perfectly plain and this court has consistently applied its express terms as providing a statutory supersedeas in cases such as the present one. Accordingly the appeal of Goldman and Shenberg stayed the judgment appealed from and the resolution of March 15, 1940, directing a substitution of attorneys is ineffective for that purpose.

[13] However, upon a rehearing of the motion, DeGarmo presented for filing a supplement affidavit in which he states that further action has been taken by the corporation concerning a substitution of attorneys. The judgment removing Goldman and Shenberg from office barred them from re-election only until December 1, 1940. According to DeGarmo's affidavit, a meeting of the stockholders of Golden State Glass Corporation was held on December 5, 1940, at which time a new board of directors was elected. Thereafter a meeting of the directors then elected was held, at which time the resolution expressing the desire of the corporation to substitute Newby & Newby as its counsel was ratified and approved.

In an answering affidavit, on behalf of the corporation, facts are stated which are at variance with those presented by DeGarmo concerning the election of directors. These affidavits therefore present an issue of fact concerning the validity of the election, and a decision upon the motion would require a determination as to what persons, if any, had been duly elected as directors of the corporation. Under such circumstances, the record is not such as to enable this court to rule upon the motion.

There is also before the court a stipulation signed by Newby & Newby, who, on March 18, 1940, were substituted as counsel for the appellant Goldman, and counsel for DeGarmo, that the appeal of Goldman may be dismissed. When this stipulation was filed, the court reserved a ruling upon it in order that the effect of a dismissal upon the rights of other appellants might be considered in connection with the merits of the case.

[14, 15] The rules of this court provide: "An appeal may be dismissed by the court at any time, upon and in accordance with the written stipulation of the attorneys of record of the respective parties." Rule XXIV. This rule states a general principle of appellate procedure. An appellant may not dismiss his appeal as a matter of right; whether he will be permitted to do so is within the discretion of the court. And where the dismissal of the appeal of one of several appellants will prejudice his co-appellants, it may be properly refused. 3 Am.Jur. 322, 324; 4 C.J.S., Appeal and Error, § 1351, p. 1942. Nor should a court allow a litigant to dismiss his appeal when it appears that the effect of such an order would make it possible for the respondent to obtain the benefits of a judgment to which, in equity and good conscience, he is not entitled.

[16] The reason for the stipulation requesting a dismissal is undoubtedly shown by affidavits now before the court. From them it appears that since September 1, 1939, Goldman has been employed by the Golden State Glass Company as manager of its business department with the title "Assistant to the President." But upon a retrial, the court may determine that, because of his own derelictions of duty as the president and a director of the corporation, DeGarmo should not obtain equitable relief. If that should occur and, in the meantime, Goldman has been allowed to dismiss his appeal, DeGarmo will have accomplished at least a portion of an inequitable purpose.

Under these circumstances, the court will not dismiss the appeal of Goldman and the rights of the respective parties must be determined accordingly. Nor will it dismiss the appeals of Goldman and Shenberg upon the ground that the issues have become moot because the judgment barred each of them from re-election only during the period prior to December 1, 1940. The record shows that at the time this suit was commenced Shenberg was employed by the corporation under a contract and that the determination of his appeal may affect the rights thereunder. Also, it is apparent that the validity of actions taken by the directors appointed to succeed Goldman and Shenberg may be called into question as between them and DeGarmo or the corporation. The case must therefore be decided upon the merits. Couts v. County of San Diego, 139 Cal.App. 706, 34 P.2d 812.

The court will make no order dismissing the appeal of Goldman pursuant to the stipulation of counsel; permission to file the supplemental affidavit upon the motion of the corporation to substitute counsel and the answer thereto is denied as to each of them; the motion to substitute counsel is denied without prejudice to an application to renew the same in the Superior Court upon a new trial of the suit; and the judgment is reversed.

GIBSON, C. J., TRAYNOR, J., and PETERS, Justice pro tem., concurred.

SHENK, Justice (dissenting).

I agree that this court has original appellate jurisdiction in this case but I dissent from the judgment of reversal as to the defendant Shenberg and the corporation and from the refusal to dismiss the appeal of the defendant Goldman.

The defendant Shenberg's brief is devoted to disputed evidentiary matter and other discussion not material to the real issue in the case. Section 310 of the Civil Code provides for removal of directors from office in case of fraudulent or dishonest acts or gross abuse of authority or discretion with reference to the corporation. The complaint charged him and the defendant Goldman with certain fraudulent acts. The trial court found, among other things, that Shenberg, along with Goldman, was guilty of fraudulent practices in connection with dealings between the corporation and a certain labor union with which it had contractual relations; fraudulent practices in obtaining rebates from employees; fraudulent practices in dealing with its employees in connection with work being performed on Public Works Administration contracts; and fraudulent practices in keeping duplicate books in such a way that false reports were made to a trade association so that increased sales were made in violation of an agreement with that association. It was also found that as a result of the keeping of two sets of books, the rental for the premises occupied by the corporation which was based on the amount of sales, was fraudulently reduced to the minimum. In considering Shenberg's appeal from the judgment of removal, the issue is simply whether the evidence supports the findings as to the alleged fraudulent acts. A review of the record discloses that there is overwhelming evidence to support those findings, and the majority opinion does not even intimate otherwise.

As one of the acts of abuse of authority the complaint charged that on and after March 1, 1938, Goldman and Shenberg refused to permit DeGarmo to perform any of his duties as president of the corporation or to perform any services for or on behalf of the corporation and that they gave such instructions to the auditor as to cause the corporation to discontinue DeGarmo's salary. As a defense or justification for the discontinuance of the salary. the defendants offered evidence to show that since 1935 DeGarmo had been ill a great part of the time and had been so incapacitated that he could render no services to the corporation. The trial court sustained objections to this offer of proof yet found that DeGarmo had performed his duties until March 1, 1938. Defendant Shenberg now urges that this finding is not supported by the evidence and that it was prejudicial error to sustain the objections to the offer of proof that DeGarmo had not performed the services. If the stopping of the salary payments by the corporation because of the activities of this defendant were the only act of misconduct charged against him and if the judgment of removal were based solely on this alleged act of misconduct there might be some merit in the contention. However, as previously stated, numerous acts of misconduct were found which were supported by the evidence. It therefore becomes immaterial whether this one finding is supported by the evidence. Hertel v. Emireck, 178 Cal. 534, 174 P. 30; Young v. Young Holdings Corp., Ltd., 27 Cal.App.2d 129, 154, 80 P.2d 723; 2 Cal.Jur. 1028, 1029; 24 Cal.Jur. 942. Assuming that the trial court erred in sustaining the objection and that the finding with reference to DeGarmo's services is unsupported, such finding does not affect the judgment of removal and is not a ground for reversal. Forestier v. Johnson, 164 Cal. 24, 127 P. 156; Delannoy v. Quetu, 73 Cal.App. 627, 239 P. 71.

In answer to a question propounded by this court since the appeal was lodged here the defendant Shenberg now contends that the plaintiff DeGarmo was estopped from bringing the action for removal because of alleged acquiescence and participation in the alleged fraudulent acts. In other words, it is claimed that DeGarmo came into court with unclean hands. Assuming that the plea is available to Shenberg and that, as here, it may be raised without pleading and for the first time on appeal, this defendant is at once met with the conclusion of the trial court implicit in the findings and judgment that no basis in fact existed for the operation of such an estoppel. Whether it existed was a question of fact and the plaintiff is entitled to the intendments in his favor arising from the judgment. Unless the record shows as a matter of law that he actively participated in the fraudulent and dishonest acts or had knowledge of those acts and negligently failed to take any steps to remedy the situation this court is bound by the conclusions of the trial court.

DeGarmo denied any knowledge whatsoever of the fraudulent activities of Shenberg and Goldman until after the same were committed. He admitted acquiring information that false sales reports had been made to the Biddle Sales Corporation so that the defendant corporation could make more sales in violation of its agreement to the lessor bank to reduce rent; and to the state to reduce sales taxes. But he did not remain inactive after learning of these activities. He made strenuous and frequent objections to such a method of conducting the affairs of the corporation. He reprimanded Shenberg, Goldman, the bookkeeper, and the auditor, and demanded that the methods of reporting sales be changed. These efforts to correct the dishonest practices within the corporation were effective. In August, 1936, DeGarmo caused the corporation to withdraw from the glass association, thus terminating the false sales reports to that association. At the end of 1937 a new lease was made which provided that the rent was to be paid on a flat basis instead of being based on the amount of sales. There is little testimony in regard to the payment of sales taxes, but it clearly appears from the record that that difficulty had also been corrected before the commencement of the action.

There is no evidence whatsoever that DeGarmo actively participated in the fraudulent practices of Shenberg and Goldman. There is evidence that when DeGarmo obtained knowledge of such practices he protested against the continuance of the same. He received assurances that they would be discontinued and they were discontinued with the results above indicated. There is no basis in the record for the contention that the plaintiff was or is estopped from maintaining the action.

Appeal of A. Goldman.

The defendant Goldman, through his own attorney, filed a separate notice of appeal from the judgment removing him as a director of the corporation. He has filed no brief. He was charged with the same acts of misconduct and gross abuse of authority alleged against Shenberg and since he has filed no brief he may well be deemed to have abandoned his appeal. Furthermore, Goldman has presented to this court a written stipulation to dismiss his appeal with the request that an order of dismissal be made in accordance therewith. The stipulation is signed by his counsel of record and is approved by his own signature. It is also signed by counsel for the plaintiff.

Rule XXIV governing the practice and procedure in this court provides: "An appeal may be dismissed by the court at any time, upon and in accordance with the written stipulation of the attorneys of record of the respective parties."

Notwithstanding the foregoing rule the defendant Shenberg objects to an order of dismissal of Goldman's appeal on the ground that he would be prejudiced thereby. There is no merit in the objection. It may be assumed that under some circumstances an appellant should not be permitted, as of right, to dismiss his appeal when such dismissal would prejudice the rights of a co-defendant on a joint appeal. But Goldman's appeal is not of that character. It is a separate appeal which he had the right to take or not to take regardless of Shenberg's wishes. Having taken it he should have the right to control it under the circumstances here presented and to dismiss it under the rule.

The corporation is not a party aggrieved by this judgment. The judgment does not purport to adjudicate any of the corporation's rights. It is silent on that subject. It would not constitute a bar to any subsequent action the corporation might desire to bring against the plaintiff. Section 938 of the Code of Civil Procedure provides that "Any party aggrieved may appeal * * *." Unless a party is aggrieved he has no right of appeal (Maxwell Hardware Co. v. Foster, 207 Cal. 167, 277 P. 327), and if taken it should be dismissed. Youle v. Thomas, 146 Cal. 537, 80 P. 714; 2 Cal. Jur. 217. A party aggrieved is one "having an interest recognized by law in the subject matter of the judgment, which interest is injuriously affected by the judgment." In re Estate of Colton, 164 Cal. 1, 127 P. 643, 645.

In my opinion the judgment removing the defendant Shenberg as a director of the corporation should be affirmed and the separate appeals of the defendants Goldman and the corporation should be dismissed.

CURTIS and CARTER, JJ., concurred.

20 Cal.2d 894

In re RICHARDSON.

Cr. 4277.

Supreme Court of California.
March 19, 1942.

Attorney and client 🔑39

Where investigation and report by State Bar indicated that facts and circumstances surrounding conviction of attorney on his plea of guilty in Federal District Court did not disclose moral turpitude to have been involved in the commission of the offense, order to show cause issued in disbarment proceedings was discharged.

In Bank.

Proceedings in the matter of the disbarment of Jerome Lyman Richardson.

Order to show cause discharged.

See, also, 15 Cal.2d 536, 102 P.2d 1076.

Miguel Estudillo, of Riverside, and Robert W. Kenny and Morris E. Cohn, both of Los Angeles, for petitioner.

Philbrick McCoy, of Los Angeles, for respondent.

PER CURIAM.

It appearing upon investigation and report by the State Bar that the facts and circumstances surrounding the conviction of Jerome Lyman Richardson, on his plea of guilty in action No. 27812 in the District Court of the United States in and for the Northern District of New York, do not disclose moral turpitude to have been involved in the commission of the offense, the order to show cause heretofore issued herein is discharged.

19 Cal.2d 659

LYON v. GOSS et al. (two cases).

L. A. 17182, 17594.

Supreme Court of California.
March 3, 1942.

1. Appeal and error 🔑80(3)

A decree in equity which is denominated "interlocutory" and directs further hearing for certain purposes may make so complete and final an adjudication of all issues of fact and law as to constitute a "final judgment" for purpose of appeal, since it is not the form of decree but the substance and effect of adjudication which is determinative of the finality thereof for purpose of appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Judgment".

2. Appeal and error 🔑80(3)

Where no issue is left for future consideration except the fact of compliance or noncompliance with terms of first decree, that decree is "final"; but, where anything further in the nature of judicial action on part of court is essential to a final determination of rights of parties, decree is "interlocutory".

See Words and Phrases, Permanent Edition, for all other definitions of "Final Decree" and "Interlocutory Decree".

3. Action 🔑6
Equity 🔑39(1)

In declaratory judgment action, trial court after entering interlocutory decree properly undertook to administer further equitable relief in accordance with general prayer of pleadings, since equity, having once obtained jurisdiction of a cause, will dispose of the entire controversy. Code Civ.Proc. § 1060.

4. Appeal and error 🔑80(3)

Trial court's undertaking to administer further equitable relief in accordance with general prayer of pleadings in action for declaration of rights under contract and lease did not have effect of establishing the character of first decree as purely interlocutory and unappealable. Code Civ.Proc. § 1060.

5. Appeal and error 🔑80(3)

In action for declaration of rights under a contract and lease, and for other equitable relief, a decree, which reserved for future consideration not only the matter of compliance or noncompliance with its terms but also issues pertaining to performance and prevention of performance of contract, and which did not even complete declaration of rights and duties of parties but expressly stated that no adjudication was made as to what their rights would be in event defendant was unable to perform, was "interlocutory" and hence not appealable. Code Civ. Proc. § 1060.

6. Appeal and error 🔑80(3)

In action for declaration of rights under contract and lease wherein court entered an interlocutory decree, refusal on final hearing to make further adjudication contemplated by decree or to administer general equitable relief on ground that only issues properly triable were those essential to declaration of rights and that interlocutory decree constituted a complete declaration of such rights could not operate retroactively to alter purport of interlocutory decree and accord to it a finality so as to make such decree appealable. Code Civ.Proc. § 1060.

7. Municipal corporations 🔑720

Where contract for lease of public market provided that lessee was immediately to commence to sublease spaces in market, subleases providing for payment of bonuses by prospective subtenants in addition to rentals, and lessor was to receive proportions of income received by lessee and lessee's interest in lease would be forfeited unless lessee procured subleases calling for payment of specified amount in bonuses by certain date, contract was not void for want of "mutuality".

See Words and Phrases, Permanent Edition, for all other definitions of "Mutuality".

8. Municipal corporations 🔑720

A contract for lease of public market, providing that lessee was to immediately commence to sublease spaces in market and that lessee's interest in lease would be forfeited unless lessee procured subleases calling for payment of specified amount in bonuses by certain date, was not void for want of mutuality even if contract was unilateral in its inception, where contract became mutual and binding upon partial performance by lessee, and upon execution for a valuable consideration by lessor of a waiver of certain obligations under contract.

9. Municipal corporations 🔑720

Under contract for lease of public market which required lessee to immediately commence to sublease spaces in market and to obtain certain bonuses and rentals from sublessees, whereby lessee was required to endeavor to replace canceled subleases within a reasonable time, what constituted reasonable time was a "question of fact" in determining which court properly considered conduct of parties, acquiescence of lessor and his administrator in delay and replacement, construction which parties placed upon contract, the date of commencement of lease, and administrator's failure to co-operate with lessee in securing of contracts and leases.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

10. Action 🔑6

In action for declaratory judgment construing a contract for lease of public market which required lessee to immediately commence to sublease spaces in market, it was improper for court to incorporate new obligations in contract or to couch interlocutory decree in terms of a decree in specific performance by giving lessee a specified time in which to perform. Code Civ.Proc. § 1060; Civ.Code, § 3390.

11. Action 🔑6

In action for declaratory judgment construing contract for lease of public market, specific performance of obligations could not be decreed where contract was one for rendition of personal services which neither party could be compelled to perform. Code Civ.Proc. § 1060; Civ.Code, § 3390.

12. Action 🔑6

In action for declaratory judgment construing a contract for lease of public market involving personal services, that con-

tract was not susceptible of being made the subject of decree of specific performance in equity did not leave the parties without remedy or deprive trial court of its power to proceed with disposition of entire controversy since court might allow parties to amend pleadings and to litigate their respective legal claims for damages. Code Civ.Proc. § 1060; Civ.Code, § 3390.

◆

In Bank.

Appeals from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by Beach D. Lyon, as administrator with the will annexed of the estate of Homer Laughlin, deceased, against C. A. Goss and another, for a declaration of rights under a contract and lease and for other equitable relief. From an interlocutory decree, plaintiff appeals, and from a final judgment thereafter entered, named defendant appeals.

Appeal from interlocutory decree dismissed and final judgment reversed.

For prior opinions, see 115 P.2d 886, 115 P.2d 891.

Russ Avery and Harmel L. Pratt, both of Los Angeles, for Appellant in case No. 17182 and for Respondent in case No. 17594.

Bartlett & Kearney, Alfred L. Bartlett, and Wm. B. Gilroy, all of Los Angeles, for Respondents in case No. 17182 and for Appellant in case No. 17594.

CARTER, Justice.

This action was brought to secure a declaration of the rights of the parties under a contract and lease, and for other equitable relief. Plaintiff has appealed from an interlocutory decree (L. A. No. 17182), and defendant Goss from a final judgment entered five months later (L. A. No. 17594).

The premises affected by the contract and lease cover the ground floor of the Homer Laughlin Building, located at 315 South Broadway, Los Angeles. For many years prior to this litigation these premises had been occupied by the largest public market in Los Angeles. In it there were approximately seventy stalls occupied by sub-tenants operating meat and vegetable markets, grocery stores, and other concessions, and some seven hundred employees were engaged to serve the twenty to forty thousand customers who shopped there daily.

For years prior to March, 1929, the master lease upon the entire premises had been held by a corporation, the Grand Central Public Market, Inc., and the term of its then lease ran to October 31, 1939. For over twenty years defendant C. A. Goss had been interested in this corporation as organizer, president, or general manager. The corporation ordinarily followed the plan of sub-leasing the various stalls to subtenants, who operated individually but were subject to certain rules and to the supervision of the corporation.

On March 11, 1929, Mr. Goss and Homer Laughlin, the owner of the Homer Laughlin Building, entered into an agreement for a lease of the market property for a term of twenty years commencing November 1, 1939, and ending October 31, 1959. It will be noted that at the time of the execution of this contract the outstanding master lease had approximately ten years and eight months to run, and that immediately upon its termination, the new lease was to take effect.

The agreement of March 11, 1929, recited that Mr. Goss was desirous of securing a lease of the premises for the 1939-1959 term, and for it offered to pay Mr. Laughlin, as a bonus and in sole consideration of the execution of the lease and not as any part of the rental, the sum of $1, together with certain portions of the income which Mr. Goss would receive as lessee. The agreement further recited that Mr. Laughlin had accepted the offer, and had that day executed a lease to Mr. Goss for the twenty year term at a fixed rental of $2,280,000, payable at the rate of $9,500 a month on the first day of each month commencing November 1, 1939.

It was provided that the premises would continue to be used for a market without substantial change in the method of operation, and that Mr. Goss would proceed with diligence to procure sub-leases and contracts for sub-leases from responsible persons who wished to conduct merchandising establishments in the stalls and would agree to make bonus and rental payments to at least the minimum amount specified in a schedule attached to the agreement. According to the schedule, the total of all bonuses for subleasing the entire market would be $485,000. Of this sum Mr. Laughlin was to receive the first $205,000, and the balance was to be divided equally with Mr. Goss. The schedule also called for a total minimum rent from subleases of $17,410 a month, of which $9,500 was to be paid to Mr. Laughlin outright and the balance was to be divided equally with Mr. Goss.

The agreement declared that Mr. Laughlin entered into it because of special confidence and trust in Mr. Goss and his long experience in subleasing and managing the premises. Mr. Goss covenanted to endeavor immediately to secure subleases and sublease contracts and to continue the endeavor with diligence until all available space was subleased. He also agreed that he would procure contracts calling for the payment of bonuses in the sum of $75,000 by March 11, 1932, and additional contracts providing for the payment of further bonuses in the sum of $130,000 by March 11, 1935, or a total of $205,000, and that by the latter date he would also have subleases providing for a rental income over the term of not less than $9,500 a month, time being expressly made the essence of the agreement. In the event of his failure to so perform by March 11, 1935, it was provided that the agreement and all of his interest in the master lease and in all subleases and contracts should immediately cease and determine, and that all sums paid in should be held by Mr. Laughlin as liquidated damage for the breach. Provision was made for the deposit of all income with a trustee bank, to be disbursed in accordance with the terms of the agreement, and also for conditional assignment of the master lease to the trustee, to be held for the benefit of the one party or the other, conditioned upon performance or nonperformance of the agreement by Mr. Goss.

On April 23, 1929, the parties addressed a letter to the trustee which among other things provided that all subleases and contracts for subleases should be submitted to Mr. Laughlin for approval, and that without his approval none would be entered into by Mr. Goss or accepted by the trustee.

On May 28, 1930, the parties addressed another letter to the trustee wherein it was agreed that in case any of the contracts or subleases delivered to Mr. Laughlin as part of the $205,000 first to be delivered to him, should be cancelled by reason of the default of the maker, then such contracts would be replaced or made good to Mr. Laughlin from later contracts. It was also provided that the first available funds, if necessary, even those due Mr. Goss, could be used by the trustee to meet semi-annual installments on a mortgage outstanding against the Homer Laughlin Building, Mr. Goss to be later reimbursed for such advances.

Subsequent to execution of the agreement Mr. Goss proceeded with diligence to perform. Prior to April 20, 1931, he obtained and delivered to the trustee, and secured the approval of Mr. Laughlin on thirty-four contracts to enter into leases and thirty-four subleases with persons desiring to conduct merchandising stalls on the premises. The total amount of the bonuses to be paid under these contracts was $282,000, and the total monthly income provided by the subleases was $7,400.

On April 20, 1931, the parties addressed another letter to the trustee. It called attention to the provision of the agreement that in event of failure by Mr. Goss to obtain the specified contracts and subleases by March 11, 1935, his interest should cease and determine. It then stated: "The second party (C. A. Goss) has at this time secured sufficient subleases and contracts to enter into subleases to assure the performance of the covenants and conditions of said trust agreement on his part to be kept and performed and it has now been agreed that first party (Homer Laughlin) now waives said provision of the trust agreement and from this date said trust agreement shall be held to be a binding contract and it is agreed that no default thereof can be declared by first party (Homer Laughlin) because of any present or future violation or failure to perform the provisions of said trust agreement hereinbefore and in this letter set out." The letter further provided that in consideration of the premises, it was agreed that all bonus and sublease income received by the trustee, over necessary expenses, should be paid to Mr. Laughlin until he should have received $205,000 net, and that in case the Grand Central Public Market, Inc., should pay $13,500 advance rent, it should be turned over to Mr. Laughlin. This advance rental was subsequently paid.

On December 27, 1932, Mr. Laughlin died, and Beach D. Lyon, plaintiff herein, was appointed administrator with the will annexed of his estate. Meanwhile an economic depression had settled upon the country, twenty-six of the thirty-four contracts for subleases were in default, and at least twenty-three of them had to be cancelled. The trustee received only $65,692.42 in bonuses, including installments on defaulted contracts, of which it paid $43,800.64 to Mr.

Laughlin, and after the deduction of expenses retained a balance of $14,258.69. The contracts in default were not replaced. In 1937 Mr. Goss procured from a responsible person an additional contract for a sublease and $8,000 bonus, accompanied by a $1,000 deposit, but the administrator refused to approve the transaction. This refusal, according to findings of the trial court, was unreasonable and unjustified but it was not made in bad faith to prevent, nor did it prevent further performance by Mr. Goss of the agreement of 1929.

As the time approached for commencement of the term of the 1939-1959 master lease, the necessity for procuring subleases for the remaining stalls became pressing. On June 30, 1938, the administrator brought the present action against Mr. Goss and one of his associates. The prayer of the complaint was for a declaration of the rights and duties of the parties under agreement of 1929, and for such other and further relief as should be just and equitable. Defendant Goss alleged in his answer that the agreement was valid, subsisting, and had not been forfeited, and asked that plaintiff be restrained from delaying or hindering performance, and for general relief.

Trial of the cause was completed and findings were entered on March 2, 1939, less than eight months prior to the commencement date of the term of the master lease. In addition to finding facts as already set forth, the trial court defined the rights and duties of the parties and found the further facts to be in substance as follows:

Defendant Goss failed to replace or make good any of the contracts for leases cancelled by reason of the default of the makers, and failed to continue with diligence his endeavor to secure contracts, but this failure was due in part to plaintiff's refusal to accept contracts submitted for approval, and in part to the acquiescence by Mr. Laughlin and by plaintiff in delays in securing additional contracts, by their construction of the agreement of 1929 and modifications thereof, and by their failure to insist upon strict performance. The waiver clause embodied in the letter of the parties of April 20, 1931, was executed for a valuable consideration passing to Mr. Laughlin. By it defendant "was relieved of his obligation to secure contracts for leases with bonuses of $205,000, payable on or before October 31, 1939, and monthly rentals of $9,500 and his obligation to replace or make good contracts which were cancelled within the periods stipulated in the contract, that is to say, bonus contracts in the amount of $75,000 by the 11th day of March, 1932, and contracts in the additional amount of $130,000 on March 11, 1935; but he was not relieved of his obligation to continue diligently in an endeavor to replace or make good contracts that had been cancelled, nor was he relieved of his obligation to replace and make good said contracts within a reasonable time."

In determining what would be a reasonable time, the court stated that consideration should be given to the conduct of the parties, the acquiescence of Mr. Laughlin and plaintiff in the delay in replacement, and plaintiff's refusal to accept the contract submitted for approval or to cooperate with defendant. In view of these circumstances, the court found, a reasonable time had not elapsed within which the contracts must be replaced or made good and "that a reasonable time therefor would be four months after the filing of an interlocutory decree" in stated terms.

It was the intention and agreement of the parties, the court further found, that defendant should continue his efforts until all space in the market was rented, but it was not their understanding that if he failed to rent all space before November 1, 1939, his rights and interests under the agreement of 1929 should terminate. In view of the conduct of the parties it would be inequitable to terminate his rights immediately, without affording him an opportunity to fulfill his obligations, but as it was doubtful that he would be able to obtain the requisite contracts and leases, it would likewise be inequitable to allow him more than four months after the filing of the interlocutory decree within which to obtain contracts with bonuses of not less than $205,000, payable on or before October 31, 1939, for leases calling for monthly rentals of at least $9,500. In view of the time which had elapsed during which no acceptable contracts were secured, and in order to show the responsibility of the prospective subleases, each contract for a sublease should be accompanied by a deposit of not less than 10 per cent of the total bonus to be paid, with an additional 10 per cent payable within sixty days after acceptance of the contract and sublease by plaintiff, and the balance of the bonus, without interest, should be payable on or before October 31, 1939. If within four months after entry of the interlocutory decree, defendant should obtain contracts and subleases from responsible tenants upon the specified terms, this would constitute a substantial performance by defendant up to that time of the agreement of 1929, and he would thereafter have the right, so long as he used diligent efforts, to continue to secure contracts and leases for all unrented stalls. The court intentionally and expressly failed to adjudicate or define the rights of the parties, or what would constitute a substantial performance of the agreement of 1929, or under what circumstances it might be inequitable to compel further performance, in the event of a substantial failure on the part of defendant to rent all of the stalls upon the specified terms.

On the same day that the findings were filed, March 2, 1939, an "Interlocutory Judgment and Decree" was entered. It adjudged that the agreement of 1929 was still in force and that defendant was entitled to an opportunity to fulfill it; that he should be allowed four months thereafter within which to procure and submit contracts and subleases upon the terms set forth in the findings, and that plaintiff should, without delay, approve all such contracts and subleases offered by responsible tenants; that in the event of performance to the required extent within the four months' period, defendant should be given the right to proceed with diligence to rent the remaining stalls; that in the event of non-performance to the required extent within four months, or failure thereafter to continue diligent efforts to rent remaining stalls, the right of defendant should immediately cease and determine. Lastly, provision was made for a further hearing at the end of the four months and it was expressly declared that "no adjudication is made as to what the rights of the parties would be in the event defendant Goss should be unable to secure contracts and subleases for all of the stalls in the market or the bonuses and rentals set out in the schedule."

Plaintiff appealed from this interlocutory decree on the theory that it constituted a final judgment and was therefore appealable (L. A. No. 17182). Defendant did not appeal.

On April 14, 1939, well within the four months period, defendant filed a petition for an order directing plaintiff to show cause why he should not be ordered to approve contracts for subleases which had been submitted to him, and why the four months period should not be extended. The order to show cause was issued and hearings were had on it on April 21st and 28th. The court found that in an effort to comply with the terms of the interlocutory decree, and in an endeavor to secure subleases with responsible persons, defendant had acted and was continuing to act with diligence; that he had employed experienced assistants, advertised in newspapers, and written to and made personal contact with many present and prospective tenants. Subleases had been secured from seven different parties, but plaintiff had rejected six and failed to act on the remaining one. All of prospective tenants save one were responsible parties, and plaintiff was not justified, with the one exception, in failing to approve the proffered contracts and subleases. The court also found that plaintiff, being familiar with the provisions of the interlocutory decree, had wilfully failed to comply with it by neglecting and refusing to approve subleases, that he had also failed to cooperate with defendant in his endeavor to secure contracts, and that these facts had become a matter of general information to present and prospective tenants of the market. With respect to the charge that such wilful misconduct on the part of plaintiff had materially affected defendant's progress in performing and that it justified an extension of the four months period, the court expressly reserved its finding until the final hearing provided by the interlocutory decree.

In July, 1939, after expiration of the four months, plaintiff made a motion, supported by affidavits, for further hearing and for entry of a final judgment decreeing that because of defendant's failure to perform, all of his rights under the agreement of 1929 had ceased and determined. Defendant offered counter-affidavits to prove that his failure was due to plaintiff's interference and prevention of performance. The matter came on for hearing on August 8, 1939, and after some discussion the court stated: "You had better offer your proof. I think this hearing now may be considered to be a resumption of the trial of the case as part of the trial." Oral evidence was thereupon introduced by both sides, by plaintiff to prove nonperformance by defendant, and by defendant to prove prevention of performance by plaintiff. The court, however, declined to try the issue of prevention and performance and, on motion of plaintiff, it struck out all testimony on behalf of defendant on that subject. Findings were then filed.

The court found that contracts and subleases in good standing procured before and after entry of the interlocutory decree provided for bonuses in no more than the sum of $106,400 and for monthly rentals of no more than $3,545; that defendant had submitted further contracts and subleases, but plaintiff had refused to approve them and would not approve any further contracts; that defendant had offered to prove that plaintiff's refusal had interfered with his efforts to perform but that the court had refused to try that question for the reason that "it was not in issue and its determination was not essential to a declaration of the respective rights of the parties. * * *"

From these findings the court concluded as a matter of law that neither plaintiff nor defendant had complied with the terms of the interlocutory decree, that the only issues properly triable were those essential to a declaration of the rights of the parties, and that the interlocutory decree constituted a complete declaration of those rights. A final decree was thereupon entered adjudging "that neither party have or recover of the other any relief other than a declaration of their respective rights as set forth in the interlocutory decree heretofore made and entered and the findings of fact and conclusions of law this day made and filed, after trial had pursuant to the terms of the interlocutory decree."

Defendant appealed from this final decree (L. A. No. 17594). Plaintiff did not appeal but reasserted his position that the interlocutory decree constituted a final judgment and that the points made by him on his appeal from that decree were well taken.

[1, 2] The first question to be considered is that of the nature of the interlocutory decree. A decree in equity which is denominated "interlocutory" and directs a further hearing for certain purposes, may make so complete and final an adjudication of all issues of fact and law as to constitute a "final judgment" within the meaning of that term as used in the statutes concerning appeals. The problem of determining whether a particular decree is essentially interlocutory and nonappealable, or whether it is final and appealable is often a difficult one. Two conflicting lines of authority bearing upon the subject are reviewed in Security-First Nat. Bank v. Superior Court, 132 Cal.App. 683, 23 P.2d 1055. See also Perry v. West Coast Bond & Mortg. Co., 136 Cal.App. 557, 29 P.2d 279; Los Angeles A. T. Co. v. Superior Court, 94 Cal.App. 433, 271 P. 363; Johnson v. Solomons, 124 Cal.App. 43, 12 P.2d 140; Hollar v. Saline Products, Inc., 3 Cal.2d 80, 43 P.2d 273; Heywood v. Sooy, 4 Cal.2d 352, 353, 49 P.2d 826; Middleton v. Finney, 214 Cal. 523, 6 P.2d 938, 78 A.L.R. 1104; Doudell v. Shoo, 159 Cal. 448, 114 P. 579; Krotzer v. Clark, 178 Cal. 736, 174 P. 657; Maxwell v. Superior Court, 1 Cal.2d 294, 34 P.2d 475; Clement v. Duncan, 191 Cal. 209, 215 P. 1025; 2 Cal.Jur., secs. 18, 23, pp. 137–150. It is not the form of the decree but the substance and effect of the adjudication which is determinative. As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory.

The present action was brought under the declaratory relief statute (Code Civ. Proc., sec. 1060), which specifically provides that a party "may ask for a declaration of rights or duties * * * and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time," and the declaration "shall have the force of a final judgment." Under this statute the court could have terminated the action at the time of entry of the interlocutory decree by confining its provisions to a declaration and adjudication of the rights and duties of the parties without reservation for future consideration of matters requiring further judicial action. The interlocutory decree would then have had the force of a final appealable judgment.

[3-5] The court, however, undertook to administer further equitable relief in accordance with the general prayer of the pleadings. This was not improper, for equity, having once obtained jurisdiction of a cause, will dispose of the entire controversy (10 Cal.Jur., sec. 40, p. 496), but it did have the effect of establishing the character of the first decree as purely interlocutory and nonappealable. In other words, that decree reserved for future consideration not only the matter of compliance or noncompliance with its terms, but also issues pertaining to performance and

prevention of performance of the agreement of 1929; in fact, it did not even complete the declaration of the rights and duties of the parties but expressly stated that no adjudication was made as to what their rights would be in the event defendant was unable to secure contracts and subleases at the figures specified in the schedule. That the decree thus lacked finality and called for further judicial action on the part of the court is obvious.

[6] It is true that when the time came for a final hearing and the entry of a final decree, the court refused to entertain the evidence adduced on the issue of prevention of performance, and attempted to restrict its adjudication to a mere affirmance of the declaration of rights and duties as set forth in the interlocutory decree, to the same effect as if that decree had in fact been final. That is, the court refused on the final hearing to make the further adjudication contemplated by the provisions of the interlocutory decree, or to administer general equitable relief designed to dispose of the entire controversy, but instead concluded as a matter of law that the only issues properly triable were those essential to a declaration of the rights of the parties, that the interlocutory decree constituted a complete declaration of those rights, and that neither party should have or recover any other relief. However, this attempted restriction and wrongful procedure could not operate retroactively to alter the purport of the interlocutory decree and accord to it a finality which it did not possess.

Although the attempted appeal of plaintiff from the interlocutory decree (L.A. No.17182) was ineffectual and must be dismissed, a consideration of the propriety of that decree is necessary to a proper disposition of defendant's appeal from the final judgment (L.A.No.17594). Therefore, the entire record will be reviewed on the merits and the contentions made by plaintiff in his briefs on appeal L.A.No. 17182 will be considered briefly both in answer to defendant's points on appeal L.A. No.17594, and for the guidance of the trial court on further hearing of the cause.

[7, 8] A primary question is that of the validity of the agreement of 1929. Plaintiff contends that it is void for want of mutuality in that it did not bind defendant to any obligation or to the performance of any act; the only promise on his part was to endeavor to secure contracts and subleases, and in event of his failure, no legal liability was imposed upon him; he was free to abandon the enterprise at any time.

The consideration recited in the agreement is payment of $1 by defendant to Mr. Laughlin, together with proportions of the income to be received by defendant from his use and possession of the premises under the master lease, and execution by Mr. Laughlin to defendant of the master lease. It is also provided that defendant will procure contracts and subleases with responsible persons at scheduled bonus and rental prices, that he will carry liability and other insurance, and that he will immediately place funds and sublease transactions in the trustee bank for handling in accordance with further terms of the contract. The forfeiture clause provides for termination of the agreement upon defendant's failure to perform in the manner specified.

These provisions appear to impose mutual and reciprocal obligations constituting a valid and binding agreement. But even assuming that the point is an arguable one and that the contract was unilateral in its inception, that is, an offer of Mr. Laughlin to lease the premises to defendant if defendant performed certain undertakings in connection with subleasing, it is clear that the agreement became mutual, valid, and binding upon partial performance by defendant prior to April 20, 1931, and the execution on that date for a valuable consideration of the waiver agreement hereinbefore quoted. Rest. of the Law, Contracts, vol. 1, p. 33, sec. 45; Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 P. 1086; Blumenthal v. Goodall, 89 Cal. 251, 26 P. 906; Noble v. Reid-Avery Co., 89 Cal.App. 75, 264 P. 341; Bank of America Nat. Trust & Savings Ass'n v. Lane Mortg. Co., 18 Cal.App.2d 431, 63 P.2d 1189; Caspary v. Moore, 21 Cal.App.2d 694, 70 P.2d 224; 6 Cal.Jur. 211–215, secs. 139–141.

[9] A further contention is that defendant abandoned or breached the contract subsequent to the death of Mr. Laughlin in 1932. In this connection the trial court properly construed the waiver agreement as relieving defendant of his obligation to secure, prior to March 11, 1935, contracts for $205,000 in bonuses, and subleases providing a monthly rental of $9,500, but as not relieving defendant of his obligation to continue diligently in an endeavor to replace or make good the can-

celled contracts within a reasonable time. The question of what constituted a reasonable time was of course one of fact. In determining it the court properly took into consideration the conduct of the parties, the acquiescence of Mr. Laughlin and plaintiff in defendant's delay in replacement, the construction which the parties themselves placed upon the contract, that is, that it did not require defendant to replace or make good the contracts prior to October 31, 1939, the date of commencement of the term of the master lease, and also to plaintiff's failure to approve the contract and lease submitted to him by defendant and his failure to cooperate with defendant in the securing of contracts and leases. Weighing these factors, the court concluded that on the date of entry of the findings and interlocutory decree, a reasonable time within which defendant might perform had not yet elapsed.

Although the evidence adduced on a retrial might compel a different conclusion, the present record affords sufficient support for these findings. This is so even if it be conceded that the limited authority of plaintiff, as administrator, would not have empowered him to take any action after the death of Mr. Laughlin to revitalize, vary, or waive the performance of the contract provisions. Eliminating this factor, there still remained as a basis for the findings, the effect of the waiver agreement, of Mr. Laughlin's acquiescence in delay in the face of the continuing economic depression, and of defendant's efforts to complete performance despite plaintiff's refusal to cooperate.

The further finding that a reasonable time within which to perform would be four months after filing of the interlocutory decree, and that it would be a substantial performance if defendant within that period should secure from responsible tenants contracts for bonuses to the amount of $205,000, and subleases providing a monthly rental of $9,500, each contract to be accompanied by a 10 per cent bonus deposit, with another 10 per cent payable in 60 days, and the balance before October 31, 1939, and if defendant would thereafter continue with diligence to endeavor to rent all remaining space, is subject to the criticism that the court thereby made a new contract for the parties instead of construing the existing contract.

The action being one for declaratory relief, the court could have concluded its adjudication with its declaration of the rights of the parties and its finding that the contract was still in full force and effect and that a reasonable time for performance had not elapsed. The decree would then have had the force of a final judgment. Code Civ.Proc., sec. 1060, supra.

[10] Or if the court felt that a further exercise of its equitable jurisdiction was necessary, it could have provided by interlocutory decree for a further hearing to be held prior to the date of commencement of the term of the master lease, but without the above criticized restrictive provisions relative to performance. On further hearing it could then have appropriately determined whether the contract was still in force, whether under intervening circumstances a reasonable time for performance had elapsed, whether defendant had performed, or whether his performance had been hindered or prevented by plaintiff. Any additional declaration required to completely define the rights and duties of the parties, and any additional adjudication designed to dispose of the entire controversy could likewise have been made.

It was not proper, however, for the court to incorporate new obligations in the contract, or to couch the interlocutory decree in terms of a decree of specific performance by giving defendant a specified time in which to perform and expressly ordering plaintiff to "without delay approve all contracts for subleases and subleases offered by responsible tenants" and to "promptly notify defendant Goss and the tenants of such acceptance."

[11] That the obligations are not such as can be specifically enforced by an affirmative decree is clear. Aside from other reasons suggested, such as lack of mutuality of remedy (Civ.Code, sec. 3386), inadequacy of consideration (Rest., Contracts, sec. 367), etc., it is obvious that the agreement is one for the rendition of personal services which neither party can be compelled to perform (Civ.Code, sec. 3390; Rest., Contracts, sec. 379).

It obligates defendant to perform unique personal sales services, as witness the recital, "This contract is entered into by first party (Laughlin) because of his special confidence and trust in second party (Goss) and second party's long experience in subleasing and managing the premises under leases now in existence and because of second party's peculiar relation and acquaintance with those persons who now conduct mercantile establishments in the leased premises and who are prospective sub-tenants under the terms of this contract." It obligates plaintiff to accept or reject contracts and subleases submitted for approval, basing his action on his opinion as to the responsibility of the prospective tenants. Although, by virtue of a special provision of the contract, this service is one which plaintiff, as administrator, was empowered to perform after the death of Mr. Laughlin (11b Cal.Jur. 194, sec. 796), it requires an exercise of personal judgment and a degree of cooperation in making the enterprise successful, which cannot be compelled by court decree.

[12] The fact that the contract, although valid, is not susceptible of being made the subject of a decree of specific performance in equity does not leave the parties without remedy or deprive the trial court of its power to proceed with a disposition of the entire controversy. If the court concludes, on retrial, as it did from the evidence offered on the further hearing herein, that a reasonable time for performance of the contract by defendant has elapsed, or that plaintiff has consistently refused and will continue to refuse to approve any new contracts or subleases, and that the agreement has terminated, then it may allow the parties, if they so desire, to amend their pleadings and to litigate their respective legal claims for damages, an issue which will be determined by evidence of whether defendant breached the agreement and failed to perform because of his inability to meet its terms, or whether such failure was due to plaintiff's interference, and refusal to cooperate, or to approve contracts and subleases.

A similar situation was presented in Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 172, 88 P.2d 698, 89 P.2d 386, 387, where a contract was declared to be valid but not susceptible of specific enforcement by affirmative decree, and for this reason it was there held that "the court would be constrained to deny equitable relief and to leave the parties to assert their legal rights under the contract." The opinion states: "Although the equitable remedy is not available to plaintiff, nevertheless the contract sued upon is valid and sufficiently certain to warrant the trial court in entertaining a plea for the recovery of damages [referring to cited cases]. The complaint, while praying for 'all just and proper relief', was not framed in the alternative to seek the legal remedy for breach of the contract as a whole. * * * Under present code procedure, which permits a party to litigate his right to legal and equitable relief in the same action, and by amendment to ask a change of remedy, there appears to be no reason why plaintiff, if so advised, should not apply for permission to amend its pleading. Farnsworth v. Hunter, 11 Cal.2d 27, 77 P.2d 840; Peters v. Binnard, 219 Cal. 141, 25 P.2d 834; Pascoe v. Morrison, 219 Cal. 54, 25 P.2d 9; Ahlers v. Smiley, 163 Cal. 200, 124 P. 827; 10 Cal.Jur., p. 10, sec. 7; note, 22 C.L.R., p. 208. Whether the plaintiff is entitled to damages, or to what extent, is not here intimated. That is a matter to be proved upon trial of the issue."

The appeal from the interlocutory decree is dismissed. The final judgment is reversed.

SHENK, CURTIS, and HOUSER, JJ., concurred.

19 Cal.2d 676

STEINER et al. v. LONG BEACH LOCAL NO. 128 OF OIL WORKERS INTERNATIONAL UNION et al.

L. A. 17777.

Supreme Court of California.

March 3, 1942.

Hearing Denied April 1, 1942.

1. Torts 🔑10

Workmen may lawfully combine to exert various forms of economic pressure upon an employer, provided object sought to be accomplished has a reasonable relation to betterment of labor conditions and the workmen act peaceably and honestly.

2. Constitutional law 🔑90, 91

The right of workmen to combine and to exert various forms of economic pressure in negotiating with an employer is guaranteed by the Federal Constitution as an incident of "freedom of speech", press, and assemblage.

See Words and Phrases, Permanent Edition, for all other definitions of "Freedom of Speech".

3. Torts 🔑10

The right of workmen to combine to exert economic pressure upon an employer in seeking betterment of labor conditions is not dependent upon existence of a labor controversy between employer and his employees.

4. Constitutional law 🔑90

The constitutional guaranty of "freedom of speech", under which workmen may exert economic pressure upon an employer to obtain improved labor conditions, extends no further than to confer upon workmen the right to publicize the facts of an industrial controversy by peaceful and truthful means, and does not permit resort to acts of violence, physical intimidation, or false statement.

5. Injunction 🔑101(3)

Where workmen seeking betterment of labor conditions depart from bounds of peaceful persuasion and resort to acts of violence, courts are authorized and required to enjoin acts of violence or acts which amount to physical intimidation.

6. Injunction 🔑101(3)

The inherent power of a court of equity to enjoin acts of violence and physical intimidation by workmen seeking improvement of labor conditions is not limited to imposition of a restraint against violent and unlawful conduct, but may, under given conditions, be exercised to enjoin future picketing in any form where future picketing would have a coercive influence because of background of violence in controversy.

7. Constitutional law 🔑90

Where past picketing has become so irrevocably blended with acts of violence and physical intimidation as to justify belief that future picketing would result in continuance of illegal acts, an injunction restraining a labor organization from all picketing lies within equitable power of court and does not infringe right of "freedom of speech".

8. Injunction 🔑101(3)

The rule that all picketing may be enjoined where past picketing has been irrevocably blended with acts of violence and physical intimidation is particularly applicable where violent picketing was continued in defiance of a preliminary injunction.

9. Injunction 🔑101(3)

An injunction prohibiting all picketing may not be based upon isolated acts of violence or other unlawful conduct, but where picketing has been generally lawful, although accompanied by infrequent illegal acts not of a serious character, only the unlawful conduct will be enjoined.

10. Torts 🔑10

The use of vile and abusive language, threats of violence, and the shadowing of employer's business callers, employees, and employee's wives, amount to "physical intimidation" which may not be justified under any principles governing rights of persons engaged in labor disputes.

See Words and Phrases, Permanent Edition, for all other definitions of "Physical Intimidation".

11. Injunction 🔑101(3)

Evidence that representatives of union in connection with picketing defendants' place of business resorted to vile language, threats, and shadowing of defendants' business callers and employees, justified injunction prohibiting all picketing about premises of the defendants and their customers, notwithstanding that acts of actual physical assault and damage were rare.

12. Appeal and error 🔑1056(1)

In suit to enjoin union and its members from picketing, refusal of evidence that union's officers instructed pickets to refrain from violence or intimidation was not prejudicial error, where much of violence and disorderly conduct in connection with picketing was committed during presence at employers' plant of the officers who allegedly gave the instructions, and those officers admitted participation in shadowing of employees and customers.

13. Appeal and error 🔑1056(1)

It is not reversible error to exclude evidence which could not affect the decision upon a material fact.

14. Trade unions 🔑8

Where picketing plan was planned and carried out by union, union was responsible for acts of its pickets committed within scope of their agency and within sanction of its officers.

15. Injunction 🔑101(3)

In determining whether injunction prohibiting all picketing in connection with labor dispute is proper, no logical distinction may be drawn between picketing enmeshed with actual violence and picketing carried on with threatened violence and physical intimidation.

16. Injunction 🔑101(1)

Although violence and intimidation accompanying picketing by union and its members justified injunction prohibiting all picketing and the boycotting of employers' customers, union and its members should not have been prohibited from doing acts which could be done peacefully without picketing, and injunction was improper insofar as it enjoined them from inducing anyone to refrain from making sales to employers and from interfering in contractual relations between employers and their employees.

17. Damages 🔑1, 163(1)

The principle underlying right to damages for injury is that person injured is entitled to compensation commensurate with his loss, and, to recover more than merely nominal damages, the injured person must not only prove infringement of a legal right, but the items of damage suffered by him.

18. Damages 🔑163(4)

The rule that amount and items of pecuniary damage are not presumed, but must be proved to justify recovery of more than nominal damages, is applicable to a tortious interference with a business.

19. Damages 🔑103

Where an established business is wrongfully interrupted and injured, the proper measure of damages is the diminution in value of business traceable to the wrongful act as reflected by loss of profits, expenses incurred, or similar concrete evidences of injury.

20. Injunction 🔑197

Where claim for damages in suit to enjoin picketing is based upon an alleged interference with business, personal discomfort and annoyance are not compensable elements of damage.

21. Injunction 🔑197

In suit to enjoin picketing and to obtain damages upon theory that union and its members had wrongfully interfered with plaintiffs' right to carry on a lawful business, award of damages exceeding mere nominal damages was improper, where it was admitted that there had been no physical injury and no loss of profits was shown.

CARTER, J., GIBSON, C. J., and TRAYNOR, JJ., dissenting.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Fred Miller, Judge pro tem.

Suit by Fred Steiner and others against the Long Beach Local No. 128 of the Oil Workers International Union and others to enjoin the defendants from picketing or boycotting by means of force, violence, or intimidation. From a judgment granting an injunction and awarding damages, the defendants appeal.

Judgment, insofar as it granted an injunction, modified and as so modified affirmed, and the judgment insofar as it awarded damages reversed.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

D. A. Boone and James T. Satchell, both of Long Beach, for appellants.

Pierson & Block, Samuel P. Block, and Ralph Pierson, all of Compton, for respondents.

EDMONDS, Justice.

Upon a complaint charging that officers and members of a labor union had entered into a conspiracy to picket the refinery of the Elm Oil Company and that they were conducting both picketing and boycotting by means of false representations and with acts of violence, a preliminary injunction issued. By that order, the superior court enjoined the union and its agents from picketing or boycotting by means of force, violence or intimidation. Upon a trial the injunction was made permanent and its terms were broadened to prohibit all picketing and boycotting. Damages in the sum of $2,500 were also awarded. The appeal is from that judgment.

The controversy between the parties arose over the demand made upon the owners of the refinery to sign a closed shop contract with a labor union, and the question for decision concerns the right of an employer to injunctive relief when picketing goes beyond the bounds of peaceful persuasion. More specifically, the court is called upon to determine whether or not all picketing and boycotting may be enjoined when an employer shows that those acting in behalf of the union have used violence, physical intimidation and other means of illegal coercion in the endeavor to attain their purpose.

The respondents, as partners, own and operate a business in the city of Long Beach. Under the firm name of Elm Oil Company they refine crude petroleum oil and sell the products obtained therefrom. The appellants are Long Beach Local No. 128 of the Oil Workers International Union, its officers and some of its members.

The union is an affiliate of the Congress of Industrial Organizations.

By their complaint, the respondents alleged that the appellants entered into a conspiracy to injure and damage their business by picketing their premises; that no labor dispute existed between them and their employees, but on the contrary, the latter were entirely satisfied with respect to hours of labor, working conditions, wages, and all other matters connected with their employment; that their employees were not members of the C. I. O. union, were not desirous of becoming members thereof, and had expressed their desire to continue work under terms of their own choosing without the assistance of or interference from any labor organization; that the appellants, for the purpose of unionizing the respondents' business and to force their employees to join the union, caused pickets to be stationed about their premises; and that such picketing was conducted by means of violence, threats, intimidation, coercion, menacing conduct, and false representations. These asserted acts of unlawful conduct were set forth with particularity.

Further allegations of the complaint were that the respondents had valuable contracts with others for the purchase of crude oil; that by means of violence and threats, the appellants intimidated such persons from continuing to do business with them; and that by reason of the appellants' conspiracy and acts in pursuance thereof, they have suffered injury and damage to their business. The prayer was for a decree enjoining the appellants from in any manner picketing their place of business, or from in any manner interfering with their business, the business of persons dealing with them, or with their employees. In addition, damages in the sum of $25,000 were sought. Upon this complaint, a preliminary injunction issued limiting the number of pickets to be stationed about the plant during the pendency of the suit and enjoining the appellants from picketing or boycotting by means of force, violence, or intimidation.

By way of answer to the complaint, the appellants admitted the picketing of the respondents' place of business but denied the allegations of violence, threats and intimidation, asserting that the picketing was at all times carried on in a peaceful manner. As an affirmative defense they alleged that the partners had refused to negotiate with them and by means of threats and promises of favor, had forced their employees into stating that they were satisfied with their working conditions; that the working conditions in the respondents' plant with respect to wages and hours were less favorable to the employees than those which obtained in plants employing union labor, and had a tendency to break down and destroy advantages which had been established by the union; and that by reason of the respondents' acts, the appellants caused a picket line to be placed around their premises for the purpose of informing the public generally, and the persons connected with the industry, that Elm Oil Company was unfair to organized labor.

Upon the issues so framed, the case went to trial and the court made findings in substantial accordance with the allegations of the complaint. These findings, in the main, are based upon uncontradicted evidence which shows the following facts: Following the refusal of the respondents and their employees to negotiate with the union concerning a closed shop contract, a picket line was placed in front of the oil plant. At the outset, there were forty to fifty pickets. The number was then reduced, but until the date of the termination of the trial there were pickets on duty about the premises for twenty-four hours a day. At all times, the picketing was conducted under the supervision of the appellants Forrester and Coulter, both of whom were officers and representatives of the union.

Upon innumerable occasions, trucks of companies hauling oil for the respondents were followed by pickets in automobiles for long distances. Both Coulter and Forrester participated in this shadowing. Because of these actions, one truck company refused to haul any more oil for the respondents unless they protected the drivers against physical harm. To meet this demand, armed guards were provided.

The respondents' employees and their wives were followed by pickets, including Forrester. There is testimony that both the men and the wives were greatly frightened and harassed by these actions. At one time, the wife of an employee who had brought her husband's lunch to him was followed by two pickets in an automobile. The wife of another employee was also followed. This time two men employed by the oil company gave chase. Thereupon, the car containing the pickets stopped, and the appellant Booth, upon being questioned by one of these employees concerning the motive in following the woman, challenged him to a fight. Upon one occasion, Forrester followed an employee to his home after dark and drove back and forth in front of the house, causing the man and his wife great fright and annoyance. Forrester also followed the respondent Kindseth after dark.

During the picketing, those representing the union directed vile, abusive and insulting language at the respondents' business callers and employees. Threats of physical violence were embodied in some of this language, much of which is too vile to be here stated. At another time, the appellant Coulter approached an employee, who was engaged in gauging trucks at the oil plant, and told him that "in labor trouble people had been hurt, that there had been no violence in the Elm Oil Company case to date, but from that day on, he, J. C. Coulter, was not giving Brown any further protection."

Several trespasses were committed by pickets upon the property of the respondents. When a customer of the oil plant drove his car on to the premises, two of the pickets rushed at him and "grabbed at" him, and the appellant Benton threatened him with bodily harm. Upon another occasion, pickets blocked the driveways of the premises so as to prevent a truck belonging to one of the respondents' business visitors from leaving the plant. Another picket paraded in front of the premises carrying a pole on the end of which was a piece of cheese. Pickets threw rocks at the premises, hitting cars, tanks and trucks. At times, the pickets falsely represented to business callers that a strike was in progress at the plant. Moreover, the following of employees and customers, and the use of threatening and intimidating language toward them, continued after the issuance of the preliminary injunction prohibiting such conduct.

[1-3] It is now settled law that workmen may lawfully combine to exert various forms of economic pressure upon an employer, provided the object sought to be accomplished thereby has a reasonable relation to the betterment of labor conditions, and they act peaceably and honestly. Lisse v. Local Union, 2 Cal.2d 312, 41 P.2d 314; McKay v. Retail Auto. S. L. Union No. 1067, 16 Cal.2d 311, 106 P.2d 373. This right is guaranteed by the federal Constitution as an incident of freedom of speech, press and assemblage. Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Carlson v. People of California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104. Nor is the right dependent upon the existence of a labor controversy between the employer and his employee. McKay v. Retail Auto. S. L. Union No. 1067, supra; C. S. Smith Met. Market Co. v. Lyons, 16 Cal.2d 389, 106 P.2d 414; American Federation of Labor v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855.

[4] But the constitutional guarantee of freedom of speech extends no further than to confer upon workmen the right to publicize the facts of an industrial controversy by peaceful and truthful means. Labor has no sanctuary in any federal right when it departs from the bounds of peaceful persuasion and resorts to acts of violence, physical intimidation, or false statement. Under such circumstances, picketing loses its character as an appeal to reason and becomes a weapon of illegal coercion.

[5-7] These principles both authorize and require courts to enjoin acts of violence or acts which "amounted to physical intimidation." Lisse v. Local Union, supra [2 Cal.2d 312, 41 P.2d 316]; McKay v. Retail Auto. S. L. Union No. 1067, supra. Furthermore, the inherent power of a court of equity to grant injunctive relief is not limited to the imposition of a restraint against the violent and unlawful conduct, but may, under given conditions, be exercised to enjoin future picketing in any form. Prior picketing interwoven with continuous acts of violence and physical intimidation may create such fear and hostile attitude in the public, and in those persons desirous of business relations with the employer, that future picketing, even though conducted peaceably, would probably, if not necessarily, be regarded as sinister in purpose. The ban of the injunction against the illegal conduct would not be a sufficient remedy, under such circumstances, because acts otherwise peaceful would have a coercive influence when done with a background of violence. Accordingly, where past picketing has become so irrevocably blended with acts of violence, physical intimidation or other unlawful conduct as to give rise to a justifiable belief that future picketing is likely to result in a continuance of the illegal acts, an injunction restraining a labor organization from any and all picketing lies within the equitable power of the court and does not

constitute an infringement of the right of free speech.

This is the rule which was very recently stated and applied in Milk Wagon Drivers Union v. Meadowmoor Dairies Inc., 312 U.S. 287, 61 S.Ct. 552, 555, 85 L.Ed. 836, 132 A.L.R. 1200, where the United States Supreme Court upheld the right of a state court to enjoin acts of picketing in themselves peaceful, when they were enmeshed with accompanying violent conduct which was unlawful. In that case the court declared: "It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guarantee of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution. * * * And acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. * * * In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. * * * Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct."

[8] The Meadowmoor case does not stand alone, nor are the principles upon which it was decided of recent origin. Many other jurisdictions have authorized an injunction against all picketing where labor's acts have been so entangled with violence and other illegal conduct that future excesses might reasonably be anticipated in the light of what was done before. Vaughan v. Kansas City Moving Picture Operators' Union, D. C., 36 F.2d 78; Levy & Devaney v. International Pocketbook Workers' Union, 114 Conn. 319, 158 A. 795; Joe Dan Market v. Wentz, 223 Mo. App. 772, 20 S.W.2d 567; Keuffel & Esser v. International Ass'n of Machinists, 93 N.J.Eq. 429, 116 A. 9; Exchange Bakery & Restaurant v. Rifkin, 245 N.Y. 260, 157 N.E. 130; Nann v. Raimist, 255 N.Y. 307, 174 N.E. 690, 73 A.L.R. 669; Steinkritz Amusement Corp. v. Kaplan, 257 N.Y. 294, 178 N.E. 11; Busch Jewelry Co. v. United Retail Employees' Union, 281 N.Y. 150, 22 N.E.2d 320, 124 A.L.R. 744; Am.Law Inst. Restatement, Torts, vol. 4, sec. 816; see cases collected in 132 A.L.R. 1218. The rule is particularly applicable where violent picketing is continued in defiance of a preliminary injunction restraining the defendants from resorting to violence or physical intimidation. Under such circumstances, the probability of a recurrence of the unlawful conduct is great, and the violators should be allowed no further opportunity for wrongful conduct under the protection of a judgment given upon terms which have been previously ignored. Nann v. Raimist, supra; R. A. Freed & Co. v. Doe, Sup., 283 N.Y.S. 186.

[9] It is true that an injunction prohibiting all picketing may not be based upon isolated and episodic acts of violence or other unlawful conduct. An injunction issues only to protect against future irremedial harm, and where the picketing has been in general lawful but has been accompanied by infrequent illegal acts not of a serious character, only the unlawful conduct will be enjoined. Disassociated acts of past misconduct do not evidence an illegal intention and purpose on the part of labor, nor do they so stigmatize its conduct as to warrant a sweeping restraint against future picketing upon the ground that a recurrence of the illegal acts is likely despite a prohibition against the unlawful conduct. As stated in Milk Wagon Drivers Union v. Meadowmoor Dairies, supra, "* * * the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force."

[10, 11] Applying these principles to the facts of the present case, the injunction of the trial court must be upheld insofar as it prohibits picketing about the premises of the respondents and their customers. There is ample support for the findings concerning a series of acts which go far beyond what may reasonably be termed peaceful picketing. The use of vile and abusive language and threats of violence amounts to physical intimidation which may not be justified under any principles governing the rights of persons engaged in labor disputes. The following of the respondents' business callers and employees and the wives of employees is in the same category. Implicit in such shadowing is a threat of physical violence. The futility of a ban against this unlawful conduct alone is demonstrated, not only by its continuity, but also by the fact that it was conducted

in the face of a preliminary restraining order.

[12] The appellants refer to these acts as the isolated acts of pickets unauthorized by the union and therefore not binding upon it. To call such acts isolated is to close one's eyes to the proved facts of the case. True, acts of actual physical assault and damage were rare. But threatened violence was common, for the conduct of the union representatives in following business callers and employees, and, in resorting to vile language and threats, was continuing, uninterrupted and thoroughly enmeshed with the picketing carried on by them.

The appellants challenge, as prejudicial error, the refusal of the trial court to receive evidence that the union's officers instructed its pickets to refrain from violence or intimidation of any character. However, the uncontroverted evidence shows that the picketing was conducted under the direction of Forrester and Coulter, who, it is asserted gave these instructions. Much of the violence and disorderly conduct was committed during their presence at the oil company's plant and with their tacit approval. Also, according to their own testimony, they participated in the shadowing of employees and customers.

[13, 14] Under the well-settled rule that it is not reversible error to exclude evidence which could not affect the decision upon a material fact (2 Cal.Jur. 1022), the appellants may not successfully challenge the refusal of the trial court to hear evidence of instructions which would not exonerate them from responsibility. Certainly instructions violated by the officers who issued them are no shelter to the union. The entire picketing plan was planned and carried out by the union, and it is responsible for the acts of its pickets committed within the scope of their agency and with the sanction of its officers. As the court declared in Milk Wagon Drivers Union v. Meadowmoor Dairies, supra, "* * * It is true of a union as of an employer that it may be responsible for acts which it has not expressly authorized or which might not be attributable to it on strict application of the rules of respondeat superior."

[15] The appellants seek to avoid the application of the rule announced in the Meadowmoor case upon the ground that the decision was made upon evidence showing the use of extreme physical violence of a most brutal nature, resulting in serious personal injuries and property damage to the picketed employers, their employees and the public. However, insofar as the propriety of an injunction prohibiting all picketing is concerned, no logical distinction may be drawn between picketing enmeshed with actual violence and picketing carried on with threatened violence and physical intimidation. If past picketing is entangled with violent threats and physical intimidation, future misconduct on the part of the pickets and justifiable apprehension of physical harm on the part of the employers, employees, and the public, may be as reasonably anticipated as in cases of actual physical violence. If the unlawful threats and intimidation are sufficiently continuous and extensive, the prohibition of the unlawful conduct only will not serve to remove the coercive effect of the picketing. Since the acts committed by the appellants were not isolated but formed a chain of physical intimidation characterizing the whole picketing as illegal, the trial court was entirely justified in issuing the broad and comprehensive restraint.

Many of the cited cases in which an injunction against all picketing was upheld were decided upon facts which did not include any evidence of extreme physical violence. In Busch Jewelry Co. v. United Retail Employees Union, supra, cited with approval in the Meadowmoor case, pickets blocked the entrances to retail stores and by such action prevented customers from entering; they intimidated employees by threats of personal violence and coercion; they used loud and obscene language and made false and fraudulent statements; by violence and threats they prevented customers from paying their bills; they picketed the homes of employees and customers; and they conducted snake dances in front of the picketed stores. As in the present case, however, there were only isolated instances of actual physical violence. In affirming a decree of the trial court enjoining the defendants from picketing the stores, the Court of Appeals declared: "* * * If a trial court can ever grant an injunction against continuing picketing where the picketing has been carried on with violence and will be in the future, this is such a case." [281 N.Y. 150, 22 N.E.2d 322, 124 A.L.R. 744.]

In Levy & Devaney v. International Pocketbook Workers' Union, supra, a labor organization sought to induce the unionization of a factory by picketing. Employees were followed to and from their work on various occasions, but there were no acts of physical violence. A judgment restraining all picketing was affirmed with the declaration: "When picketing is so unlawful as to indicate that the defendant does not intend to use his rights in a lawful manner, a court may reasonably expect that such unlawful conduct will continue, in the absence of an injunction, and in such case it is within the discretion of the trial court to enjoin further picketing altogether." [114 Conn. 319, 158 A. 796.]

Another case of the same character is Joe Dan Market v. Wentz, supra. The plaintiffs, owners of a retail grocery store and butcher shop, sought to enjoin the picketing of their place of business. Pickets walked to and fro in front of the premises so close to the entrance as to interfere with the ingress and egress of patrons; they used abusive language towards customers; their conduct was so boisterous that large crowds gathered; on several occasions the pickets were intoxicated and followed patrons who had left the store; and several persons desiring to trade in the store were accosted. In addition, a few assaults were committed. Rejecting the defendants' contention that the decree of the trial court was too broad in restraining lawful as well as unlawful picketing, the court held: "The picketing conducted by defendants consisted of one continuous transaction, involving unlawful acts on the part of defendants, and showing, by a systematic course of conduct and concerted action, their intention to accomplish their purpose by unlawful means. In such case equity will do complete justice by enjoining the whole of the unlawful proceeding. Picketing conducted as this was, accompanied by intimidation, threats, violence, and coercion, soon becomes current in the neighborhood, so that a continuation of the picketing, even though conducted peaceably, would probably, if not necessarily, result in intimidation." [223 Mo.App. 772, 20 S.W.2d 569.]

In support of their position that under the evidence which has been stated, only unlawful conduct may be enjoined, the appellants cite Pierce v. Stablemen's Union, 156 Cal. 70, 103 P. 324; Southern California Iron & Steel Co. v. Amalgamated Association, 186 Cal. 604, 200 P. 1, and Lisse v. Local Union, supra. But in those cases, the court was not called upon to determine whether acts, which are otherwise peaceful, may be enjoined when picketing has been carried on with a background of violence, and they are not controlling in a determination of the rights of the parties to the present suit.

[16] However, the injunction from which the present appeal was taken must be modified insofar as it prohibits acts which may be done peacefully without picketing. The conduct of the appellants in the vicinity of the Elm Oil Company's plant and in connection with the boycotting of firms with whom the respondents have business relations justified the trial court in concluding that future activities of that character would continue to be carried on with the coercion of physical intimidation or violence. But peaceable discussion away from the situs of former violence may not be enjoined.

The remaining question for decision concerns the award of $2,500 damages. It is the position of the appellants that as the respondents failed to prove any actual damage, they were entitled to nominal damages only. On the other hand, the respondents urge that general damages may be awarded upon a showing of unlawful interference with their business, and that the elements constituting such damage need not be proved. Admittedly, no physical injury was done to the respondents, nor did they show any loss of profits, but they demanded damages upon the theory that the appellants had wrongfully interfered with their right to carry on a lawful business. The trial court gave judgment accordingly.

[17-19] Generally speaking, the principle underlying the right to damages for injury is that the person injured is entitled to compensation commensurate with his loss. It is not sufficient to prove the infringement of a legal right; to recover more than merely nominal damages, the injured person must prove the amount or items of the damage suffered by them. As stated in 25 C.J.S., Damages, § 144, p. 788, "As noted in § 6 supra, a presumption of at least nominal damage follows from proof of a legal wrong. However, the amount and items of pecuniary damage are not presumed, but must be proved; and if there is no evidence as to the extent of the pecuniary loss there can be no recovery of substantial damages, at least where the elements of damage are such as to be susceptible of pecuniary admeasurement." The rule is applicable to a tortious interference with a business. Hammer v.

Baum, 136 Misc. 490, 240 N.Y.S. 145; St. Germain v. Bakery & Confec. Workers' Union, 97 Wash. 282, 166 P. 665, L.R.A. 1917F, 824. Where an established business is wrongfully interrupted and injured, the proper measure of damages is the diminution in value of the business traceable to the wrongful act, as reflected by loss of profits, expenses incurred or similar concrete evidences of injury. Lambert v. Haskell, 80 Cal. 611, 22 P. 327; Barnes v. Berendes, 139 Cal. 32, 69 P. 491, 72 P. 406; Berry Foundry Company v. International Moulders Union, 177 Mo.App. 84, 164 S.W. 245.

[20, 21] The appellants seek to invoke the rule as to measure of damage in nuisance cases in which damages are allowable without any showing of exact pecuniary loss. In those cases, however, the principal damage suffered consists of injuries to the senses, physical discomfort, and personal annoyance, all of which is incapable of mathematical ascertainment. But the gravamen of the present action, insofar as the right to damages is concerned, is not an invasion of personal security but an interference with business, the damage to which is susceptible of precise computation. The damage resulting from such unlawful interference cannot be divorced from tangible injury to property and loss of profits. Personal discomfort and annoyance are not compensable elements of damage in such a case.

That part of the judgment which enjoins the appellants from doing certain acts is modified by striking therefrom the provisions "(d) Inducing any one to refrain from selling crude petroleum oil to plaintiffs" and "(e) Interfering in the contractual relations between plaintiffs and their employees"; as so modified it is affirmed. The judgment, insofar as it awards damages, is reversed for a new trial upon that issue. Costs on appeal shall be borne by the respective parties.

SHENK, CURTIS, and HOUSER, JJ., concurred.

CARTER, Justice (dissenting).

I dissent.

The inevitable effect of the majority opinion in this case will be the abrogation of the constitutional guarantees of freedom of speech, press and assembly, and, for all practical purposes, will operate as a denial of the right of organized labor to exercise those rights by engaging in peaceful picketing; that is, the publicizing of a labor dispute, which rights were unequivocally declared to be protected against abridgement by a state by the Fourteenth Amendment to the Constitution of the United States in Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093, and Carlson v. People of California, 310 U.S. 106, 60 S.Ct. 746, 84 L.Ed. 1104.

In order that we may have a more complete picture of the factual situation in the instant case, I will refer to the facts found by the trial court with reference to the character of the picketing here involved. The majority opinion in its statement of facts has gone beyond the findings of the trial court, disregarding the elementary rule that the findings of fact must support the judgment, and if they do not, the judgment must be reversed. The findings may be summarized as follows: That the plaintiffs are engaged in the business of refining and selling petroleum and its products, employing thirteen employees; that defendant Long Beach Local No. 128 of the Oil Workers International Union, affiliate of defendant C. I. O., is the local branch of the Oil Workers International Union; that there has never been a labor dispute between plaintiffs and their employees and the latter are not and do not wish to become members of defendant union or its affiliate; that no contract has ever existed between plaintiffs and defendants; that defendants conspired to "unionize" plaintiffs' business and their employees, to cause said employees to become members of defendant union and plaintiffs to enter into a closed-shop contract and discharge nonjoining employees; that to accomplish the purpose of the alleged conspiracy, defendants picketed plaintiffs' premises, the pickets wearing arm bands with the words "C. I. O. Picket" thereon, there being forty to fifty pickets at the outset, fifteen or twenty for about the first week thereafter, and varying numbers during twenty-four hours a day thereafter; that on March 23, 1939, defendant Forrester, a representative of defendant union, followed one of the plaintiffs around the block after dark; and that on one occasion two pickets followed the wife of one of plaintiffs' employees away from plaintiffs' premises, and on another occasion followed the employee and his wife in an automobile; that some of the defendants on one occasion followed one of the employees on foot and in a car; that there were five other instances when employees and their wives were followed off of plaintiffs' premises by certain of the defendants, and an employee at one time requesting the reason for his fellow employee's wife being followed was asked by one of the defendants if he wanted to fight; that on several occasions plaintiffs' customers or business callers were followed away from plaintiffs' premises (this conduct occurred during the month of March and early part of April, 1939); that during January, February and March, five of plaintiffs' employees were informed by various of the defendants in effect that unless they joined defendant union, plaintiffs' plant would be closed and they would never get work in the oil fields; that business callers at plaintiffs' premises were told not to deal with plaintiffs, to which some acceded, and some firms doing business with plaintiffs were picketed; that on various occasions abusive and insulting language was directed at plaintiffs' business callers and employees; that on one occasion a picket paraded in front of the premises carrying a pole on the end of which was a piece of cheese, and shook the pole at plaintiffs' premises; that Baker, a business caller of plaintiffs' "drove his car into the premises of plaintiffs and on into the private driveway of plaintiffs, driving in such a manner as to pass very close to the defendant F. G. Benton; that two of the defendant pickets rushed at Baker and grabbed at him, and that the defendant F. G. Benton, at said time and place, took off his jacket and threatened Baker with bodily harm"; that on one occasion the pickets blocked plaintiffs' driveway with a car and prevented a business caller of plaintiffs' from driving his truck off plaintiffs' premises. On one occasion one of defendants entered plaintiffs' premises without their consent and made a telephone call.

It must be remembered that during all of the time covered by the above findings, picketing which was unquestionably peaceful was being regularly pursued; one of the defendants were ever charged with or found guilty of contempt for violating the preliminary injunction issued by the trial court.

It should also be noted that the trial court did not consider the picketing to be violent or not peaceful or that violence was so interwoven with peaceful conduct that it could not be effectively restrained without the enjoining of all picketing. The court specifically found:

"XIII. That at all times during which pickets were maintained about the premises of the Elm Oil Company, the officers and employees of the company went to and from their work daily through the picket line and were at no time physically or bodily injured in any way, nor was any person physically or bodily injured while coming to or going from the plaintiffs' premises; and at no time was any of the tangible property of the Elm Oil Company injured.

"XIV. That when the trucks and cars of officers, employees and customers of the Elm Oil Company were followed by officers, members and pickets of the Union, at no time were any such trucks or cars stopped or attempted to be stopped or the driver and passengers of any such cars or trucks detained or attempted to be detained by, or engaged in conversation by any of the officers, members or pickets of the Union so following said cars and trucks."

Nevertheless, the trial court issued a blanket injunction against all picketing. In order to support that decree the majority decision relies upon the case of Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 61 S.Ct. 552, 85 L.Ed. 836, 132 A.L.R. 1200. It must necessarily, as it does, concede that picketing is lawful and will not be enjoined even though there is no dispute between the employer and his employees, and none of the employees are members of the picketing union. A union may lawfully picket an employer for the purpose of obtaining a closed-shop contract, and unionizing the employer's employees. McKay v. Retail Auto. S. L. Union No. 1067, 16 Cal.2d 311, 106 P.2d 373; Lund v. Auto Mechanics' Union No. 1414, 16 Cal.2d 374, 106 P.2d 408; C. S. Smith Met. Market Co., Ltd., v. Lyons, 16 Cal.2d 389, 106 P.2d 414; American Federation of Labor v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855.

Turning then to the sole foundation of the majority decision, the case of Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., supra, we find at the outset that under no possible theory may it be applied to the case at bar. Assuming for the moment that in that case the Supreme Court of the United States announced the rule that if the background of peaceful picketing consists of unlawful acts which are so inseparably interwoven with the peaceful picketing that it is impossible to give adequate relief without restraining all picketing, both tortious and nontortious, all picketing may be restrained, the fact remains that the trial court in the instant case made absolutely no finding that such conditions existed. The existence thereof is necessarily a factual problem upon which the trial court should exercise its discretion and judgment. If anything, the clear implication from the above quoted findings XIII and XIV, is that the trial court was of the opinion that no such conditions existed. But an examination of the record in this case shows beyond any doubt that the trial court did not even have the rule of the Meadowmoor case in mind, and did not even contemplate or consider its applicability to the case at bar. The judgment in the instant case was entered on March 4, 1940. The Meadowmoor case was decided on February 10, 1941, nearly a year later. In its oral opinion in this case the trial court stated:

"The McKay case has been decided by the District Court of Appeals, and it is now being argued yesterday and today, and it may go on for some time before the Supreme Court of this state. Whether there is a point there that can go to the Supreme Court of the United States on a writ of error, I don't know. There may be. We do not know when the conclusion of this thing will come, but upon this theory of trial and error, we will get there eventually, and we will have a definite conclusion on this thing. The matter now stands that a District Court of Appeal in this state has said that there is a labor policy in this state based upon freedom of the individual employee to form a contract with an employer or not to have one, and he has the right not to have it disturbed in any way by anybody unless he chooses that person as his representative to disturb it. * * *

"There is only one case coming under the Labor Code in this state that has been decided by the Appellate Court that I know of—or three—those three cases that are now before the Supreme Court. They are the Lyons and all of those, which have no discussion of labor code situation in them at all. That code says that the individual right of freedom shall not be disturbed in any way. The McKay case says in effect, in my opinion, that if a labor union comes in and attempts to unionize a plant where it has no employee whom it represents, that the effect of that may be to force the employer to help compel his employees to join the union. That, the court says, will be an interference with his freedom. * * *

"I am not the lawmaker. It is the Legislature which said that the individual working man shall be given the preference, and I think that is what it does. If that is unconstitutional and the upper courts say so, very well—we will have to conform—but so far the District Court of Appeal has said that the freedom of the individual to do as he pleases, whether it conforms to the great majority, and by failing to conform may do harm, which minorities always do—they do harm from the point of view of the majority always—that the Legislature has said that principle of freedom of action absolutely untrammeled by anybody shall exist in the employee, and once he has made his decision, unless there is a labor dispute, the union cannot come in and interfere with that set-up so as to make it even probable that the employer might try to change that policy of the employee being a non-union man if he wants to be. * * *

"On the limited part of it—preventing violence and that sort of thing, but under my theory of this case, it is illegal to picket at all. It is not a question of whether the picketing is done peacefully or otherwise. Upon my theory of the case the Labor Code made it impossible to picket at all under these circumstances, and that, under that declared labor policy, the labor union had no right to go out there and interfere with these people at all in any way whatever. * * *

"The right to picket, in my opinion, not existing in this case, or the right to interfere with this business at all—would make it proper to have a complete injunction and that is what I will grant in this case, an injunction total in its effect, preventing the defendants from interfering with this business in any way whatever so far as the problems involved in this case are concerned."

It is obvious that the trial court decided the instant case solely upon one legal proposition, that is, that plaintiffs were entitled to an injunction against the picketing because there was no labor dispute between the employer and its employees. It cannot be criticized for so deciding the case because at the time of its decision the case of McKay v. Retail Auto. S. L. Union No. 1067, supra, had been decided by the District Court of Appeal, and that court had held, contrary to the later holding of this court, that under the Labor Code picketing was unlawful when there was no labor dispute between the employer and his employees. See 90 P.2d 113, May 5, 1939. It was not until October 14, 1941, more than a year after the trial court's judgment, that this court announced a contrary rule. McKay v. Retail Auto. S. L. Union No. 1067, supra. The case of American Federation of Labor v. Swing, supra, stating the rule as announced by this court in the McKay case was decided by the Supreme Court of the United States on February 10, 1941. It inescapably follows therefore that not only was the instant case tried and decided upon a theory wholly foreign to the Meadowmoor case, but furthermore, the doctrine of that case was not even considered or contemplated by the parties, counsel or the court. Yet the majority opinion is based wholly upon that doctrine which is utterly without support in the findings of the trial court. The United States Supreme Court recognized the necessity for a finding of fact to support the doctrine of the Meadowmoor case, stating at page 555 of 61 S.Ct.: "It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the state of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority." But the majority opinion here is not disturbed about the lack of such findings, it not only announces the rule of law, but decides the issues of fact, thereby invading the province of the trier of facts to weight the evidence and exercise his discretion as to its sufficiency and pass upon the credibility of witnesses. If the case had been tried and decided upon that doctrine there would have been in all probability much evidence introduced bearing upon the question of whether the public, plaintiffs' customers and their employees were justifiably in terror and fear of physical injury, whether efforts to control the unlawful conduct would be unavailing, and the like. In effect, the parties have not had a trial on that issue or the opportunity to present a case bearing thereon, and the majority opinion deprives them of those rights.

Still assuming that the Meadowmoor case in fact announces as the view of the United States Supreme Court, the doctrine ascribed to it by the majority opinion, there is another reason why it is manifestly not applicable to the case at bar. Here there was no such background of violence as was present in the Meadowmoor case. In that case it was said at page 554 of 61 S.Ct.:

"Witnesses testified to more than fifty instances of window smashing; explosive bombs caused substantial injury to the plants of Meadowmoor and another dairy using the vendor system and to five stores; stench bombs were dropped in five stores; three trucks of vendors were wrecked, seriously injuring one driver, and another was driven into a river; a store was set on fire, and in large measure ruined; two trucks of vendors were burned; a storekeeper and a truck driver were severely beaten; workers at a dairy which, like Meadowmoor, used the vendor system were held with guns and severely beaten about the head while being told 'to join the union'; carloads of men followed vendors' trucks, threatened the drivers, and in one instance shot at the truck and driver. In more than a dozen of these occurrences, involving window-smashing, bombings, burnings, the wrecking of trucks, shootings, and beatings, there was testimony to identify the wrongdoers as union men. * * *

"The question which thus emerges is whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously *violent* conduct which is concededly outlawed." (Emphasis added.)

In the case at bar as seen from the findings heretofore discussed, the most that occurred were a few isolated acts of unlawful conduct such as the blocking of plaintiffs' driveway, abusive language, and perhaps an assault. No physical violence was found; no property was damaged; there were no threats of physical violence or property damage; there is no evidence whatsoever of any concerted plan or scheme to engage in a continuous and concerted campaign of violence with the aim of terrifying and physically intimidating the public, or plaintiffs' customers or employees. Yet the majority opinion concludes that: "Prior picketing interwoven with *continuous* acts of violence and physical intimidation may create *such fear and hostile attitude in the public,* and in those persons desirous of business relations with the employer, that future picketing, even though conducted peaceably, would probably, if not necessarily, be regarded as sinister in purpose."

There is not one scintilla of evidence in the case at bar that there was created a "fear and hostile attitude" on the part of the public. The followers of plaintiffs' employees and customers never stopped or even communicated with the persons followed. Those things occurred away from the employer's premises where the picketing was in progress, and as far as appears, the public knew nothing of it, and were not aware that there was any relation between the shadowing and the picket line. Because one or a few pickets sporadically used abusive language and followed employees and customers is certainly not a background of violence as contemplated by the Meadowmoor case. Even the courts of Illinois which gave birth to this doctrine have subsequently squarely held that it is strictly limited to acts of violence on a large and extensive scale as distinguished from unlawful acts not characterized by acts of violence. In 2063 Lawrence Ave. Bldg. Corporation v. Van Heck, 377 Ill. 37, 35 N.E.2d 373 at page 374, decided June 17, 1941, the Supreme Court of Illinois stated: "From the cases just referred to [the Meadowmoor case and others] it is definitely settled that to enjoin all picketing it must be found that *violence* has given the picketing a coercive effect whereby it would operate *destructively as a force* and intimidation, and it further appears to the court from the circumstances, that peaceful picketing in the future would be enmeshed in violence, threats or coercion by intimidation." (Emphasis added.) In the instant case there was no violence and no evidence indicating that the violence "would operate destructively as a *force.*" Even if it be conceded that there was some violence, it cannot be claimed upon any interpretation of the evidence that that violence consisted of more than *two or three isolated instances.* In Ellingsen v. Milk Wagon Drivers' Union, etc., 377 Ill. 76, 35 N.E. 2d 349, the conduct as outlined by the court in its opinion was far more serious than that occurring in the case at bar, yet the decree of the lower court was reversed because it enjoined all picketing. The court stated at page 353 of 35 N.E.2d: "This brings us to a consideration of the acts of violence and intimidation alleged to have been committed in connection with the picketing in this case. The master found that there was evidence of *intimidation by threats;* that some of the conversation of the pickets was such as to amount to an attempt to coerce the storekeeper to give up the sale of the milk of the milk company and to prevent the delivery of other merchandise by *preventing drivers going to the store who had sold the merchandise to the storekeeper.* An examination of the evidence shows that in some instances the pickets sought to interfere with customers, such as attempting to *prevent the purchase of chocolate milk* by children who had purchased and were drinking it, by telling them: 'You will get sick drinking that stuff. Do you know how they get that chocolate milk? They go to the toilet and get it.' In other instances drivers delivering other products *were told they could not go in.* In one instance the picket stood in front of the doorway and *prevented a driver from delivering orange juice* which he had sold to the storekeeper, and by *obstructing the doorway and gesturing prevented the deliverymen from entering.* Other evidence is that delivery drivers were told 'to get to hell out of here' when they stopped. Other instances were that the pickets declared that drivers would get into trouble if they went into the store. Another witness testified that a picket told him: 'Don't enter there. Don't open the door or step into that store.' That the witness replied: 'Business is business,' to which the picket added: 'If you are smart about it, don't you know some day we will get even with you?' The master finds that the Union instructed the pickets not to engage in conversation with the storekeeper, or any one else, but that they violated those instructions. The master also found that the evidence shows that one of the stores picketed was caused to lose at least one customer by statements of the pickets amounting to an attempt to coerce." (Emphasis added.) And again at page 354 of 35 N.E.2d: "The record in this case does not, however, contain evidence tending to indicate that threats or statements such as were made are apt to become an element of future picketing. The master found, and the officers of the defendant union testified without dispute, that the *pickets were instructed they were not to talk to any one* *while on picket duty, were not to obstruct the business of the stores and were to use no force or violence.* This case is, under and above-described record, to be distinguished from the Meadowmoor case, where the record justified the restraining of non-tortious acts of picketing as well as acts of violence and threats." (Emphasis added.)

It is said in the majority decision: "The appellants challenge, as prejudicial error, the refusal of the trial court to receive evidence that the union's officers instructed its pickets to refrain from violence or intimidation of any character. However, the uncontroverted evidence shows that the picketing was conducted under the direction of Forrester and Coulter, who it is asserted gave these instructions. Much of the violence and disorderly conduct was committed during their presence at the oil company's plant and with their tacit approval. Also, according to their own testimony, they participated in the shadowing of employees and customers." It is obvious that the majority opinion completely ignores the nature of defendants' claim as a ground for reversal. They offered to prove that the pickets had been expressly instructed to avoid acts of violence and unlawful conduct. Their offer was refused. Surely such evidence was admissible upon the question of the responsibility, if any, of the members of the union not actually participating in the picketing. It was for the trial court to give it the weight it deserved rather than for this court in effect to hold that such evidence was wholly inadmissible. For that reason alone the judgment should be reversed. But there is even more significance to be attached to the refusal of the offer of that evidence. It has a direct bearing upon the issue of whether defendants' tortious conduct was so enmeshed with the lawful conduct that it would not be possible to control the unlawful conduct except by enjoining all picketing. It goes directly to the question of whether there was a concerted and continuous plan and course of conduct aimed at creating a fear of physical injury in the public and plaintiffs and their employees. If the pickets were expressly instructed against violence, then as to the nonparticipating members of the union, it would tend to establish that the acts were merely isolated and episodic rather than an inseparable part of a campaign of violence. The Meadowmoor case concedes that isolated and episodic acts are not sufficient to bring into operation the doctrine announced in that case. Yet the majority opinion without any finding by the trial court on the question, and with no evidence bearing thereon before it, (it having been excluded), proceeds to declare the case appropriate for a blanket injunction.

In the foregoing discussion I have assumed that the Supreme Court of the United States announced, in the Meadowmoor case, *as its own,* the doctrine ascribed to it by the majority decision. That, however, is not the case and that so-called doctrine cannot and should not be declared to be the law in this state. The Supreme Court of the United States was very careful to point out in the Meadowmoor case, that the courts of the state of Illinois in the exercise of their equity powers could if they chose, adopt such a doctrine without doing violence to the constitutional guarantee of freedom of speech. It did not declare that such doctrine was a policy of which it approved. The court stated at page 554 of 61 S.Ct.: "The question which thus emerges is whether *a state can choose to authorize its courts* to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed. The Constitution is invoked to deny Illinois the power to authorize its courts to prevent the continuance and recurrence of flagrant violence, found after an extended litigation to have occurred under specific circumstances, by the terms of a decree familiar in such cases. Such a decree, arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance. To assimilate the two is to deny to the states *their historic freedom to deal with controversies through the concreteness of individual litigation* rather than through the abstractions of a general law." (Emphasis added.) And at page 556 of 61 S.Ct.: "But we do not have revisory power over state practice, provided such practice is not used to evade constitutional guarantees. See Fox River Paper Co. v. Railroad Comm., 274 U.S. 651, 655, 47 S.Ct. 669, 670, 71 L.Ed. 1279; Long Sault Development Co. v. Call, 242 U.S. 272, 277, 37 S.Ct. 79, 81, 61 L.Ed 294. We are here concerned with power and *not with the wisdom of its exercise.* We merely hold that in the circumstances of the record before us the injunction authorized by the supreme court of Illinois does not transgress its constitutional power. *That other states have chosen a different path in such a situation indicates differences of social view in a domain in which states are free to shape their local policy.*" (Emphasis added.) It follows, therefore, that the Supreme Court of the United States did not, in the Meadowmoor case, pass upon the wisdom or propriety of what might be called the "enmeshment with violence" doctrine. Each state is wholly free to adopt the course, with respect to that doctrine, it believes to be most compatible with justice and the constitutional guarantees. The majority opinion treats the issue as wholly new in California and has having never been decided. That is not true. It has heretofore been established by this court that the scope of an injunction in a picketing case should be limited to a restraint upon only the tortious acts, and that a decree restraining peaceful picketing as well as tortious acts must be modified. In Pierce v. Stablemen's Union, 156 Cal. 70, 80, 103 P. 324, 328, this court said with reference to an injunction restraining all picketing: "In conclusion, then, and applying these principles to the injunction here under consideration, it appears that, while the injunction was properly granted, it was broader in its terms than the law warrants. It was, for example, too broad in restraining defendants from 'in any wise interfering with' plaintiff's business, since the interference which we have discussed, of publication, reasonable persuasion, and threat to withdraw patronage, is legal, and such as defendants could employ. So, also, was the injunction too broad in restraining defendants from 'intimidating any customer by boycott or threat of boycott' since, as has been said, the secondary boycott is likewise a legal weapon." In Southern California Iron & Steel Co. v. Amalgamated Ass'n, 186 Cal. 604, 620, 200 P. 1, 7, this court stated: "The judgment as entered, however, is *too broad in its terms, in that it purports to prohibit acts which may or may not be unlawful,* according to the purpose for which they are done, and it does not clearly couple the acts with the unlawful purpose. Thus, for example, the placing of pickets near respondent's place of business for a purpose not at all connected with said business, and not for the purpose of intimidating employees of respondent, so as to coerce them to quit that employment, nor for the purpose of intimidating persons intending to become employees of respondent, so as to prevent them from doing so, could not appropriately be enjoined, since such an act would not be wrongful as against the respondent, and would not be calculated to injure the respondent's business. The judgment is not clearly expressed in other respects, and it is therefore liable to be misunderstood in the enforcement thereof if it should be violated. Consequently, it should be modified in these particulars." (Emphasis added.) See also, to the same effect, Lisse v. Local Union No. 31, 2 Cal.2d 312, 41 P.2d 314. While those cases may not have given minute consideration to the so-called enmeshment with violence doctrine, they clearly and unequivocally hold that an injunction which enjoins all picketing, where there are both tortious and nontortious acts, cannot stand. I take it therefore, that the doctrine has been repudiated in California at least, implicitly if not expressly.

The reasons are forceful and numerous why the doctrine should not become a part of California jurisprudence. It is tantamount in its practical operation to a prohibition of picketing as a means of publicizing a labor controversy; it declares forfeited and permits unjust abridgement of the constitutional guarantee of freedom of expression. It is a backward step in the struggle against government by injunction and all its attendant evils. Frankfurter & Greene, The Labor Injunction (1930) 200. The process has been slow whereby peaceful picketing reached its status as being within the protection of the Constitution, reaching its goal in Thornhill v. Alabama, supra. Heretofore the courts in civil liberties cases have zealously prevented states from infringing those liberties even though a desirable public advantage was the goal sought to be attained. Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352; Thornhill v. Alabama, supra; Schneider v. State of New Jersey, 308 U.S. 147, 60 S. Ct. 146, 84 L.Ed. 155; Lovell v. City of Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L. Ed. 949.

Trial courts whose social views are antagonistic to the rights of labor in its struggle will find the doctrine an easy means whereby the right of freedom of expression may be completely destroyed any time some questionable act is committed in the course of a bitter labor dispute. No matter what the provocation for the particular misconduct, the court may attempt to justify a blanket injunction against picketing on the ground that that was the only method of meeting the situation.

The only two possible theories upon which the doctrine may be based are: First, that the background of violence lends a "coercive thrust" to the subsequent peaceful picketing and thereby makes it in fact violent and physically intimidating. That is apparently the basis of the Meadowmoor case. Second, that by committing tortious acts, the right of freedom of expression is forfeited. See cases collected, 132 A.L.R. 1218. Those theories are equally untenable.

The first rests upon a rule so vague and indefinite in its outlines that its fair application is practically impossible in face of the cardinal principle guiding the issuance of injunctions that there must be certainty and precision. How many acts are necessary to establish a background of violence with a coercive thrust? What must be the character of such acts? When in point of time must the acts have been committed? How can it be ascertained that it is impossible to control and prevent the tortious acts unless all picketing is restrained? What portion of the public must be aware of the tortious acts before they are physically intimidated? Is the injunction being used as an instrument to prevent crimes (a field in which equity will not act) or to protect the employer from being picketed? As pointed out by Mr. Justice Black (Mr. Justice Douglas concurring) in his dissenting opinion in the Meadowmoor case, the standard for guidance is impossible to grasp. He said: "On the one hand it is said that 'dissociated acts of past violence' are not enough to forfeit the right of free speech. On the other hand a 'background of violence' appears to be sufficient. Nor are any more definite standards or guides to be found in such clauses as 'context of violence'; 'entanglement with violence'; 'coercive effect'; 'taint of force'; and 'coercive thrust'. It is my apprehension that a rule embodying such broad generalizations opens up new possibilities for invasion of the rights guaranteed by the First Amendment." The doctrine insofar as it is based upon a "background of violence," that is, past misconduct violates the elementary principle in the issuance of injunctions that they are given to prevent future misconduct but never to punish past misconduct. An injunction is a preventive rather than punative remedy. 14 Cal.Jur. 175, 176, 209, 210.

The second theory is equally unsound. As we have seen, an injunction is not an instrument for punishment. Therefore, it should not be used as a weapon to declare that a person's constitutional right of freedom of expression is forfeited because he is guilty of some tortious conduct. On that theory one tortious act alone would require a declaration of the forfeiture of one's constitutional right. The ramifications of such a rule when applied to analogous situations are startling to say the least. Assuming that an injunction would lie to restrain the utterance or printing of slander or libel, then a person who made or printed one or more slanderous or libelous statements could be perpetually enjoined from henceforth either speaking or writing. If a blanket injunction against peaceful picketing which is undeniably lawful may be issued where one or more tortious acts are committed in the course thereof, then a newspaper publisher who printed one or more libelous articles could be totally debarred from thereafter publishing his paper under any and all circumstances; the freedom of the press would be completely lost. A person making a slanderous utterance could be completely and permanently silenced upon all subjects. A person who persisted in diverting more water from a stream than that to which he was entitled could be enjoined from diverting any water from the stream although he had an unquestioned right to a certain quantity.

I can think of no logical reason, and none is advanced by the majority opinion as to why the courts cannot enjoin tortious conduct without sacrificing the constitutionality guaranteed civil liberties in the process. I see no valid reason why the courts cannot exercise adequate and efficient control over picketing by limiting its coercive process to tortious conduct. It is not acting alone in its effort in that respect. The entire machinery of the criminal law is available and ready, able and willing to thwart and punish acts of violence. To adopt the doctrine of the majority opinion is equal to the expression of a belief that that machinery is helpless and fails to function.

The authorities from other jurisdictions cited in the majority opinion as supporting a blanket injunction were all either decided prior to or failed to take into consideration the Thornhill and Carlson cases which placed the right to picket squarely on the constitutional guarantees of freedom of speech, press and assembly. The reasoning in those cases is practically the same as that which appeared in the earlier authorities which held all picketing unlawful asserting that by the very nature of things peaceful picketing was a misnomer because such a thing could not exist. They merely give word or lip service to the principle of freedom of expression while arriving at a conclusion which for all practical purposes destroys that principle.

Especial reliance is place upon the case of Busch Jewelry Co. v. United Retail Employees Union, 281 N.Y. 150, 22 N.E.2d 320, 124 A.L.R. 744, but in a later case in that state, May's Furs and Ready to Wear v. Bauer, 282 N.Y. 331, 26 N.E.2d 279, in the course of the picketing there were acts of violence and disorderly conduct, arrests and convictions following in the case of the latter, nevertheless the court modified an injunction restraining peaceful picketing, stating at page 284 of 26 N.E.2d:

"Second, the injunction forbids defendant to engage in activities which are altogether lawful. It has often been said by the courts of this State that an injunction is protection for the future and not punishment for the past. Nann v. Raimist, supra [255 N.Y. 307, 174 N.E. 690, 73 A.L.R. 669]; J. H. & S. Theatres, Inc., v. Fay, supra [260 N.Y. 315, 183 N.E. 509]. That defendant has committed acts of violence, which would be repeated but for the staying hand of equity entitles plaintiffs to protection against such conduct; but just as plaintiffs are entitled to engage in their lawful pursuits, free from unlawful interference, so defendant is entitled for its lawful purposes to employ all means which are lawful. Senn v. Tile Layers Protective Union, 301 U.S. 468, 483, 57 S.Ct. 857, 81 L.Ed. 1229; Goldfinger v. Feintuch, supra, 276 N.Y. [281], at page 288, 11 N.E.2d 910, 116 A.L.R. 477. It is not the function of courts to supervise labor controversies. The task is sufficiently difficult when confined to preventing the parties from overstepping the bounds of lawful conduct. Section 876-a clearly confirms the right to engage in peaceful picketing and other lawful modes of persuasion. The injunction, therefore, was improper in including many peaceful and lawful activities which are enumerated among the proscriptions.

"In Nann v. Raimist, supra, it was held to be beyond the power of this court to review the exercise of the 'chancellor's discretion' in restraining all activities if violence had been committed. Even so, the discretion of the 'chancellor' was allowed only a narrow scope. Wise Shoe Co. v. Lowenthal, supra [266 N.Y. 264, 194 N.E. 749]. And now, since the enactment of section 876-a, the 'chancellor' is confined to restraining only unlawful acts. Thus the right of peaceful picketing is clearly established in this State (cf. Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; Schneider v. State of New Jersey, Town of Irvington [308 U.S. 147], 60 S.Ct. 146, 84 L.Ed. [155], decided November 22, 1939, and the constitutionality of the act of the Legislature has been recognized. Goldfinger v. Feintuch, supra [276 N.Y. 281, 11 N.E.2d 910, 116 A.L.R. 477].

"In the Busch case a majority of this court read the record as disclosing a situation completely permeated by violence and as affording *no ray of hope* that the defendant would engage in other than violent picketing. The rule of that case presents an exception which is verbal rather than real, for since defendant would have engaged only in violent picketing, the unqualified prohibition of picketing operated *only on* the *one kind of picketing* present in that situation, viz., *violent* picketing. In that case peaceful picketing was out of the question. In the case at bar *there is no finding to that effect,* and so far as the record bears upon this issue, it appears that defendant has reformed its conduct in a more peaceful direction since the institution of this suit." (Emphasis added.)

See also, Miller v. Gallagher, 176 Misc. 647, 28 N.Y.S.2d 606.

From an examination of the record in the case at bar, it is obvious that no consideration whatsoever was given to the theory upon which the Meadowmoor case was decided, and neither the evidence nor the findings are sufficient to justify the application of the doctrine announced in that case to this case. The attempt by the majority of this court to apply the doctrine of the Meadowmoor case to the case at bar cannot be justified upon any rational theory, and when the facts of this case as determined by the trial court are considered in the light of the rules of law applicable thereto, as announced in the authorities which I have cited herein, it necessarily follows that the judgment should be reversed.

GIBSON, C. J., and TRAYNOR, J., concurred.

50 Cal.App.2d 432

ROSE v. ROSE.

Civ. 11993.

District Court of Appeal, First District, Division 2, California.

March 12, 1942.

1. Divorce ⇨287

Where trial court found that husband had inflicted extreme cruelty upon wife but did not make finding on effect of such cruelty on wife's health, income, or dependence on husband for necessities, reviewing court could not determine whether trial court erred in refusing alimony to wife, but would remand cause for further proceedings.

2. Divorce ⇨249(3)

Court's power to apportion property upon decreeing a divorce is limited to community property and the homestead of the parties.

3. Divorce ⇨249(1)

Court has no power in divorce decree to order cancellation of note given by husband to wife.

Appeal from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Action for divorce by Leonard Medley Rose against Mary Wysong Rose, wherein defendant cross-complained for divorce. From portions of interlocutory decree granting divorce to cross-complainant, which denied alimony and ordered cancellation of a note given to defendant, defendant appeals.

Reversed and remanded with directions.

S. S. Hahn and W. O. Graf, both of Los Angeles, for appellant.

Cecil L. Lacy, of Monrovia, and John Oliver, of Los Angeles, for respondent.

McWILLIAMS, Justice pro tem.

The plaintiff in this action brought suit against his wife for divorce on the ground of cruelty. The defendant answered and also cross-complained asking for separate maintenance but afterwards amended the prayer of her cross-complaint and asked for a divorce. The lower court granted a divorce to cross-complainant on the ground of cruelty. She has appealed from the portion of the interlocutory decree that denied her alimony and also from the portion of the decree which ordered the cancellation of a $500 promissory note that respondent had given to appellant for a loan made to him out of separate funds of appellant.

On the trial of the case much testimony was introduced by the parties in support of the charges of cruelty made by each respectively against the other. The testimony offered by each party was ample if believed by the lower court to justify that court in granting a decree of divorce to either. The action of the trial court in granting a divorce to appellant has effectively disposed of the question of her right to such divorce. It will therefore not be necessary to review the evidence on the issue of cruelty.

In its decree the lower court adjudged that the parties owned community property of an aggregate value of $5,900. It awarded to respondent a $1,600 equity in a small shop that was operated by the parties and which they had contracted to purchase for the sum of $3,800. Of the sum paid on the purchase price $500, represented by the promissory note of respondent referred to above which the court ordered cancelled, had been loaned to respondent by appellant. The court also awarded to respondent an automobile of the value of $400.

To appellant the court awarded a $1,000 life insurance policy on which the parties had borrowed the sum of $500. It also awarded to appellant jewelry of the value of $400. It also gave to appellant the household furniture valued at $2,000 and a $1,000 equity in the home of the parties located at San Marino, California. The court found that this latter real property had a value of $7,500, and also found that the unpaid balance on the purchase price was payable in installments of $50 per month. To summarize, the appellant was awarded community property of the value of $3,900 and to respondent was awarded the remaining community property of the value of $2,-

000. The court awarded the custody of one of the children to respondent and the custody of the other to appellant, and also awarded to appellant the sum of $35 per month for the support of the child whose custody was given to her.

[1] Appellant first contends that the trial court abused its discretion in denying her alimony. In our opinion that question cannot properly be determined by this court in view of the state of the record. A summary of certain features of the case should make clear our reasons for this conclusion. The parties were married in 1920. Two children, aged fifteen and eighteen respectively at the time of the commencement of the action, were the issue of the marriage. The plaintiff in her cross-complaint set out in detail the cruelty said to have been inflicted on her by respondent which cruelty she alleged had had the effect of seriously imperiling her health. She also alleged that the respondent was an able-bodied man and in receipt of an income sufficient to enable him to pay a reasonable sum for the support of herself and their two children and to defray the costs of her medical requirements. She further alleged that she had no income and that she was entirely dependent upon respondent for the necessities of life and for the support and maintenance of the two children. The answer of respondent denied that appellant had no income. He also denied that he was in receipt of any income in excess of $200 per month, out of which sum he said he was obliged to pay $50 per month on the purchase price of the business above referred to. Although the trial court found that respondent had inflicted extreme cruelty upon appellant it failed to make any finding as to the effect of respondent's cruelty on the health of appellant. It also failed to make any finding on the issue of appellant's lack of income or on the issue of the dependence of appellant on respondent for the necessities of life. However, the court concluded that appellant was not entitled to any alimony. Whether or not the lower court abused its discretion in not granting alimony to appellant would depend on various circumstances including the state of appellant's health. Substantial evidence was introduced on behalf of appellant on that subject. She testified that she had suffered with malaria for sixteen or seventeen years. She further testified that she had suffered with neuritis for a period of eight years as the result of a sacroiliac sprain. No finding was made by the court on this issue. Whether or not the lower court erred in refusing alimony to appellant in the circumstances shown by the evidence cannot properly be determined by this court until the lower court has passed upon all the issues made by the pleadings and the evidence introduced by the parties.

It is the more necessary that all of the issues be passed upon in a case of this kind in which the lower court has held that the wife was entitled to a divorce on the ground of the extreme cruelty of her husband but has denied her alimony since as has been pointed out by this court, a man past middle age can usually rehabilitate himself in life following a divorce but a woman of that age can seldom do so. Farrar v. Farrar, 41 Cal.App. 452, 457, 182 P. 989.

[2, 3] Appellant also contends that the lower court erred in ordering the cancellation of the $500 promissory note that had been given by respondent to appellant. According to the findings of the lower court the note was the separate property of appellant. The law is settled in this state that the power of a court to apportion property upon decreeing a divorce is limited to community property and the homestead of the parties. Carlson v. Carlson, 10 Cal.App. 300, 303, 101 P. 923; Heintz v. Heintz, 126 Cal.App. 106, 14 P.2d 317; Conard v. Conard, 5 Cal.App.2d 91, 41 P. 2d 968. Moreover, when a husband borrows money from his wife and gives her a promissory note to evidence the indebtedness, a court has no power in a divorce decree to order the cancellation of the note. Mann v. Mann, 1932, 136 Kan. 331, 15 P.2d 478.

Those portions of the judgment that have been appealed from are reversed and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

NOURSE, P. J., and SPENCE, J., concurred.

50 Cal.App.2d 292

AUSTIN v. SOUTHERN PAC. CO. et al.

Civ. 11882.

District Court of Appeal, First District, Division 1, California.

March 3, 1942.

1. Master and servant 🔑8(3)

The fact that employment of railroad employee was from month to month and, therefore, terminable at will, did not deprive employee of protection of such rights as he might have under the employment. St.1937, pp. 261, 262, §§ 2922, 3001–3003.

2. Injunction 🔑118(2)
Master and servant 🔑80(4)

In action by railroad employee to be restored to his proper status on seniority lists, to enjoin interference with such status, and for payment of money due him, complaint, alleging that plaintiff was employed by railroad as a chef in 1911 and had worked continuously for same employer for 28 years and that in 1933 he was reduced in rank to second cook and never restored to his former rating, was insufficient for failing to allege nature of seniority status or why employee was entitled thereto by alleging when and how seniority rights had become fixed. St. 1937, pp. 261, 262, §§ 2922, 3001–3003; Railway Labor Act, 45 U.S.C.A. § 151 et seq.

3. Master and servant 🔑16

Under Railway Labor Act, a railway employee, if he voted for union as bargaining agent, or even if union was elected as bargaining agent by a majority of railway personnel despite employee's adverse vote, would not necessarily know of, or be entitled to notice of, negotiation of contract between railroad and union relating to seniority rights and working conditions. Railway Labor Act § 2, 45 U.S.C.A. §§ 151a, 152.

4. Pleading 🔑8(15)

In action by railroad employee to be restored to his proper status on seniority lists of railroad and union, employee's allegations that his status was "fraudulently and arbitrarily determined" in secret agreement between railroad and union presented no issue of fact. Railway Labor Act § 2, 45 U.S.C.A. §§ 151a, 152.

5. Master and servant 🔑16

A railway employee's grievance with respect to loss of seniority when he was demoted from chef to second cook was within purview of Railway Labor Act provision for settlement of disputes between individual employees and employer. Railway Labor Act § 3(i), 45 U.S.C.A. § 153(i).

6. Master and servant 🔑16

An action by railroad employee to determine his seniority rights may be brought, at his election, either in a court or settled by the administrative remedies prescribed by Railway Labor Act, the act not providing an exclusive remedy or tribunal. Railway Labor Act §§ 1 et seq., 3(i), 45 U.S.C.A. §§ 151 et seq., 153(i).

7. Master and servant 🔑16

Where railway employee made election to invoke jurisdiction of Adjustment Board to determine question of his seniority rights, award or determination of board was final and conclusive. Railway Labor Act § 3 (m), 45 U.S.C.A. § 153(m).

◆

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by P. B. Austin against Southern Pacific Company and another for restoration of plaintiff to his proper status on the seniority lists as a railroad employee, to enjoin interference with such status and for payment of money due him. From a judgment for defendants after their demurrer to the third amended complaint without leave to amend was sustained, plaintiff appeals.

Affirmed.

H. L. Richardson, of Oakland, for appellant.

John J. Allen, Jr., of Oakland, Henley C. Booth and Burton Mason, both of San Francisco, and Vaughns & Larche and Frank M. Larche, all of Oakland, for respondents.

GOODELL, Justice pro tem.

This appeal was taken from a judgment for respondents after the demurrer of each of them to the third amended complaint had been sustained without leave to amend.

It appears from said complaint that appellant was employed by respondent railroad in January, 1911, as a chef and had worked continuously as a cook for the same employer ever since; that in June, 1933, he was reduced in rank from chef to second cook and was never restored to his former rating; that his seniority entitled him to chef's rating, and that others, junior in service, had been advanced over him and given that rating; that in 1933 he had been "held out of service" for two months, at which time he was entitled to a salary of $147.50, but as second cook had received only $110 a month, and that he had run as second cook from September, 1933, until July, 1938, when he was "displaced from his employment * * * because of lack of seniority." (This last allegation is hard to reconcile with the allegation of continuous service.) Further, that there are now working for the respondent railroad numerous chefs whose seniority status is not as high as his, in preference to whom he should now be employed, and that his position with respondent railroad "is at a hazard."

The complaint alleges on information and belief that prior to this action, the exact date of which plaintiff does not know, respondent railroad "secretly, deliberately, and without notifying plaintiff, entered into a written contract" with respondent union "defining the seniority status of its dining car employees" whereby "the seniority status of plaintiff as an employee with said company was fraudulently and arbitrarily determined by said contract in such fashion that plaintiff lost his correct seniority ranking" and that he "was not given any notice of the making of said contract, and does not know its exact terms and conditions and has no way of ascertaining" them. Further, that respondent railroad's action in denying him his correct seniority status is due solely to the action of the respondent union in making said contract, and that unless the union is restrained from interfering with his seniority status he will lose his employment with respondent railroad for a considerable portion of time as well as the difference of $27.50 per month between the pay of chef and that of second cook; that his dispute with the respondent railroad did not arise because of any dissatisfaction with his services; that he is 66 years old, knows no other kind of work, and the earning of his livelihood is threatened. A demand for restoration was alleged and its refusal, and finally, that "plaintiff took the matter of his seniority status up with the National Railroad Adjustment Board * * * and submitted to them the facts herein set forth" but that the board denied him any relief.

The prayer is for the restoration of appellant by respondent railroad "to his proper status on their seniority lists"; that the respondent union be restrained from interfering with him, his employment, and his seniority status, and that the respondent railroad be required to pay appellant such money as may be due him.

[1, 2] It should be noted that two distinct contracts are mentioned in the pleading, the first, appellant's contract of employment with respondent railroad by which, presumably, he acquired his claimed seniority, the second, the contract between respondent railroad and respondent union, by which he claims to have lost it. With respect to the first contract: Although an unbroken service of over 28 years is pleaded, the allegations show nothing more than an employment from month to month (sections 3001, 3002, 3003, Labor Code, St. 1937, pp. 261, 262) terminable at the will of either party (section 2922, Id.). The circumstance that the employment was merely at will does not mean that the employee is without protection of such rights as he might have thereunder (Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131, L.R.A.1916D, 545, Ann.Cas.1917B, 283), but the inquiry arising upon the face of this complaint is, just what are those rights? Counsel for appellant concedes that the employment was at will, terminable at any time, but couples that concession with the claim "that the employer, as long as he keeps the employee in his employment, should give him the seniority status that he is entitled to by virtue of a long term of service with said employer * * *." But in the pleading there is nothing to tell the court what is "the seniority status that he is entitled to" or why he is entitled to it. The complaint alleges that in June, 1933, when he was demoted "plaintiff was entitled to a rating as a chef cook * * * because of his seniority status" with the respondent railroad. That is the only allegation connecting his contract of employment with his claimed seniority. If he bases such seniority on his contract of employment it would seem that to make out any kind of a case, appellant should have alleged when and how the seniority right became fixed,—whether by an express promise made to him or to somebody acting on his behalf; whether by statute, or by a rule, practice, or custom of the employer; its extent or limit; by what terms or to what extent the employer bound itself to respect it, how it might be forfeited, lost or otherwise terminated, and perhaps

how it affected appellant's contemporaries and juniors in service. The demurrers of both respondents specially directed attention to this defect in the pleading. The case of Battle v. Atlantic Coast Line R. Co., 132 Ga. 376, 64 S.E. 463, 465, cited by respondent union, decided (1909) before the enactment of the Railway Labor Act, 45 U.S.C.A. § 151 et seq., is directly in point. There the plaintiff sued two railroads after a consolidation, on the ground that he had acquired seniority. There were as here, general and special demurrers to the complaint. The court said: "* * * No cause of action was set out against either defendant. While the petition made frequent references to the plaintiff's 'rights' of priority in the line of promotion in his work, it failed to show that there was any such legal right, or exactly what it was, or how it arose. It showed no contract on the part of any of the companies mentioned, made with him, to employ him for any definite length of time, or not to discharge him except under certain specified circumstances, or that it would promote him in any particular manner." Again: "But it was not shown that he had any contract with the first company which gave him any definite rights, privileges, or rank, or that he had any contract with the second company on that subject." The action of the court in sustaining the demurrers was affirmed.

The appellant has not charged a breach of the contract of an employment itself, for the complaint alleges a continuous service. The alleged grievance is the loss of appellant's "seniority status," but there is nothing to tell the court the right upon which the suit is based, or the source of such right except the bald statement that the appellant was entitled to the rating as chef because of his seniority status. Taking this allegation at its face value it shows the loss of rating in 1933 by the sole action of the respondent railroad without any interference by the union. Apparently at that time, so far as the complaint shows, no contract had been entered into between the railroad and the union.

[3, 4] With respect to the second contract, the complaint alleges that "the seniority status of plaintiff as an employee with said company was fraudulently and arbitrarily determined by said contract in such fashion that plaintiff lost his correct seniority ranking." It is not possible to tell from this whether appellant claims his seniority status was initiated by this contract or destroyed by it. The language would indicate the latter. Without proper allegations as to the origin of the right it is difficult if not impossible to determine the legal consequences of its loss. A number of cases cited by respondent railroad indicate that such seniority rights as those here discussed arise generally, and for the most part, from contracts entered into between a union, acting as the bargaining representative for employees of a class or group (whether members of the union or not) on the one hand, and the railroad-employer on the other. See, Capra v. Local Lodge, etc., 102 Colo. 63, 76 P.2d 738; Estes v. Union Terminal Co., 5 Cir., 89 F.2d 768, at page 774, and cases therein cited. In the Estes case Judge Hutcheson in a concurring opinion says, with respect to seniority agreements, "Under the theory and purpose of the statute [Railway Labor Act, 44 Stats. 577, as amended, 45 U.S.Code Ann. sec. 151 et seq.] neither the employee favored, nor those disfavored, by the carrier, have individual legal rights which they can press against the carrier as rights personal to themselves, apart from the collective agreement under which they work. Their rights are those of the class covered by the agreement, arising to the class and to them as members of the class, by virtue of the agreement, and by virtue of it alone. [Citing cases.]" The Railway Labor Act (sec. 151a, title 45, U.S.C.A.) provides, inter alia, that it is adopted "(5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." The next section (152, title 45, U.S.C.A.), subdivision First, provides that "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." Subdivision Third of the same section provides that representatives shall be chosen without coercion from carriers or employees and that representatives of the employees need not be in the employ of the carrier. Subdivision Fourth provides that "Employees shall have the right to organize

and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class * * *." It will be observed that this last sentence leaves it to the majority of any craft or class, regardless of union affiliation, to say who their representative shall be. It is not alleged whether this appellant is a member of respondent union. It would seem that would be immaterial for if a majority of dining car personnel voted for the respondent union as its bargaining representative, such it would become according to the wording of the act regardless of whether those voting were members of the union, and despite the fact that some of the individuals voting might have voted for an opposing candidate,—union or otherwise. Thus we have seen that the act supplies the machinery for the negotiation of a contract such as one dealing with seniority of railroad employees comprised of this, that or the other "craft or class." We have seen, furthermore, under the preceding discussion, that there is no allegation in this complaint which establishes any basis for the seniority status which is claimed by appellant under his contract of employment with the respondent railroad. Appellant alleges that the contract between the railroad and the union was negotiated "secretly, deliberately, and without notifying plaintiff" and that therein his seniority status was "fraudulently and arbitrarily determined" to his detriment. Under the act, if appellant had voted for the respondent union as bargaining agent—or, for that matter, if respondent union had been elected as such by a majority of dining car personnel even despite appellant's adverse vote—he would not necessarily know of, or be entitled to notice of, the negotiation of the contract itself. As far as the allegations of fraud are concerned, the appellant's statements that his status was "fraudulently and arbitrarily determined" present no issuable facts (12 Cal.Jur., 801-803). With respect to the allegation that appellant does not know and has no way of ascertaining the exact terms and conditions of the contract between the railroad and the union, it is sufficient to say that appellant could have invoked the provisions of sec. 1000, Code Civ.Proc., as soon as the action was commenced and those of sec. 2021, Code Civ.Proc., as soon as the first demurrers were filed. Notwithstanding these avenues were open, counsel stated to the court when the final ruling was made that he could not change his complaint in any appreciable way, whereupon, on sustaining the demurrers, the court denied leave to further amend.

[5-7] The fourth section (sec. 153, U.S.C.A. Title 45) establishes the National Railroad Adjustment Board. Subdivision (i) thereof provides that: "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." It will be observed that this language clearly contemplates a dispute between an individual employee and his employer. The appellant's grievance with respect to loss of seniority was clearly within the purview of this section. The face of the complaint shows that appellant invoked the jurisdiction of the board, as follows: "That prior to the commencement of this action, plaintiff took the matter of his seniority status up with the National Railroad Adjustment Board, Division Three thereof, and submitted to them the facts herein set forth, and said National Railroad Adjustment Board on November 9, 1938, denied him any relief." The act does not provide an exclusive remedy or tribunal. In Moore v. Illinois Central R. Co., 312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089, the Supreme Court held that an aggrieved employee was not compelled under the act to exhaust the administrative remedies granted him by it. Following this decision the 7th Circuit Court of Appeals in Adams v. New York, C. & St. L. R. Co., 121 F.2d 808, 810, held that "the employees' action may be brought, at their election, either in a court, or settled by the administrative remedies prescribed by said Act." The appellant, according to the face of his complaint, made his election and invoked the board's jurisdiction. Subdivision (m) of the last-mentioned section of the act provides "* * * the awards shall be final and binding upon both parties to the

dispute, except insofar as they shall contain a money award. * * *"

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

50 Cal.App.2d 281

PEOPLE v. COLLINS.

Cr. 2199.

District Court of Appeal, First District, Division 1, California.

March 2, 1942.

1. Criminal law 🔑706, 1171(1)

Where from the record it may be definitely determined that a prosecuting officer has deliberately framed a question in such a manner as to make it appear that it is a proper question, but which in truth is designed to elicit an answer which prosecuting officer knows will place before jury inadmissible evidence, conduct of prosecuting officer in so doing is grossly improper and under some circumstances may demand a reversal.

2. Criminal law 🔑1154

Whether prosecuting officer has deliberately framed a question in such a manner as to make it appear that it is a proper question, but which in truth is designed to elicit an answer which he knows will place before jury inadmissible evidence, must in most cases be left to trial court.

3. Criminal law 🔑867

Where prosecuting officer asked police officer on direct examination whether defendant had stated to him what his occupation was, and police officer answered that defendant had told him that he was unable to work and had been a thief since nine years old which testimony was stricken out upon defendant's objection, trial court did not abuse its discretion in thereafter refusing to declare a mistrial on ground that prosecuting officer was guilty of "misconduct".

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

4. Criminal law 🔑683(1), 1169(2)

In burglary prosecution, refusal to permit defendant to be asked question whether he was suffering from any disease, which question was offered for purposes of showing that it would have been impossible for defendant to have run in manner burglar was described by witnesses as having run in flight from scene of crime, was improper, but did not constitute prejudicial error, where it appeared that purpose for which question was asked was fully accomplished by further interrogation by defendant's counsel and by having defendant partly disrobe so that jury could observe his physical condition.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

Tom C. Collins was convicted of burglary in the first degree, and he appeals.

Affirmed.

Leo A. Sullivan and William A. Sullivan, both of Oakland, for appellant.

Earl Warren, Atty. Gen., and Dennis Hession, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

The appellant was charged with the crime of burglary and five previous convictions of felony. He entered a plea of not guilty to the burglary charge, and denied having suffered the previous convictions. During trial two of the latter charges were dismissed, and the jury found him guilty of first-degree burglary, and that the charges involving the three remaining previous convictions were true. He was sentenced to imprisonment in the state prison, and this appeal was taken from the judgment and the order denying his motion for a new trial.

It appears from the evidence that about 4 a. m. on July 4, 1940, Bernard Schwalm, a college student residing in Berkeley, was awakened by a noise in his bedroom. He sat up in bed, looked toward the window and saw the figure of a tall, thin man, disappear hurriedly from the room. Schwalm got out of bed, and, barefooted and clad in pajamas, pursued the burglar for several blocks, in and out of backyards, through alleys and along the streets. Shortly after the chase started he caught up with the burglar, who stopped, turned around and facing Schwalm said, "Stay away * * * or I'll kill you." The burglar then turned and ran. Schwalm pulled a picket from the fence, continued the chase, and when the burglar paused to open a gate Schwalm broke the picket over the burglar's head, but it did not stop him in his flight. About this time a young man named Dean joined Schwalm in the pursuit, and succeeded in overtaking the burglar, whereupon the burglar stopped momentarily, faced Dean, and calling him a vile name displayed a knife in a threatening manner. Dean then left to summon the police, but Schwalm continued the chase. The burglar finally ran into a backyard surrounded by a ten-foot fence, and upon reaching the fence turned around, faced Schwalm, and in a menacing manner raised his arm. Schwalm having meanwhile picked up two milk bottles, hurled them at the burglar. The second bottle struck the burglar on the jaw, felling him to the ground. He lay there for a minute or two, then arose slowly and the chase was on again. After running two or three more blocks the burglar stopped, and as related by Schwalm the following conversation took place: "He said 'Let me alone,' and I said, 'No, not until I find out what you took from me.' He said, 'All I got was your wallet, and it's back there where you knocked me down.' * * * I said I had $12.00 in my wallet and I wanted that, and he said, 'If I give you $12.00 out of my own pocket will you let me go?' And I agreed." Thereupon the burglar laid $12 in currency on the pavement and hastily walked away. Later Schwalm found his empty wallet where the burglar said he had dropped it. It was dawn when the chase started, but Schwalm testified that it was "completely light" before it ended, so that each time the burglar stopped his features were clearly discernible. Subsequently Schwalm examined more than two thousand pictures in the police files and picked the photograph of appellant as being that of the burglar. In December of the same year appellant was apprehended in southern California and returned to Berkeley, where Schwalm and Dean, at different times and out of the presence of each other, positively identified appellant in a line-up of ten or more persons, as being the burglar. In all respects he fitted the description previously furnished the police by Schwalm and Dean; moreover they again identified him at the trial as being the burglar.

The fact that a burglary was committed was not disputed, but appellant, testifying in his own behalf, claimed he was in Los Angeles at the time of the commission of the crime. However, he was unable to state where he was then living, or name any persons with whom he came in contact, nor did he produce any witness or establish any circumstance to corroborate his asserted alibi. He admitted having served the three prior convictions, and that his true name was Truman Thomas Crowley, the name set forth in the records of said prior convictions. The first was obtained in 1922 in Kansas, the charge being grand larceny "and escape from jail"; the second was for burglary, committed in 1933 in Missouri; and the third was for an attempted burglary, in Kansas in 1936.

Appellant makes no point that the evidence is insufficient to support the jury's verdict, but as grounds of appeal urges misconduct on the part of the prosecuting officer, and that the trial court erred in sustaining an objection to a question propounded to appellant on direct examination. It is our conclusion that no ground for reversal has been established.

The first point arises out of the following situation: By the testimony of a police inspector of the Berkeley Police Department who brought appellant from Glendale where he was arrested to Alameda County for trial, the people sought to prove a series of admissions which it was claimed appellant had made to the police inspector, and one of the questions propounded to the witness by the prosecuting officer was whether appellant stated "what his occupation was." Appellant's counsel objected to the question upon the ground that it was incompetent, irrelevant and immaterial. The objection was overruled, and the witness answered in the affirmative. Thereupon, after fixing the time and place of the conversation and the persons present, the witness was asked: "What did you say and what did he say in regard to what his occupation was?" Appellant's counsel again objected on the same general grounds; the objection was overruled, and the witness replied: "I asked him where he had been last employed and he told me that he was unable to work, he had been a thief all his life, since 9 years old." Appellant's counsel asked that "that all go out," and "that the jury be instructed to disregard it," adding, "I am going to ask for a mistrial, it couldn't be responsive, it couldn't under any circumstances. The district attorney must have known the answer. It couldn't do anything but prevent the defendant from receiving a fair and impartial trial, it's done deliberately.

"The Court: Motion granted. The answer may be stricken out."

Appellant's counsel thereupon asked the court to declare a mistrial, saying he cited "the remark" as prejudicial misconduct Following the denial of the motion for mistrial appellant's counsel stated: "At this time I am going to ask the Court to admonish the jury they are not to be biased or prejudiced by that statement of the officer and absolutely that they are not to draw any unfavorable inference therefrom.

"The Court: The jury will be instructed at the proper time to disregard any testimony that has been stricken out."

Such an instruction was subsequently given in the following words: "You are hereby further instructed that you are not to consider for any purpose any testimony or evidence which has been struck out by the Court, nor the offer of any evidence which was not admitted by the Court."

As will be noted from the foregoing, appellant's complaint that he was prevented from receiving a fair trial was based upon the fact that the witness included in his answer a prejudicial statement not responsive to the question propounded to him by the prosecuting attorney. But as will be noted also, on appellant's motion the trial court immediately struck out the entire answer and later instructed the jury that testimony so stricken was not to be considered by the jury for any purpose. In that state of the record it cannot be presumed that the jury disobeyed such instruction.

[1-3] Regarding the accusation made by appellant's counsel that the prosecuting officer "must have known" what the answer of the witness would be, it may be said that where from the record itself, as distinguished from a mere accusation of opposing counsel, it may be definitely determined that a prosecuting officer has deliberately framed a question in such a manner as to make it appear that it is a proper question, but which in truth is designed to elicit an answer which he knows will place before the jury inadmissible evidence, his conduct in so doing is not only grossly improper, but under some circumstances may demand a reversal. However, the determination of questions of this kind must necessarily, in most cases, be left to the trial court, which, of course, should not hesitate to take appropriate action, even to the extent of granting a new trial, when convinced that such misconduct has prevented a defendant from having a fair trial. Obviously the trial court here did not believe that the accusation so made by appellant's counsel against the prosecuting officer was justified; and the record on appeal fails to disclose anything which would warrant this court in holding, as a matter of law, to the contrary. Moreover, in considering the question of whether the objectionable portion of the answer of the police inspector operated to appellant's prejudice, it must be remembered that according to appellant's own admissions before the jury his criminal career, which included the crimes of larceny and burglary, extended back as far as 1922.

[4] With respect to the second point, the record shows that upon taking the witness stand in his own behalf appellant testified that his age was 37, that his height was 6 feet 1 inch, and that he weighed 120 pounds. Shortly afterwards his counsel put this question to him: "I will ask you, Mr. Crowley, if you are suffering from any disease?" Objection was made upon the ground that it was incompetent, irrelevant and immaterial, and the objection was sustained. Thereupon counsel stated that his purpose in asking the question was to show that appellant was "suffering from an advanced stage of tuberculosis," and that "it would be impossible for him in his physical condition to have ever run in the manner described that the man on July 4, 1940, was supposed to have run * * *." Further objection was made that the question called "for hearsay and for his medical conclusions"; and in reply his counsel stated that he was not asking for a conclusion, but was "asking him of his own knowledge, if he is suffering from tuberculosis." The court again sustained the objection, but immediately thereupon, according to the reporter's transcript, the following proceedings tooks place:

"Mr. Sullivan: All right. I will ask you this question. On the 4th day of July, 1940, were you physically able to do any running or anything of that nature? A. No sir.

"Q. For how long a time have you been in a physical condition where you would be unable to run or take any great exertion? A. For about a period of four or five years.

"Q. Take you coat off, if you will. Step down in front of the jury, step down over here, roll up your sleeves, if you will, both of them. (The witness stepped down before the jury.) Now, were you in the same physical condition on July 4, 1940, as you are at the present time? A. Yes, sir.

"Q. Put your coat on. (The witness returned to the stand.) Was your weight approximately the same then as now?

"The Court: Just a moment.

"Mr. Sullivan: Q. Your weight as of July, 1940? A. It was just about the same, wouldn't vary one way or the other."

The assignment of error here relied upon is directed against the ruling upon the original question, to wit, whether appellant was "suffering from any disease," and it would seem that in view of the evidence showing the circumstances attending the flight and the pursuit of the burglar from the scene of the crime, and considering the purpose of the question as disclosed by appellant's counsel, the trial court should have permitted appellant to answer it, notwithstanding that, as stated by the prosecuting officer, appellant was not "a doctor." However, it cannot be said that the ruling complained of operated to appellant's prejudice, because as will be seen, the real purpose for which the question was asked was fully accomplished by further interrogation by appellant's counsel, and by having appellant partly disrobe so that the jury could observe his physical condition.

After an examination of the entire record including the evidence it is our conclusion that no ground for reversal has been established, and that the verdict has not resulted in a miscarriage of justice. The judgment is affirmed.

GOODELL, J. pro tem., concurred.

PETERS, Presiding Justice.

I concur in the conclusion contained in the majority opinion, but not in the reasons given for that conclusion. The majority opinion holds that the prosecuting officer was not guilty of misconduct in asking the question of the officer concerning the admissions made by defendant to him relating to his occupation. It is held that it does not appear from the record that the prosecutor can be charged with deliberately trying to get inadmissible evidence before the jury. I cannot agree with that construction of the record. The question asked of the officer was, "What did you say and what did he say in regard to what his occupation was?" The answer was, "I asked him where he had last been employed and he told me that he was unable to work, he had been a thief all his life, since 9 years old." Obviously, the question called for the entire conversation concerning the occupation of the defendant, and just as obviously the answer was responsive to that question. The reference to the fact that the defendant is supposed to have said that "he had been a thief all his life, since 9 years old" clearly is responsive to the question concerning the defendant's occupation. It is also perfectly clear to me, the answer being responsive to the question, that the prosecutor, as a matter of law, is chargeable with knowledge of the answer the witness was going to give. The witness was the prosecution's witness. Under such circumstances, the law is clear that the prosecutor is chargeable, as a matter of law, with knowledge of the responsive answers to questions asked by him.

The attorney general concedes the law to be that the character of a defendant cannot be attacked unless he puts his character into issue by producing character witnesses. That is undoubtedly the law. People v. Arlington, 123 Cal. 356, 55 P. 1003; People v. Adams, 76 Cal.App. 178, 244 P. 106; People v. Wells, 100 Cal. 459, 34 P. 1078; People v. Wong Loung, 159 Cal. 520, 114 P. 829. It, therefore, follows that in this case it must be held that the prosecutor deliberately attempted to get the bad character of the defendant before the jury when that issue was not before the court. Such tactics should not be condoned. The defendant is entitled to a fair trial, and cannot be convicted simply because he may be a bad man or may have a bad record. It is the duty of prosecuting officials to protect the rights of the defendant, and certainly they have no lawful right to invade intentionally such rights.

It is my opinion, therefore, that the prosecutor in this case was guilty of deliberate misconduct in asking the question for the purpose of eliciting an improper answer. That was error, but not every error requires a reversal. Here the record shows that the trial judge struck the improper evidence from the record, and instructed the jury not to consider stricken evidence for any purpose. While that will not, in all cases, cure the error, it cannot be held in the present case that after an examination of the entire record "the error complained of has resulted in a miscarriage of justice" within the meaning of art. VI, Sec. 4½ of the Constitution. In the present case the defendant admitted that he had served three prior terms for similar offenses. His criminal career admittedly started in 1922 when he was but eighteen years of age. In view of the fact that the improper evidence was stricken and the jury properly instructed to disregard such evidence, and, in view of the evidence properly in the record, it cannot be said, under the circumstances, that there has been a miscarriage of justice as a result of the error under consideration.

50 Cal.App.2d 189

RIPPE et al. v. CITY OF LOS ANGELES.

Civ. 12733.

District Court of Appeal, Second District,
Division 3, California.

Feb. 26, 1942.

Hearing Denied April 23, 1942.

1. Automobiles 🔑276

As regards city's liability for death and injuries when automobile, during darkness and heavy fog passed terminus of street at point where there was no guardrail or light and where curb was concealed by earthen fill placed there by city, traversed 85 to 100 feet of vacant land and plunged over adjacent bluff, city had "constructive notice" of defective condition of highway from continuance thereof for some three years. Gen. Laws 1937, Act 5619, p. 2630.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Notice".

2. Automobiles 🔑306(5)

In action against city for death and injuries when automobile, during darkness and heavy fog, passed terminus of street at point where there was no guardrail or light and where curb was concealed by earthen fill placed there by city, traversed 85 to 100 feet of vacant land, and plunged over adjacent bluff, evidence sustained finding that city had actual knowledge of defective conditions of highway at place of accident. Gen.Laws 1937, Act 5619, p. 2630.

3. Automobiles 🔑306(5)

In action against city for death and injuries when automobile, during darkness and heavy fog, passed terminus of street at point where there was no guardrail or light and where curb was concealed by earthen fill, traversed 85 to 100 feet of vacant land, and plunged over adjacent bluff, evidence that earthen fill was placed there by city's responsible agents sustained finding that city had knowledge of such inherently dangerous condition which city created, especially in view of trial judge's personal inspection of area involved. Gen.Laws 1937, Act 5619, p. 2630.

4. Municipal corporations 🔑764(1)

In determining whether requisite conditions under Public Liability Act are present so as to impose liability on city for injuries sustained because of dangerous or defective condition of street, each case must depend upon its own state of facts and no hard and fast rule can be applied. Gen. Laws 1937, Act 5619, p. 2630.

5. Automobiles 🔑306(4)

In action against city for death and injuries when automobile, during darkness and heavy fog, passed terminus of street at point where there was no guardrail or light and where curb was concealed by earthen fill placed there by city, traversed 85 to 100 feet of vacant land, and plunged over adjacent bluff, evidence sustained finding that a dangerous and defective condition of street existed at place of accident so as to render city liable under Public Liability Act. Gen.Laws 1937, Act 5619, p. 2630.

6. Appeal and error 🔑1008(1)

In action against city for death and injuries when automobile, during darkness and heavy fog, passed terminus of street at point where there was no guardrail or light and where curb was concealed by earthen fill placed there by city, traversed 85 to 100 feet of vacant land, and plunged over adjacent bluff, the question of contributory negligence of deceased driver was for trier of facts. Gen.Laws 1937, Act 5619, p. 2630; Vehicle Code, § 525, St.1935, p. 181.

7. Automobiles 🔑306(8)

In action against city for death and injuries when automobile, proceeding at the rate of six to twenty miles per hour during darkness and heavy fog, passed terminus of street at point where there was no guardrail or light and where curb was concealed by earthen fill placed there by city, struck a pole, traversed 85 to 100 feet of vacant rough land, and plunged over adjacent bluff, evidence sustained finding that deceased motorist was not contributorily negligent so as to preclude recovery for death and injuries. Gen.Laws 1937, Act 5619, p. 2630; Vehicle Code, § 525, St.1935, p. 181.

8. Appeal and error 🔑1012(1)

In action against city for death and injuries when automobile, during darkness and heavy fog, passed terminus of street at point where there was no guardrail or light and where curb was concealed by earthen fill placed there by city, struck a pole off the road, traversed 85 to 100 feet of vacant rough land, and plunged over adjacent bluff, the presence of pole adjacent to curb not directly in line with path of automobile did not furnish such irresistible proof of negligent speed, manner of operation, or of proximate cause as to require a conclusion contrary to that reached by trial court that motorist was not contributorily negligent. Gen.Laws 1937, Act 5619, p. 2630; Vehicle Code, § 525, St. 1935, p. 181.

9. Automobiles ⟹306(7)

In action against city for death and injuries when automobile, during darkness and heavy fog, passed terminus of street at point where there was no guardrail or light and where curb was concealed by earthen fill placed there by city, struck a pole off the road, traversed 85 to 100 feet of vacant rough land, and plunged over adjacent bluff, evidence sustained finding that defective condition of highway was proximate cause of death and injuries. Gen.Laws 1937, Act 5619, p. 2630.

10. Automobiles ⟹257, 278, 279

In action against city for death and injuries when automobile, during darkness and heavy fog, passed terminus of street at point where there was no guardrail or light and where curb was concealed by earthen fill placed there by city, struck a pole off the road, traversed 85 to 100 feet of vacant rough land, and plunged over adjacent bluff, the concealed curb, the fill, the absence of any barrier, light or other visible marker at the danger point, the dimness of double center line, the absence of lines or markers, the grade of the street, and similar matters, were all proper for consideration in determining city's liability. Gen.Laws 1937, Act 5619, p. 2630; Vehicle Code, § 525, St.1935, p. 181.

◆

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge pro tem.

Action by Pansy M. Rippe and others against the City of Los Angeles to recover damages for wrongful death and for personal injuries arising out of an automobile accident. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Ray L. Chesebro, City Atty., and Leonard Husar, Deputy City Atty., both of Los Angeles, for appellant.

Joe Raycraft and Rufus C. Porter, both of San Pedro, for respondents.

SCHAUER, Presiding Justice.

This is an appeal by the defendant city of Los Angeles from a judgment rendered in favor of three plaintiffs after trial by the court without a jury in an action for wrongful death and for personal injuries arising out of an accident in which an automobile being operated by Budd Rippe, the husband of plaintiff Pansy M. Rippe, during darkness and a heavy fog, passed the southern terminus of Pacific Avenue in San Pedro at a point where there was no guard rail or light and where the curb was concealed by an earthen fill, placed there by the defendant city, traversed eighty-five to one hundred feet of vacant land, and plunged over an adjacent bluff ninety-five feet high. The accident was found to be the proximate result of a dangerous and defective condition of the highway of which the defendant city, but not the deceased driver, had notice and knowledge. In such accident Mr. Rippe was killed and his two guest-passenger companions, plaintiffs Clarence Comer and Chris Jones, were injured, the plaintiff Comer falling with the automobile and the driver Rippe over the cliff and the plaintiff Jones being thrown from the car after it left the highway but before it fell down the precipice.

Defendant city claims neither an exorbitant award of damages nor any error of law but avails itself of the legal right of appeal, arguing in effect that the evidence was insufficient to support the findings. It states its "points" as follows:

"Point I. There was no dangerous or defective condition of the street at the scene of the accident.

"Point II. The dangerous and defective condition found by the court to exist was not the proximate cause of the accident.

"Point III. The evidence fails to show that the City of Los Angeles had notice or knowledge of the dangerous or defective character of the condition complained of."

In its closing brief appellant splits its Point II and elaborates its position with the direct contention that "The proximate cause of the accident was the negligence of the driver of the car."

Appellant's points are devoid of merit.

The record discloses that Pacific Avenue is a main through highway with a concrete paved roadway fifty-six feet in width, running in a northerly and southerly direction through the San Pedro area of Los Angeles. Near the scene of the accident it slopes downward at a one and one-half per cent. grade to its southern terminus which is about eighty-five to one hundred feet from the edge of the Point

Fermin Cliffs which at that point are about ninety-five feet above mean sea level. At such terminus it is joined by Paseo del Mar, a street which runs in a general northeasterly and west southwesterly direction, the joinder being on a curve of about sixty degrees banked slightly lower on the outside than on the inside. The outside (southerly and easterly sides) of this curve had been marked by a curb and by a white-painted fence approximately three feet six inches in height, but about three years before the accident in question a truck had crashed through the fence and made a gap twenty-eight feet wide of which gap a space of sixteen feet was directly opposite and in line with the westerly sixteen feet of roadway of Pacific Avenue. This condition was allowed to exist for three years, up to the time of the accident. The point sixteen feet east of the west curb line of Pacific (extended) was marked by a utility pole adjacent to the south curb of the curve. From this pole, for a distance of about sixty feet along the curve to the west and across all of the twenty-eight feet of fence gap mentioned above the defendant city had thrown in a dirt fill, approximately curb height, so that the curb itself as stated by a witness "for a distance * * * was just barely visible and then disappeared entirely." This dirt fill on the inner or street side was sloped or banked up about six inches and along the edge was surfaced with oil. At the curb it filled the gutter and made the elevation of the street inside the curb exactly the same as that of the land immediately adjacent to the curb outside the street limits. Aside from "hundreds of dents" from previous accidents the pole was marked only with four dull, corroded aluminum strips. On a post of the fence to the east of the pole were the remains of a red glass reflector which was "broken to smithereens and had been hanging in that condition for months and months."

Northerly from a point one block north of its terminus Pacific Avenue was a white-line-marked four-lane highway but at Shepard Street, one block (123 feet) north of its joinder with Paseo del Mar the white lines, other than the double center line, ended. The double center line, which curved around to join Paseo del Mar, was described as being "worn and dim," and as having been painted six or seven months before the accident. There were no zig-zag lines to indicate a turn or intersection. In an area beginning some one hundred fifty feet north of Shepard Street, in the *easterly* of the two traffic lanes on the west side of Pacific Avenue, there were painted, and apparently under favorable conditions dimly visible, the words "Curve" and "Slow" and an arrow. The car in which decedent Rippe and plaintiffs Comer and Jones were riding on the fateful occasion was not in such easterly lane but, in accordance with law (Vehicle Code, sec. 525, St.1935, p. 181) and caution, was proceeding in the lane next to the right hand or westerly curb. This lane was not favored with any cautionary device or symbol.

Into this setting, during early morning darkness and a dense fog (at about 5:30 o'clock a. m.) on March 15, 1939, the decedent Budd Rippe, with the plaintiffs Comer and Jones, "trying to creep his way along," at a speed not over twenty miles per hour and perhaps as low as six miles per hour, looking for the intersection of a street he never found, drove his light delivery truck south along Pacific Avenue in his right hand (the westerly) traffic lane of Pacific Avenue. He missed the curve into Paseo del Mar, drove over the curb-high dirt fill, sideswiped the utility pole, his car careened into the somewhat rough ground adjacent to the southerly terminus of the highway and the left wheels sank into a gully or channel running from this point out and generally down grade to the edge of the cliff. The plaintiff Jones was thrown from the car while it was crossing the rough ground but the driver and plaintiff Comer remained in the vehicle, which followed the slope about eighty-five to one hundred feet to the precipice edge and crashed to the beach below. The deceased driver was not familiar with the street conditions at the scene of the accident.

The trial court found on sufficient evidence that "on said date and for a long time prior thereto, said defendant failed to erect or maintain a barricade, fence, barrier, visible curb, or any other object at the south end of the west side of Pacific Avenue, which at night time, ordinarily would indicate to a motorist driving south on the right or west side of material change in its course; that the defendant had fomerly [sic] maintained a white fence across said space, but that the same had been broken down and carried away a long period of time prior to March 15, 1939; that on March 15, 1939, the defendant * * * maintained a white barricade or fence along the curb line on the portion of the curve at the south end of the east half of Pacific Avenue and extending slightly to the west of the extended center line of Pacific Avenue; that on March 15, 1939, there was no street light or warning light of any kind at the south end of Pacific Avenue * * * that the defendant, City of Los Angeles, and its proper officers and agents with authority to make necessary improvements and repairs, had knowledge and notice of the dangerous and defective condition existing at the south end of the said Pacific Avenue for a sufficient length of time prior to March 15, 1939, in which to have made all necessary improvements or repairs; that the conditions existing on March 15, 1939, at the south end of Pacific Avenue had existed for a period of three years prior thereto."

[1, 2] In addition to the constructive notice arising from the long continued defective condition of the highway (see Hook v. City of Sacramento, 1931, 118 Cal.App. 547, 5 P.2d 643; Wise v. City of Los Angeles, 1935, 9 Cal.App.2d 364, 366, 49 P. 2d 1122, 50 P.2d 1079; Cressey v. City of Los Angeles, 1935, 10 Cal.App.2d 745, 747, 53 P.2d 172; Bauman v. City and County of San Francisco, 1940, 42 Cal.App.2d 144, 157, 108 P.2d 989), there was ample evidence that the defendant city had actual knowledge of the conditions. Three members of the city council who were members of the public works committee and two deputy city engineers examined the premises in 1936 or 1937 and the conditions found were reported to the Board of Public Works. A council member who discussed the conditions with the president of the board of public works admitted that the city council in 1936 had received a letter from Mr. Rufus C. Porter, a resident of the district, in which letter it was stated, among other things, with reference to the locality in question, that:

"I desire to repeat to you again, in as strong language as I can make it, that said corner is a very dangerous one, and is becoming more so from time to time as public travel increases.

"Not one but quite a number of deaths have occurred there, and much property has been destroyed. The city lamp post located there have [sic] been destroyed time and again. The large city electric poles or telephone poles have been broken, and destroyed. Since your committee was here, a city lamp was destroyed, and the numerous scars on the posts there are mute but unanswerable signs of what is constantly happening on that corner * * * I venture to say that there has been a greater loss of life and a greater destruction of property at said corner of Pacific Avenue, Paseo del Mar and Bluff Place within the last five years than has occurred by reason of faulty street crossings, at any half dozens corners of Broadway in the City of Los Angeles in the same length of time." Concerning the matters referred to, the councilman testified that in a conversation with the president of the board of public works, early in 1937, he "called his attention to the letter from Mr. Porter * * * that there was a needed improvement * * * I told him it was a corner that needed attention. It was in a deplorable condition, and it needed attention." While it does not appear that the attention of the council or of the board of public works was specifically directed to the precise portion of the curve, the defective condition of which was responsible for the tragedy involved in this case, it would be unjustifiable for us to hold in the light of all the circumstances depicted in the record that as a matter of law the trial court's findings of notice and knowledge are unsupported.

[3] As a result of Mr. Porter's vigorous demands, extending from 1935 to 1937, it appears that the defendant city finally improved to some extent the conditions at the junction involved, so far as the southeasterly corner thereof was concerned but left the southwesterly side subject to the defective conditions which existed on March 15, 1939. The words "slow," "curve" and the arrow were painted in the easterly roadway north of Shepard Street but no such warning signs were placed in that portion of the roadway which vehicles obeying the law (Vehicle Code, sec. 525) traveling south under dark and foggy conditions such as the car in this case encountered would be traversing. Furthermore the dirt fill concealing the curb at the place where it was most needed for the protection of persons traveling under the conditions decedent Rippe encountered was placed there by the defendant city's own responsible agents; and under the circumstances shown, the trial court was justified in finding that defend-

ant had knowledge of this inherently dangerous condition which it created. Wise v. City of Los Angeles, 1935, supra; Sandstoe v. Atchison, T. & S. F. Ry. Co., 1938, 28 Cal.App.2d 215, 219, 82 P.2d 216. In this connection it should be noted that the trial judge himself inspected the area and had the benefit of his own observations as of the trial date in interpreting the conditions shown by the photographs and testimony of witnesses to have existed on March 15, 1939, and prior thereto.

[4, 5] It has been repeatedly held in this state that when dealing with cases falling under the provisions of the Public Liability Act of 1923 (Stats. 1923, p. 675; Deering's Gen. Laws, 1937, Act 5619, p. 2630), as does this case, each of such cases must depend upon its own state of facts and that in the majority thereof no hard and fast rule can be applied. Rafferty v. City of Marysville, 1929, 207 Cal. 657, 661, 280 P. 118; George v. City of Los Angeles, 1938, 11 Cal.2d 303, 309, 79 P.2d 723; Arellano v. City of Burbank, 1939, 13 Cal.2d 248, 254, 255, 89 P.2d 113. As tested by the discussions of the law in the cases cited the evidence in the case before us clearly supports the trial court's conclusions that a dangerous and defective condition of the street existed at the place of the accident and that defendant city had both actual knowledge and constructive notice of such conditions.

[6, 7] Likewise the question of contributory negligence of the deceased driver was a problem for the trier of facts. Appellant calls our attention to Smyth v. Harris & Devine, 1934, 3 Cal.App.2d 194, 197, 198, 38 P.2d 862, and invokes the doctrine quoted by that case from Ham v. County of Los Angeles, 1920, 46 Cal.App. 148, 158, 189 P. 462, which in turn was based on the Wisconsin case of Lauson v. Town of Fond du Lac, 1909, 141 Wis. 57, 123 N.W. 629, 25 L.R.A.,N.S., 40, 135 Am.St.Rep. 30. The latter case held flatly that it was negligence on the part of a driver to operate his car at night at such a rate of speed as would prevent the car from being stopped within the radius of illumination of the car lights. It should be noted that the District Court of Appeal in Sawdey v. Producers' Milk Co., 1930, 107 Cal.App. 467, 472, 473, 290 P. 684, 686, discussed the Wisconsin case and declined to accept the rule "in all of its fullness." We have also examined the cases of Haynes v. Doxie, 1921, 52 Cal.App. 133, 198 P. 39; Wurl v. Watson, 1924, 67 Cal.App. 625, 630, 228 P. 43; Gammon v. Wales, 1931, 115 Cal.App. 133, 300 P. 988; and Smarda v. Fruit Growers' Supply Co., 1934, 1 Cal.App.2d 265, 36 P.2d 701, and have considered the implications of language used therein with respect to a stricter rule of accountability being applicable to a driver whose vehicle contacts obstructions or defects in the highway bed itself rather than placed thereon (Sawdey v. Producers' Milk Co., 1930, supra) or who is not familiar with the road being traversed, but find none of such cases to be conclusive here.

A statement in Haynes v. Doxie, 1921, supra, is, however, pertinent. The facts in that case were that the night was dark and rainy, the windshield of the car was wet and fairly hard to see through, the road ran downgrade and was slippery and the car more or less inclined to skid; the driver did not see an unlighted truck in the highway until he was within twenty-five or thirty feet from it and at the rate of speed he was traveling, eighteen miles per hour, was unable to stop or turn sufficiently to avoid striking it. The court said, at page 136 of 52 Cal.App., at page 40 of 198 P.: "On these facts we are asked to declare it to be the rule that it is negligence for the driver of an automobile to drive on the highway on a dark night at such a rate of speed that he cannot avoid objects after they come within the area lighted by his lights." The court then quotes from Ham v. County of Los Angeles, 1920, supra, and proceeds: "The fact that respondent was not able to see, and did not see, the unlighted truck until he was within 25 or 30 feet of the same does not fully establish the facts necessary to give appellant the benefit of the rule above stated. Notwithstanding the facts stated, it may also be true that if the truck had been lighted, as required by law, plaintiff would have been able to see it, and would have seen it, while at a distance great enough to enable him to stop his automobile, and avoid the collision." Substantially the same statement may be made here. It may be true that if the highway had been properly constructed and maintained the driver could and would have seen the curb, the barrier, the light, the reflector, the lines or cautionary words or symbols in the roadway or adjacent to it in ample time to turn into Paseo del Mar or to stop. The difficulty in this case was that *there was nothing of the sort for the careful driver to see.* The speed of the car was somewhere between six and twenty miles per hour. If we hold that on the facts presented it was negligence per se for the driver to proceed it will practically amount to a holding that any vehicular movement whatsoever under such conditions is negligence. It would license municipalities to construct and maintain highways with defects dangerous and concealed under conditions other than those of good visibility. Such a rule would not be in accord with the standards of governmental care, skill, and integrity in public improvements which citizens have a right to expect and for which the users of highways well pay. We cannot even conclude with certainty that any amount of familiarity with the streets in question would have enabled driver Rippe to avoid the disaster he encountered.

[8] It should be observed also that the doctrine of negligence in speed at night suggested in the cited cases and sought to be applied here by appellant is predicated on the premise (as stated in the case of Ham v. County of Los Angeles, 1920, supra, 46 Cal.App. at page 159, 189 P. at page 467) "if he drives at a rate of speed which will not permit him to stop or slow up within the radius illuminated by his lights, *and the accident is proximately caused thereby.*" (Italics added.) The evidence before us does not require a finding that the car at the speed it was traveling could not have been turned safely into Paseo del Mar or even entirely stopped within the radius of its lights if there had been anything for those lights to illuminate reasonably sufficient under the circumstances to warn the driver that the roadway ended or turned. It was the defective and dangerous condition of the highway, unmarked and not readily visible, which was the proximate cause of the accident, not the speed of the car. The dark colored utility pole with four corroded aluminum plates which the side of the car struck was out of the roadway and striking it no more conclusively proves negligence of the driver than would striking an unlighted vehicle standing in the street. Its presence adjacent to the curb not directly in line with the car's path does not furnish such irresistible proof of negligent speed, manner of operation, or of proximate cause, as to require a conclusion contrary to that reached by the trial court, which under the circumstances is conclusive. Van Praag v. Gale, 1895, 107 Cal. 438, 444, 40 P. 555; Arellano v. City of Burbank, 1939, supra.

[9, 10] While it seems at first thought strange that decedent's automobile should have traversed the somewhat rough terrain between the end of the highway and the edge of the bluff for a distance of approximately one hundred feet without his having been able to stop it, we cannot hold, merely because it seems strange, that it was impossible or that it irresistibly imports a foreign link in the chain of proximate cause. The evidence supports the finding that prior to and at the time of leaving the roadway and striking the pole at the obscured curb the decedent had been driving carefully; it would be unnatural to assume that he saw the conditions and deliberately directed his car away from the highway and across the rough land; it is more reasonable to infer that the sideswiping of the pole and the lurching of the vehicle from that impact and its own impetus and the careening which the rough ground would produce wrenched the controls from his grasp. The plaintiff Jones was thrown out by the violence of the motion and the car "seemed to gain new life." The very roughness of the ground (as depicted by photographs in evidence) over which the car passed *without overturning* suggests to us not a high rate of speed or negligent operation as contended by appellant but rather a moderate speed and a reasonable explanation for the failure of the driver at such speed to regain control. His foot might easily have been jolted from brake or clutch, at least momentarily, to accelerator; it was shown that the left wheels followed a gully or channel which apparently was sufficient to guide the vehicle to its disaster, and the slope of the land became sharper as it neared the brink.

The matters recited and other circumstances which we need not enumerate all unite in supporting the conclusion that it was the defective condition of the highway within its own boundaries which was the proximate cause of the death and the injuries suffered; the concealed curb, the dirt fill inside the curb to the same level with the ground beyond the twenty-eight-foot-wide gap in the white fence, the absence of any barrier, light, or other visible marker at the danger point, the termination of the westerly lane white line one hundred twenty-three feet north of the street end or curve, the dimness of the double center line, the absence of zigzag or other lines or markers on the westerly side of the street adjacent to its end or curve into Paseo del Mar, the grade of the street; all of these items were proper for the consideration of the trial judge. Such facts as that the dirt fill was banked up about six inches inside the street, that the utility pole was opposite a point about sixteen feet east of the west curb line extended, that on the pole were four aluminum plates (dull and corroded, but markers of a sort) do not sweep away the force of the contrary circumstances; they but create a conflict of inferences and that conflict has been determined adversely to defendant.

As suggested above the three points urged by appellant in its opening brief and the four as noted in its closing brief, in the final analysis are but an attack on the sufficiency of the evidence. We have surveyed that evidence and find it sufficient. The judgment is affirmed.

SHINN and PARKER, WOOD, JJ., concurred.

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50 Cal.App.2d 327

LANE v. WHITAKER.

Civ. 11988.

District Court of Appeal, First District, Division 2, California.

March 4, 1942.

1. Evidence 🔑594

A court may not arbitrarily disregard uncontradicted testimony which is not inherently improbable.

2. Trusts 🔑372(1)

Where action by administratrix of settlor's son was based on theory that the settlor transferred all his personalty to his divorced wife under an oral trust providing that on a certain contingency the estate of the son would on son's death become entitled to one-half of the trust property and that defendant acquired trust property without consideration and with knowledge of the existence of the trust, defendant's possession created a presumption of ownership in defendant. Civ.Code, § 654.

3. Appeal and error 🔑1012(1)

Where action by administratrix of settlor's son was based on theory that the settlor transferred all his personalty to his divorced wife under an oral trust providing that on a certain contingency the estate of the son would on son's death become entitled to one-half of the trust fund, and that defendant acquired trust property without consideration and with knowledge of the existence of the trust, presumption of defendant's ownership arising from defendant's possession constituted "evidence" the weight of which was for determination of trial court.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

4. Evidence 🔑89

A trial court may properly conclude that a presumption outweighs in evidentiary value the testimony of many witnesses.

5. Trusts 🔑21(2)

The declaration of a trust, whether written or oral, must be reasonably certain in its material terms, including subject matter involved, beneficiaries, the nature and quantity of interest they are to have and manner in which the trust is to be performed.

6. Trusts 🔑44(2)

Where action by administratrix of settlor's son was based on theory that the settlor transferred all his personalty to his divorced wife under an oral trust providing that on a certain contingency the estate of the son would on son's death become entitled to one-half of the trust fund, and that defendant acquired trust property without consideration and with knowledge of the existence of the trust, record sustained determination that the administratrix had not made out a sufficiently clear case to authorize judgment in her favor.

7. Jury 🔑14(5)

Where complaint alleged the existence of a trust which it asked that the court decree and carry into effect and asked that defendant as trustee be required to account for the trust res, equity court had exclusive jurisdiction of issues presented, and plaintiff's demand for jury trial was properly denied.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action to enforce a trust by Hazel Lane as administratrix of the estate of Harry C. Lane, deceased, against Nell Whitaker. From an adverse judgment, plaintiff appeals.

Affirmed.

Conroy & Conroy, Edward L. Conroy, and Alvin Wendt, all of Hollywood, for appellant.

Earle M. Daniels, Hallam Mathews, and John A. Gilligan, all of Los Angeles, for respondent.

McWILLIAMS, Justice pro tem.

This is an appeal by the plaintiff, who sues as administratrix of the estate of her deceased husband, from a judgment in favor of the defendant. The action was tried on the fourth amended complaint of plaintiff. The complaint alleges three causes of action. The first cause of action is based upon the theory that plaintiff's husband was a beneficiary under an oral trust by the terms of which plaintiff, as his administratrix, claims to be entitled to certain personal property in the possession of defendant. The property in controversy, according to the complaint, was acquired by the defendant without consideration and with knowledge of the existence of the trust. Plaintiff alleges that the exact amount of the property so held by defendant is peculiarly within the knowledge of the defendant but that according to plaintiff's information it had a reasonable value when so acquired by defendant of approximately $125,000. The second cause of action is likewise based upon the existence of the same alleged trust. In view of the nature of plaintiff's contentions its allegations need not be further set out. The third cause of action was held by the trial court not to state facts sufficient to constitute a cause of action and defendant's objection to the introduction of evidence under that count was sustained on that ground. Appellant does not question the correctness of the court's ruling on that cause of action. The prayer of the complaint is in brief that the defendant be required to account for all of the trust estate alleged to have been received by her and that the trust be carried into effect.

In somewhat greater detail the facts pleaded in plaintiff's first cause of action may be stated as follows. In the year 1900 Chester M. Lane was divorced from Ellen Dora Lane in the State of Illinois. In 1913 Mrs. Lane came to California where she continued to reside until her death in 1938. In 1915 Mr. Lane came to California where he resided until his death in 1934. Plaintiff alleges that in 1927 Chester M. Lane transferred all of his personal property to his divorced wife under an oral trust. The precise terms of the trust need not be set forth. It is sufficient to state that it provided that on a certain contingency the estate of his son, Harry C. Lane, would on the death of the son become entitled to one-half of the trust fund. The complaint alleges that the son, Harry C. Lane, died on July 19, 1937, leaving surviving him his wife, the plaintiff herein, and a daughter, Helen Hambright. The plaintiff, as the administratrix of the estate of her late husband, contends that she is entitled to maintain this action and to enforce the alleged trust.

Appellant's principal contention is that upon the trial of the case the testimony of her witnesses was unimpeached and uncontradicted, that she was therefore entitled to judgment and that the lower court erred in holding otherwise.

[1-4] Plaintiff's case, upon the trial, was made up almost exclusively of admissions claimed to have been made by the alleged trustee, Ellen Dora Lane, during her lifetime, coupled with evidence of payments claimed to have been made by her pursuant to the provisions of the trust, which payments it is contended constituted evidence of the recognition of the trust by the trustee. Defendant did not cross-examine plaintiff's witnesses and offered no evidence in her own behalf. Counsel for appellant, in support of their contention that the judgment for defendant should be reversed, argue and cite numerous cases as holding that a court may not arbitrarily disregard uncontradicted testimony which is not inherently improbable. Unquestionably the general rule is as contended for by appellant. But appellant is in error in assuming that the case made by her was uncontradicted. She overlooks the fact that the property in controversy, according to her complaint, had been transferred to the defendant who now has possession of it. That possession raises a presumption of ownership in the defendant. This presumption to have substance must refer to and embrace the equitable as well as the legal title, since ownership is the right of a person to possess and use a thing to the

exclusion of others. Civ.Code, sec. 654. Since a presumption of ownership, like all presumptions, is evidence in this state, it was for the lower court to determine the weight to be given to it. That court may properly have considered that the case made out by the plaintiff was not so clear and unequivocal as to justify it in holding for the plaintiff in the face of the presumption. It must be borne in mind that a trial court may properly conclude that a presumption outweighs in evidentiary value the testimony of many witnesses. See People v. Chamberlain, 7 Cal.2d 257, 60 P.2d 299.

[5, 6] Moreover, the case presented by plaintiff was made up almost exclusively of testimony of conversations had some years before with a person since deceased. Situations of that kind were considered by our Supreme Court in the case of Austin v. Wilcoxson, 149 Cal. 24, 29, 84 P. 417, 419. In that case the plaintiff had likewise sought to prove an oral trust by the evidence of witnesses to declarations said to have been made by an alleged settlor of a trust. As in the instant action no written memorandum by the settlor was offered to substantiate the case of the plaintiff. In affirming a judgment in favor of the defendant the court said: "In considering what evidence may be regarded as clear and convincing in the establishment of such a trust it must be borne in mind that the Code enjoins caution in the reception of evidence of the oral admissions of a person (Code Civ.Proc., § 2061), even when that person is living. When he is dead and when, from the very nature of the evidence offered, it is impossible generally to contradict the witnesses who testify, reason suggests even a greater degree of caution, and it is not stating it too strongly to say that evidence so given under such circumstances must appear to any court to be in its nature the weakest and most unsatisfactory. [Citing cases.]" Another principle that was alluded to above which must be taken into consideration in reviewing appellant's case has been stated by Mr. Pomeroy as follows: "The declaration of trust, whether written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject-matter or property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interests which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general, or equivocal that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail." Pomeroy's Eq.Jur., 4th Ed., sec. 1009, quoted with approval in Lefrooth v. Prentice, 202 Cal. 215, 227, 259 P. 947, 952. In the circumstances shown by the record we cannot hold that the lower court erred in its conclusion that the plaintiff did not make out a sufficiently clear case to authorize a judgment in her favor.

[7] Another point of secondary importance is urged by appellant. She contends that the lower court committed error in denying her a jury trial since her suit was one at law and not in equity. In our opinion the contention is unsound. The complaint alleges the existence of a trust which it asks that the court decree and carry into effect and also that the defendant, as trustee, be required to account for the trust res which is alleged to be in her possession. In California courts of equity have exclusive jurisdiction of suits involving such issues. Woolsey v. Woolsey, 121 Cal.App. 576, 581, 9 P.2d 605. The case of Austin v. Wilcoxson, supra, upon which appellant relies in this connection, does not support her contention. As the court there pointed out the action was not one to enforce a trust but was one at law to recover a specified sum of money of which the defendant was alleged to have taken possession and which he refused to pay to plaintiff. The court also referred to the fact that the enforcement of a trust in equity has in contemplation, among other things, the terms, conduct and management of the trust which matters were not involved in the case before it.

It is of course settled that when a balance has been ascertained an action at law may be maintained by either the beneficiary or the trustee in certain instances. Vail v. Pacific Fish Products Co., 76 Cal.App. 58, 78, 243 P. 869. But such is not the case before this court.

The judgment of the lower court is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

50 Cal.App.2d 362

FOX v. SCHUSTER et al.

Civ. 13154.

District Court of Appeal, Second District, Division 2, California.

March 6, 1942.

Negligence 🔑90

Under statute imputing the negligence of the driver of an automobile to the owner for all purposes of civil damages, the negligence of a driver operating an automobile with owner's permission is imputable to owner in an action by owner against the driver of another automobile for injuries sustained in a collision. Vehicle Code, § 402(a), St. 1937, p. 2353.

Appeal from Superior Court, Los Angeles County; Robert F. Shippee, Judge pro tem.

Action for personal injuries by Lilly S. Fox against Charles Schuster and others. From a judgment for plaintiff, defendants appeal.

Reversed.

Reginald I. Bauder, of Los Angeles, for appellants.

James S. McKnight and Mark F. Jones, both of Los Angeles, for respondent.

W. J. WOOD, Justice.

Plaintiff commenced this action to recover damages for injuries which she suffered when the automobile in which she was riding collided with defendants' automobile. A jury rendered a verdict in favor of plaintiff in the sum of $2,821. Defendants have appealed from the ensuing judgment.

At the time of the collision plaintiff was riding in her own car, which was being driven by one Klinepeter with her consent. The trial court instructed the jury that "the driver's negligence, if any, may not be imputed to the plaintiff, * * * therefore, you shall find that there was no contributory negligence on the part of the plaintiff." The only issue which requires determination on this appeal concerns the contention of defendants that the court erred in giving this instruction.

Since the filing of the briefs a decision was rendered by our Supreme Court in Milgate v. Wraith, 19 Cal.2d 297, 121 P.2d 10. It was there held that by virtue of the 1937 amendment of subdivision (a) of section 402 of the Vehicle Code the negligence of one who is driving an automobile with the permission of the owner is imputable to the owner in an action by the owner against the driver of another car. The decision in the Milgate case makes necessary a reversal of the judgment in the case now before us. It is so ordered.

MOORE, P. J., and McCOMB, J., concurred.

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50 Cal.App.2d 247

HAYWARD LUMBER & INVESTMENT CO. v. AMERICAN NAT. BANK OF SAN BERNARDINO.

Civ. 2947.

District Court of Appeal, Fourth District, California.

Feb. 27, 1942.

Hearing Denied April 27, 1942.

1. **Trusts** 🔑236

Where bank entered into trust agreement with lumber company and individual to loan necessary funds for real estate development at eight per cent. interest and to handle trust on condition that bank should receive its advances and interest from the first funds derived from the sale of houses and units, in absence of an agreement to the contrary, bank was entitled to repay itself for advances from the general funds of the trust, and was not required to repay itself for advances made in respect of each unit from the particular unit, even though bank had entered a separate account for each unit for the purpose of handling the payment of bills. Code Civ.Proc. § 1866.

2. **Appeal and error** 🔑1008(3)

Where the construction given an instrument by the trial court appears to be reasonable and consistent with the intent of the parties making it, an appellate court will not substitute another interpretation even though it seems equally tenable.

Appeal from Superior Court, San Bernardino County; Frank A. Leonard, Judge.

Action by the Hayward Lumber & Investment Company against the American

National Bank of San Bernardino for the interpretation of an agreement, for an accounting, and for money had and received, wherein defendant filed a cross-complaint for the recovery of principal and interest. From the judgment, plaintiff appeals.

Affirmed.

Philip T. Lyons and Le Roy B. Lorenz, both of Los Angeles, for appellant.

R. Bruce Findlay, of San Bernardino, for respondent.

GRIFFIN, Justice.

In this action appellant, by its amended complaint, seeks an interpretation of the terms of a certain agreement, asks for an accounting based thereon, and in several separate money had and received counts prays for a recovery from respondent for the amount found due thereunder. Respondent, in its answer, admitted the execution of the agreement, denied appellant's interpretation thereof, and denied the necessity of an accounting or that it was indebted to appellant in the sum sought. By way of cross-complaint it seeks a recovery from appellant in the sum of $4,700 principal, plus interest and costs of suit. Each party pleaded a bar to the other's causes of action by virtue of the statute of limitations. After the trial of the case the parties entered into a form of stipulation reciting in part: "* * * that the court may make its order vacating * * * the order heretofore made * * * referring this matter to * * * a referee, for an accounting * * * that the court shall now finally decide the issue, which was raised upon the trial * * *" as to the proper interpretation of the agreement; that "if the court decides such issue in favor of the trustee bank, the court shall not order an accounting, but shall merely declare the rights of the parties under the said agreement with respect to an accounting." Thereupon the court made findings interpreting the agreement in accordance with the contentions of the respondent. It also found that plaintiff's causes of action for an accounting were not barred by the statute of limitations; that plaintiff was entitled to an accounting but under the stipulation it did not order an accounting or reference on the matter for such purpose "but will do so upon proper application therefor being hereafter made." It was further found that the cross-complainant was not entitled to a personal judgment against appellant herein for any deficiency but was compelled to obtain the repayment of any money due it from appellant from the funds or property of a certain trust.

As a conclusion of law the court determined that the cross-complainant was entitled "to judgment for the unpaid portion of any of its advances and interest; however, payable only from the property of said trust * * * as may hereafter be determined upon an accounting."

The court then signed a form of judgment decreeing that plaintiff was "entitled to an accounting" under the interpretation given the contract by that court; that defendant was "authorized to reimburse itself for its advances" under the agreement as so interpreted; that the parties, or either of them, "upon proper further application being made by it therefor," were "entitled to an order of reference herein for the taking of such an accounting."

It appears from the evidence that during the year 1926, one Thomason instituted a campaign to build and sell houses and chicken units or equipment on parcels of land in a tract in the northern part of San Bernardino known as the Fishelton Farms Poultry Colony. He approached appellant and made some kind of arrangements with it to furnish the building material for the improvements. About forty or fifty houses or units were begun under these arrangements when it was discovered that the "jobs" were going "sour." The project needed new finances. It became apparent then that without this new life blood the entire investment of the appellant was in grave jeopardy. Thomason and the appellant approached the respondent bank relative to these finances. The respondent agreed to advance the funds under certain conditions, one of which was that it should receive from the first funds derived from the sale of the houses and units its advances and interest. The disputed agreement was drawn for the purpose of reducing to writing the understanding of the parties. It reads in part as follows:

"This agreement, made * * * this 7th day of April, 1927, by and between Hayward Lumber & Investment Company, a corporation * * * as party of the first part, and American National Bank of San Bernardino, a corporation, * * * as party of the second part, and R. M. Thomason * * * party of the third part, Witnesseth:

"Whereas, the party of the first part is engaged in the business of selling lumber and other building materials * * *

"Whereas, the party of the second part is engaged in the banking business * * *

"Whereas, the party of the third part is engaged in the development of a large tract of land * * *

"Whereas, the title to portions of said land is in different individuals and/or corporations, and it is the plan of third party, in connection with the development thereof, to secure purchasers for portions of said tract and to establish an escrow in connection therewith, and to pay through said escrow the balance due the present holder of the legal title to the portion of the property so sold * * *

"Whereas, third party also intends to make all arrangements for the construction of the houses and other improvements to be placed on the pieces so purchased, and in connection therewith third party intends to purchase materials for said improvements, provide the labor therefor, and attend to all matters in connection therewith; and,

"Whereas, third party desires to purchase the materials for said improvements to be erected from first party which are handled by it; and,

"Whereas, the second party is willing to provide the necessary funds covering the balance due for the releasing of the lots upon which the buildings are to be built and to pay the labor claims thereon;

"Now, therefore, it is agreed,

"First: That the necessary papers covering the remaining unpaid balance of the purchase price of each individual parcel be made between the purchaser thereof and the third party;

"Second: That the above mentioned papers in the form of a first and second deed of trust mentioned heretofore be filed for record and recorded prior to the furnishing of any material or before any work of any kind is commenced;

"Third: That the first and second deeds of trust heretofore mentioned shall be assigned absolutely to the second party by the said third party to be held in trust to sell and dispose of pursuant to the provisions of this agreement;

"Fourth: The third party agrees to purchase from the first party and the first party agrees to sell to the third party all of the materials for use in the houses and * * *

"Fifth: The second party agrees to advance sufficient moneys to secure the conveyance to the purchaser of the lot upon which buildings are to be situated so that title may be shown in the name of the purchaser subject to the two deeds of trust heretofore mentioned;

"Sixth: The second party agrees to advance the necessary funds as the building progresses to pay the labor necessary in the completion of the building; * * *

"Eighth: The second party will exercise reasonable efforts to sell the said deeds of trust and the notes secured thereby, but agrees not to sell any notes secured by first deeds of trust for less than ninety-eight per cent (98%) of its face value * * * without the consent of the first party and shall apply the proceeds received therefrom in the following manner and with priorities as follows:

"[a] Return to the second party any moneys advanced covering the release of the lot * * *;

"[b] Return to the second party all moneys advanced for labor together with interest thereon at eight per cent, or any other expenses in connection therewith;

"[c] Payment to the first party of any and all remaining funds to and until such time as their bill for materials is paid in full together with interest at eight per cent from completion;

"[d] The return to the second party as trustee under the trust agreement drawn between third party in favor of various colonists and creditors of any and all remaining funds;

"Ninth: The first party in consideration of the covenants and agreements herein expressed agrees to waive any and all lien rights and to accept in lieu thereof the beneficial interest in the first and second deeds of trust herein mentioned and in accordance with the terms and provisions of this agreement; * * *"

It is not clear who actually drew the agreement, but it is clear that it was not drawn by the respondent bank. It was written on stationery of the appellant and presented to the bank for its approval. The bank advanced funds under the agreement and handled each of the six deals in the trust. On June 8, 1928, the bank submitted to appellant a statement showing that it had advanced to the trust a total of $14,074.62, and that it had repaid to itself the sum of $8,500 from the general funds of the trust, leaving a balance of $5,574.62 payable to it. The record discloses that this method of repayment to itself by the bank was not questioned by appellant until April 21, 1931. This was after the beginning of the depression and the continuing deflation of property values. Then for the first time appellant advanced the contention that the respondent could repay itself for any advances it made to complete "Unit A" only from the funds derived from the sale of "Unit A," not from "Unit B" or "Unit C" or the general funds of the trust.

[1] The only issue herein at the present time is the proper interpretation of the contract and particularly paragraph eighth thereof. The trial court found in favor of the bank's interpretation, i e., that under the agreement the bank was authorized to repay itself for its advances, from the general funds of the trust, and not from each particular job, for the advances made to each job.

It appears from the contract itself and other evidence produced, that the trial court was justified in adopting the interpretation placed upon the contract by respondent. The deals of Thomason and appellant had gone "sour." They needed more money and the benefit of the services of an organization to orderly handle their affairs. The bank agreed to handle the trust without compensation and in addition thereto to loan the necessary funds at 8 per cent interest. It had nothing to lose by refusing to enter into the agreement. Section 1866 of the Code of Civil Procedure provides that "When a statute or instrument is equally susceptible of two interpretations, one in favor of natural right, and the other against it, the former is to be adopted." Our attention has not been called to any case where a bank has agreed to loan money to any person at a specified rate of interest and provide for the repayment of the loan and interest only in case the borrower makes a profit on the transaction. One would naturally expect the entire loan and interest to be paid from the profits or collections in the general trust, without regard to any particular transaction included within it, in the absence of some agreement to the contrary.

[2] Appellant contends that the respondent bank was required, under the terms of the contract, to keep and render separate accounts on each of the several construction jobs, share its loss thereon, if any, and that it may not pool or consolidate all of the jobs in one general account, so as to set off losses in one or more jobs against gains or profits in others. In this connection, it argues that because the bank originally entered a new escrow for each job, that it thereby showed that it at that time interpreted the agreement as appellant now contends it should be interpreted. The agreement in question created a trust and not an escrow. The bank, for the purpose of better handling the payment of bills due on each house and out-building under the trust, entered a separate account for each. Such an arrangement is a logical one for handling the affairs of each improvement during the process of its construction. To contend that because the jobs were separated for that purpose and that purpose only, the bank thereby admitted the contention of appellant, is not justified. In June, 1928, the respondent showed that it considered the contract as one involving the whole and not each separate job, for in defendant's exhibit "C", the bank informed appellant that it had applied $8,500 upon its advances. Those advances were set up therein under schedules 2 and 4 in one lump sum of $14,074.62. There was no segregation. The $8,500 came from the general funds of the trust. On June 7, 1928, the respondent presented appellant with a statement which clearly showed and indicated the bank's interpretation of the contract. This statement should have shown appellant, if it did not already know it, what respondent believed regarding the interpretation of the contract. In any event, on April 21, 1931, appellant knew of respondent's attitude because, on that date, a letter was written by appellant to respondent questioning the right of the bank to pay itself out of the general fund. The action herein was started approximately six years later. The question immediately arises: "Why did appellant wait for such a long period before asserting its interpretation of the contract?" While there was evidence of delay or evasion on the part of the respondent, more than eleven years elapsed before appellant attempted to enforce its interpretation of the agreement. Appellant should have moved with reasonable dispatch thereafter to enforce the trust as it interpreted it. Such a delay has been held to amount to laches. Baxter v. King, 96 Cal.App. 415, 274 P. 610. However, we are convinced that the time-honored rule must here be applied, i. e., when the construction given an instrument by the trial court ap-

pears to be reasonable and consistent with the intent of the parties making it, courts of appellate jurisdiction will not substitute another interpretation even though it seems equally tenable. Tide Water Associated Oil Co. v. Curtin, 41 Cal.App.2d 884, 895, 107 P.2d 945. The judgment of the trial court cannot be disturbed.

In view of the conclusion reached, it becomes unnecessary to consider certain other points which are raised.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.

FIRST TRUST & SAVINGS BANK OF PASADENA et al. v. CITY OF PASADENA.*

Civ. 12002.

District Court of Appeal, First District, Division 2, California.

March 9, 1942.

Hearing Granted May 8, 1942.

1. Municipal corporations 🔑977

Where city by ordinance set up its own complete taxing system and city charter required presentation of "all claims" within six months and provided that, unless so presented, no suit should be brought upon any claim for money or damages against the city, a complaint, in action to recover portion of taxes paid under an alleged overassessment of properties through use of erroneous methods of valuation, which complaint contained no allegations showing compliance with claims provision of the charter, stated no cause of action.

2. Municipal corporations 🔑977

If any provision of ordinance whereby city set up its own complete taxing system was construable as eliminating necessity for presentation of a claim for tax refunds or as specifying a longer period for such presentation than that provided by claims provision of charter of city, then the ordinance provision would be void because in conflict with superior charter provisions.

3. Municipal corporations 🔑977

In action against city to recover portion of taxes paid under alleged overassessment of properties through use of erroneous methods of valuation, city was not precluded by "waiver" or "estoppel" from raising defense of noncompliance with charter provision requiring all claims to be presented within six months, because of alleged practice of city officials of making tax refunds in cases where claims had been filed more than six months after payment or because city attorney had told plaintiffs' counsel that it was unnecessary to file claims within six months.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel" and "Waiver".

4. Estoppel 🔑62(4)

The doctrine of estoppel may be invoked against a municipal corporation only in rare cases.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by the First Trust & Savings Bank of Pasadena, a banking corporation, and others, against the City of Pasadena, to recover a portion of taxes paid by plaintiffs under an alleged overassessment of plaintiffs' properties through the use of erroneous methods of valuation, wherein defendant filed a demurrer. From a judgment of dismissal after sustaining the demurrer, plaintiffs appeal.

Affirmed.

Holbrook & Tarr and W. Sumner Holbrook, Jr., all of Los Angeles, for appellants.

Harold P. Huls, City Atty., and H. Burton Noble, Asst. City Atty., both of Pasadena, for respondent.

SPENCE, Justice.

Plaintiffs brought this action seeking to recover a portion of the taxes paid by plaintiffs to the city of Pasadena for the tax year 1933-1934, which portion was alleged to have resulted from an over-assessment of plaintiffs' properties through the use of erroneous methods of valuation. Defendant's demurrer to plaintiffs' amended complaint was sustained. Plaintiffs elected to stand upon said amended complaint and refused to plead further. Thereupon a judgment of dismissal was entered and from said judgment, plaintiffs appeal.

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* Subsequent opinion 130 P.2d 702.

It is conceded by plaintiffs that their amended complaint contained no allegation showing compliance with the so-called claims provision of the Pasadena charter and that if compliance with said claims provision was required, then the ruling of the trial court was correct. Plaintiffs contend, however, that they were not required to allege compliance with said claims provision of said charter; that their amended complaint was sufficient in all respects; and that the trial court erred in sustaining said demurrer.

The above mentioned claims provision of the Pasadena charter is found in article II thereof. Said article requires the presentation of "all claims" within six months and further provides that unless a claim has been so presented, "No suit shall be brought upon any claim for money or damages" against the city of Pasadena.

Plaintiffs state that the trial court based its ruling on Farmers and Merchants' Bank of Los Angeles v. City of Los Angeles, 151 Cal. 655, 91 P. 795, and they devote considerable space in their briefs to an attack upon the decision in that case. They call attention to the fact that the cited case was decided by a divided court and they refer to it as "only a much criticized, never followed, frequently distinguished decision, out of line with the controlling rule of law." They concede, however, that it has never been expressly overruled.

One of the most recent cases in which the cited case is discussed is that of Brill v. County of Los Angeles, 16 Cal.2d 726, 108 P.2d 443. The majority opinion in the Brill case distinguishes the Farmers Bank case at page 731 of 16 Cal.2d, at page 446 of 108 P.2d. It is there said: "In support of its contention that the filing of a claim with it prior to suit was indispensable, the city places great reliance on the case of Farmers, etc., Bank v. City of Los Angeles, 151 Cal. 655, 91 P. 795, 797. That case is factually distinguishable from the present one and does not require a conclusion herein that the filing of a claim with the city was an indispensable prerequisite to the commencement of these actions. There, as distinguished from the present case, the city itself had directly provided a complete scheme for the assessment and collection (which, as shown, includes refund) of taxes by city officers though, pursuant to charter provision, such scheme was to be 'substantially' the same 'as the mode and manner' for the collection of state and county taxes. Though patterned after the county plan, the city had there set up its own complete taxing system and four of the justices thereupon concluded that under such circumstances the refunding procedure of such city system was subject to and controlled by the charter provision as to the necessity for filing a claim prior to suit to recover money."

The minority opinion in the Brill case gives unqualified approval to the decision in the Farmers Bank case and states on page 740 of 16 Cal.2d, page 450 of 108 P.2d that: "The decision in that case has never been overruled directly or by implication. It has stood for over thirty years, and must now be regarded as the settled law of this state." It was the view of the minority in that case that the Farmers Bank case could not be distinguished there and it was said in the minority opinion on page 739 of 16 Cal.2d, page 450 of 108 P.2d: "That case, in respect to the applicability of the law requiring presentation of a claim before suit, is the exact counterpart of the present action."

[1, 2] In our opinion, there is no essential ground for distinction between the Farmers Bank case and the instant case. Here as there, the claims provision of the charter contained a "sweeping requirement" (Brill v. County of Los Angeles, 16 Cal.2d page 741, 108 P.2d 443) which covered "all claims" against the city. Here as there the city had set up by ordinance its "own complete taxing system." See Brill v. County of Los Angeles, supra, 16 Cal.2d page 731, 108 P.2d page 446. If any provision of said ordinance is to be construed as eliminating the necessity for the presentation of a claim for a tax-refund or as specifying a longer period for such presentation than that provided by the claims provision of the charter of said city, then such "ordinance provision must necessarily be held void because in conflict with the superior charter provisions." Farmers & Merchants' Bank of Los Angeles v. City of Los Angeles, supra, 151 Cal. page 659, 91 P. page 797.

[3, 4] Plaintiffs further contend that even assuming that said claims provision of the charter was applicable to claims for tax refunds, "administrative construction of charter and tax ordinance and acts of city officials constituting estoppel bar raising defense in this case." The claimed waiver or estoppel is based upon the allegations of the amended complaint alleging the exist-

ence of a practice on the part of the city officials of making tax refunds in cases where the claims had been filed more than six months after payment and alleging that the city attorney had told plaintiffs' counsel that it was unnecessary to file claims within the six months period.

We find no merit in plaintiffs' claim of waiver or estoppel. Spencer v. City of Calipatria, 9 Cal.App.2d 267, 49 P.2d 320; Johnson v. City of Glendale, 12 Cal.App.2d 389, 55 P.2d 580; Sacramento & San Joaquin Drainage Dist. v. Riley, 194 Cal. 624, 229 P. 957; Ritter v. United States, 3 Cir., 28 F.2d 265; United States v. Globe Indemnity Co., 2 Cir., 94 F.2d 576; New York City Employees' Retirement System v. Eliot, 267 N.Y. 193, 196 N.E. 23; 87 A.L.R. 988. It is only in rare cases that the doctrine of estoppel may be invoked against a municipal corporation (Times-Mirror Co. v. Superior Court, 3 Cal.2d 309, 44 P.2d 547; City of Los Angeles v. County of Los Angeles, 9 Cal.2d 624, 72 P.2d 138, 113 A.L.R. 370; 10 Cal.Jur. 651) and we do not believe this case to be one of them.

It follows that plaintiffs' amended complaint was insufficient and that the trial court properly sustained the demurrer thereto.

The judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

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50 Cal.App.2d 242

HELBACH v. CITY OF LONG BEACH.

Civ. 12882.

District Court of Appeal, Second District, Division 3, California.

Feb. 27, 1942.

1. Municipal corporations 🔑733(1, 2)

Under Public Liability Act of 1923, making municipalities generally liable to be sued in tort actions for damages occasioned by dangerous condition of public streets, buildings, grounds or property if municipality had knowledge of danger and failed to remedy such condition or protect public therefrom within reasonable time, municipality's liability, in so far as it derived from instrumentalities used for purely governmental functions, is a liability created by such act, and without such act, municipality would be liable only if instrumentality was used in proprietary enterprise. Gen.Laws 1937, Act 5619.

2. Municipal corporations 🔑756, 847, 848

The general law, requiring any person injured as result of dangerous condition of public street, highway, building or property, to file written verified claim for damages with municipality within 90 days after accident, was not "amendatory" of, dependent upon or limited by public liability act making municipality generally liable to be sued in tort actions for damages occasioned by dangerous condition of public streets, buildings, grounds or property if municipality had knowledge of danger and failed to remedy such condition or protect the public therefrom within a reasonable time. Gen.Laws 1937, Act 5149, § 1, and Act 5619.

See Words and Phrases, Permanent Edition, for all other definitions of "Amendatory".

3. Constitutional law 🔑70(1)

The District Court of Appeal must accept and apply the law as the legislature has written it.

4. Municipal corporations 🔑1021

If claimant's right against city exists independently of statute and is limited by enactment requiring presentation of claim within prescribed time, reasonableness of operation of limitation can be considered, but if the right against city is created by statute, the claimant has only what the statute, however narrow, gives him, and that would be by way of "bounty".

See Words and Phrases, Permanent Edition, for all other definitions of "Bounty".

5. Municipal corporations 🔑812(2), 857

The general law requiring any person injured as result of dangerous condition of public street, highway, building or property to file written verified claim for damages with municipality within 90 days after accident, is "mandatory". Gen.Laws 1937, Act 5149, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

6. Municipal corporations 🔑64, 70

The opening and maintenance of public streets is a "municipal affair", but liability for defective streets, including procedure for enforcing such liability, is a matter of "general state concern".

See Words and Phrases, Permanent Edition, for all other definitions of "General State Concern" and "Municipal Affair".

7. Municipal corporations 🔑64, 70

The erection and maintenance of public building by city is a "municipal affair", but liability for defective or dangerous condition in building used by public, including procedure for enforcing liability, is a matter of "general state concern", whether building is operated in a governmental or in a proprietary capacity.

8. Municipal corporations 🔑64

The liability of municipality for tortious acts or omissions of its servants, including procedure for enforcement of liability, is a matter of "general state concern", and not a "municipal affair".

9. Municipal corporations 🔑79

A city's liability for damages arising out of defective condition of building maintained by city, including procedure for enforcement thereof, was a matter of "public concern", and not a "municipal affair", whether building was operated in governmental or proprietary capacity, and hence plaintiff suing city for injuries, sustained when she fell down exterior stairway into basement of building maintained by city, must file claim within 90-day period provided by general law, and not within six months' period provided by charter, in absence of showing that 90-day period was unreasonable or that claimant could not as well have filed her claim within 90 days as within six months. Gen.Laws 1937, Act 5149, § 1, and Act 5619; St.1921, p. 2151, § 338.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Concern".

10. Municipal corporations 🔑79

Since liability for tort was not a "municipal affair", charter provisions that claim against city must be filed within six months was not applicable to tort claims, where general law provided that such claims must be filed within 90 days. Gen.Laws 1937, Act 5149, § 1; St.1921, p. 2151, § 338.

11. Municipal corporations 🔑857

Where general law required any person injured as result of dangerous condition of public street, highway, building or property, to file written verified claim for damages with municipality within 90 days after accident, city could not extend or diminish the 90-day period for filing a claim for damages arising out of defective condition of building erected and maintained by city. Gen.Laws 1937, Act 5149, § 1.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Marguerite Helbach against the City of Long Beach for personal injuries allegedly sustained when she fell down a stairway into the basement of a building erected, maintained and operated by the city. From a judgment for the plaintiff, defendant appeals.

Reversed with directions.

Irving M. Smith, Nowland M. Reid, and Clifford E. Hayes, all of Long Beach, for appellant.

Doyle, Clark & Thomas, of Long Beach, for respondent.

SCHAUER, Presiding Justice.

Plaintiff recovered judgment against the city of Long Beach for personal injuries sustained when, during darkness, she fell down an unlighted exterior stairway into the basement of a building erected, maintained and operated by the defendant city. She failed to file her claim for damages within the ninety-day period provided for by section 1 of act 5149, Deering's General Laws, 1937, page 2204 (Stats.1931, p. 2475) but did file such claim within the six-month period ordained in section 338 of the charter of such city (Stats.1921, p. 2054, 2151). Appellant (defendant) seeks reversal of the judgment on the ground, among others, that the requirements of the general law (act 5149, supra) are applicable and mandatory. This position is well taken.

Respondent (plaintiff) endeavors to avoid the effect of the statute by arguing (1) that the building involved was operated by the defendant city in a proprietary capacity, that therefore it is liable for its tort regardless of the provisions of the Public Liability Act of 1923 (act 5619, Deering's Gen.Laws, 1937, p. 2630, Stats.1923, p. 675) and that the limitation period of act 5149, supra (Deering's Gen.Laws, 1937, p. 2204, Stats.1931, p. 2475) controls claims under the Public Liability Act but has no application to claims based on proprietary operations; (2) that the maintenance of the building was a purely municipal affair and that claims arising therefrom are controlled exclusively by the charter provision, which reads as follows: "Sec. 338. All claims for damages * * * must be presented to the city council, and filed with the city clerk within six months after the occurrence for which the damages arose." (Stats.1921, p. 2054 at 2151.)

[1] The Public Liability Act of 1923, supra, makes a municipality (or county or school district) generally liable to be sued in tort actions for damages to person or property occasioned by the dangerous or defective condition of its public streets, buildings, grounds, or property, when its governing or managing board, or person having authority to remedy the condition, had knowledge or notice of the defect or danger and failed to remedy such condition or protect the public against it, within a reasonable time. This liability, insofar, as it derives from instrumentalities used for purely governmental functions, is one created by the statute; without the statute the city would be liable only if the instrumentality was used by it in some proprietary enterprise. We deem it unnecessary, however, to determine whether the defendant city acted in a governmental or in a proprietary capacity in erecting and maintaining the building with which we are concerned, because in either case the limitation prescribed by act 5149 is applicable. The language of that statute is clear. "Whenever it is claimed that any person has been injured * * * as a result of the dangerous or defective condition of any public street, highway, building, * * * or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality * * * within ninety days after such accident has occurred." (Sec. 1, act 5149, Deering's Gen.Laws, 1937, p. 2204, Stats. 1931, p. 2475.)

[2, 3] That act is not amendatory of, dependent upon, or limited by, the Public Liability Act of 1923, supra (act 5619, Deering's Gen.Laws, 1937, p. 2630, Stats. 1923, p. 675; see Johnson v. City of Glendale, 1936, 12 Cal.App.2d 389, 392, 393, 55 P.2d 580); it purports to declare the limitation applicable "*whenever*" any person claims damages against a municipality arising out of the defective condition of "*any*" public street, highway, building, etc. To uphold respondent's position we should, in effect, have to write into that law words of limitation and exception making it read, "*Only when* it is claimed that any person has been injured * * * as a result of the dangerous or defective condition of any public street, highway, building, * * * or property *not owned or operated or maintained in a proprietary capacity,* a verified claim for damages shall be presented," etc. We perceive no justification and have no authority for such judicial legislation. We must accept and apply the law as the legislature has written it.

[4, 5] Some of the decisions applying such law in cases where its constitutionality has been questioned, which cases were based upon the Public Liability Act, have suggested the fact that liability under such act is of purely statutory creation and that therefore it may be limited as the legislature sees fit (see Johnson v. City of Glendale, 1936, supra, 12 Cal.App.2d 389, 395, 55 P.2d 580; Young v. County of Ventura, 1940, 39 Cal.App.2d 732, 735, 104 P.2d 102; Wilkes v. City, etc., of San Francisco, 1941, 44 Cal.App.2d 393, 397, 112 P.2d 759.) If we were confronted with the question as to whether the ninety-day period was reasonable in the light of particular circumstances, such as that the plaintiff by reason of the very injuries for which she seeks to recover had been so incapacitated that she was physically or mentally unable to file her claim within the prescribed period, we might have occasion to inquire as to whether her cause of action existed at common law or was created by statute; i. e., whether the maintenance of the building was in a proprietary or in a governmental character. If it was created by statute she at best would have only what the law, however narrow, gave her, and that would be by way of bounty; but if her right existed independently of statute and were limited by some enactment, the reasonableness of operation of the limitation could be considered (see Johnson v. City of Glendale, 1936, supra, 12 Cal.App. 2d 389, 395, 55 P.2d 580). Here, however, we have no showing that the ninety-day period was unreasonable or that plaintiff could not as well have filed her claim within ninety days as within six months. It is on its face a reasonable provision (Young v. County of Ventura, 1940, supra, 39 Cal.App.2d 732, 737, 104 P.2d 102) and is mandatory (Thompson v. County of Los Angeles, 1934, 140 Cal.App. 73, 78,

35 P.2d 185; Johnson v. City of Glendale, 1936, supra, 12 Cal.App.2d 389, 393, 55 P.2d 580; Von Arx v. City of Burlingame, 1936, 16 Cal.App.2d 29, 36, 60 P.2d 305; Cooper v. County of Butte, 1936, 17 Cal.App. 2d 43, 45-50, 61 P.2d 516; Wilkes v. City, etc., of San Francisco, 1941, supra, 44 Cal. App.2d 393, 397, 112 P.2d 759; Douglass v. City of Los Angeles, 1935, 5 Cal.2d 123, 128, 53 P.2d 353; Hall v. City of Los Angeles, 1941, 19 Cal.2d 198, 120 P.2d 13.) It is therefore immaterial whether the defendant city was acting in a governmental or in a proprietary capacity; in either event the ninety-day limitation of act 5149 was applicable.

[6-9] Respondent also urges, as before noted, that the erection and maintenance of the building was a purely municipal affair and that therefore the procedure, including limitation of time, for filing claims against the city arising out of its tortious acts or omissions in connection with such building is likewise exclusively of municipal concern and governed by its charter. Even if we assume respondent's premise her asserted conclusion does not follow. The opening and maintenance of public streets is typically a municipal affair (Byrne v. Drain, 1900, 127 Cal. 663, 667, 60 P. 433; Black v. Southern Pac. Co., 1932, 124 Cal.App. 321, 335, 12 P.2d 981) but liability for defective streets, including the procedure for enforcing it, is a matter of general state concern (Wilkes v. City, etc., of San Francisco, 1941, supra, 44 Cal.App.2d 393, 397, 112 P.2d 759; Douglass v. City of Los Angeles, 1935, supra, 5 Cal.2d 123, 128, 53 P.2d 353). Likewise, while a city can erect and maintain a public building as a municipal affair, any defective or dangerous condition in that building, if used by the public, is a matter of general state concern. This is true whether the building be operated in a governmental or in a proprietary capacity. As hereinabove stated, if the building be a proprietary undertaking the city is liable for its torts regardless of the provisions of act 5619, supra (Deering's Gen.Laws, 1937, p. 2630; Stats.1923, p. 675) and if it be governmental in character liability is imposed by that act. In either case the liability for tort, including procedure for its enforcement, is a matter of public concern. It was said in Douglass v. City of Los Angeles, 1935, supra, 5 Cal. 2d 123, at page 128, 53 P.2d 353, at page 355, that "The important question of the liability of municipalities * * * for the tortious acts or omissions of their servants is a matter of general state concern, and not, as contended by the plaintiff, a municipal affair." In Department of Water & Power v. Inyo Chemical Co., 1940, 16 Cal.2d 744, at page 753, 108 P.2d 410, at page 416, the Supreme Court reiterated that rule, declaring "It is undisputed that the matter of the liability of and payment by a city for its tort is *not* a municipal affair." The reasons for applying this rule to cities in proprietary enterprises are fully as cogent as when they are engaged in exclusively governmental activities. So also is it true that the benefits to be obtained from the early filing of claims required by act 5149 are fully as important to cities (and to their taxpayers) when the claims arise from proprietary undertakings as when they derive from conduct of governmental functions. We find nothing in the case of Jackson v. City of Santa Monica, 1936, 13 Cal.App.2d 376, 57 P.2d 226, or of Cathey v. City and County of San Francisco, 1940, 37 Cal.App.2d 575, 99 P.2d 1109, which requires a conclusion contrary to that which we have reached. In the former case obviously the point was not before the court and in the latter it does not appear to have been considered.

[10, 11] Since liability for tort is not a municipal affair the charter of defendant city (sec. 338, Stats.1921, pp. 2054, 2151) is non-operative in this case. The city had no power either to extend or to diminish the time fixed by the state law for filing a claim for damages arising out of the defective condition of a building erected and maintained by it (see Young v. County of Ventura, 1940, supra, 39 Cal. App.2d 732, 736, 104 P.2d 102; Kelso v. Board of Education, 1941, 42 Cal.App.2d 415, 420, 109 P.2d 29; Wilkes v. City, etc., of San Francisco, 1941, supra, 44 Cal. App.2d 393, 397, 112 P.2d 759).

The judgment is reversed with directions to the trial court to enter a judgment dismissing the action.

SHINN and PARKER WOOD, JJ., concurred.

50 Cal.App.2d 332

In re TURNER'S ESTATE.

DIXON v. MOUNTS et al.

Civ. 13436.

District Court of Appeal, Second District,
Division 1, California.
March 5, 1942.

1. **Executors and administrators** ⚷216(2), 497, 501

Whether an executor or his attorney is entitled to extraordinary compensation for services is a question committed to the sound discretion of the probate court, and its conclusion will not be set aside in the absence of a showing of an abuse of discretion.

2. **Executors and administrators** ⚷497

Where California executor made a trip to Kansas and Nebraska and was appointed ancillary administrator of testator's estate in Nebraska, and thereafter he made a second trip to Nebraska to close the ancillary proceedings and distribute the Nebraska estate and effect a sale of testator's land in Kansas, and for executor's services in connection with Nebraska estate he received a statutory fee of $200 and certain expenses were paid in connection with sale of the Kansas land, California court did not abuse its discretion in disallowing executor compensation for "extraordinary services" performed in connection with ancillary administration of the estate.

See Words and Phrases, Permanent Edition, for all other definitions of "Extraordinary Services".

3. **Executors and administrators** ⚷111(6)

Court did not abuse its discretion in reducing to $75 allowance of $115 for executor's attorney in excess of statutory fee allowed in domiciliary estate for services performed by attorney in rendering executor legal advice in connection with ancillary administration of testator's realty, which was located in other states and which was appraised at $6,400.

4. **Executors and administrators** ⚷109(4)

A personal representative is entitled to traveling expenses of himself and his attorney or agent, when necessarily incurred to enable them to perform the duties of the trust properly, but no allowance should be made where there is no necessity for travel, as where the matter can as well be attended to by mail.

5. **Executors and administrators** ⚷109(4)

Traveling expenses incurred by a personal representative to procure appointment as a special administrator are not allowable even if the personal representative's services should prove to be of great value to estate.

6. **Executors and administrators** ⚷109(4)

Traveling expenses which pertain solely to the administration of an estate in a foreign country should be paid from that part of the estate located in the foreign country.

7. **Executors and administrators** ⚷510(11)

Where court, on conflicting evidence, found against executor's claim that those objecting to his account were estopped from contending that it was unnecessary for executor to make trips to foreign state, and to recover his reasonable expenditures for traveling expenses on such trips, for the reason that they consented to those trips, the District Court of Appeal had no power to interfere.

◆

Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge pro tem.

Proceeding in the matter of the estate of Georgianna Turner, deceased, wherein Asa E. Dixon, as executor, etc., filed a final account and supplemental account, and wherein Harriet Turner Mounts and others interposed objections to the accounting in so far as certain items were concerned. From an order disallowing certain items, Asa E. Dixon, as executor, etc., appeals.

Order affirmed.

E. R. Simon, of Los Angeles, for appellant.

W. Blair Gibbens, of Santa Monica, for respondents.

YORK, Presiding Justice.

Testatrix died in Los Angeles County on July 21, 1937, leaving a will naming appellant as executor and bequeathing her entire estate to respondents, her daughters and only heirs at law. Letters testamentary duly issued to appellant on August 19, 1937, and he retained E. R. Simon as his attorney to conduct the probate proceedings in California.

In addition to real property appraised at $2,000 and a postal savings certificate valued at $25, which comprised the California estate, testatrix died seized of 1600 acres of farm land located near North Platte, Nebraska, having an appraised value of $5,000, which was leased for farming purposes under a share crop contract; and also 160 acres of farm land situated near the city of Mankato, Kansas, appraised at $1,400, occupied by a tenant but from which no income was being derived by testatrix at the time of her death.

Appellant's attorney advised him that ancillary probate proceedings were necessary in Nebraska, and that appellant could be appointed ancillary administrator if he went to Nebraska and petitioned for appointment as such. Also, that the Kansas property could be transferred directly to the respondents without further proceedings upon the filing of the will in that state.

Appellant thereupon conferred with respondents with respect to such ancillary proceedings, respondents testifying at the trial that appellant told them it was necessary for him to make a trip to the said states to handle the property there as administrator and that "it all tied in with the settling of our estate here"; appellant, on the other hand, testified he told respondents, "If I was to be appointed the administrator there it was necessary for me to go there."

At any rate, in November of 1937, appellant made a trip to Kansas and Nebraska, and was appointed ancillary administrator of the estate in the latter state. In August of 1938, he made a second trip to Nebraska to close the ancillary proceedings and distribute the Nebraska estate and to effect a sale of the land in Kansas. For his services in connection with the Nebraska estate he received a statutory fee of $200, and the attorney who represented him in that state received the same amount. The Kansas land was sold for $1,600 and when the proceedings there were closed, the attorney handling the same was paid a fee of $55 and the real estate broker who negotiated the sale was paid $80.

In his final account, report and petition for extraordinary commissions and fees, and supplemental account of executor, appellant petitioned the court to allow as a charge against the domiciliary estate in California traveling expenses incurred by him on the two trips to Nebraska and Kansas in a total sum of $363.48; and also the sum of $125 in excess of his statutory fee on account of extraordinary services performed by him for the estate in making two trips and effecting the sale of the Kansas property. He further petitioned the court for an allowance of $115 for his attorney in excess of the statutory fee allowed in the domiciliary estate for services performed by him in rendering legal advice in connection with the ancillary administration.

Respondents interposed their objections to the said accounting in so far as the items above enumerated were concerned, and the court thereafter entered its order allowing executor's attorney the sum of $75 for extraordinary services instead of the sum of $115, as prayed for; and disallowed the sum of $125 on account of extraordinary services claimed to have been performed by executor, as well as the sum of $363.48 for traveling expenses incurred by said executor in making the two trips to Kansas and Nebraska in connection with the ancillary proceedings in those two states. This appeal is prosecuted from such order.

The said items were disallowed by the court upon the theory that executor "has been paid by the Nebraska probate the compensation to which he is entitled and that it would be improper under the circumstances for the court to allow the expenses out of this state (the domiciliary proceedings in California)."

[1] The question of whether an executor or his attorney is entitled to extraordinary compensation for services is a question "committed to the sound discretion of the probate court and its conclusion will not be set aside in the absence of a showing of an abuse of discretion. In re Estate of Carr, 175 Cal. 387, 165 P. 958; In re Estate of Hedrick, 127 Cal. 184, 59 P. 590; In re Estate of Miller, 15 Cal.App. 557, 115 P. 329." In re Estate of Fritz, 16 Cal.App.2d 519, 520, 60 P.2d 1008.

[2, 3] Under the circumstances presented by the instant situation, there was no abuse of discretion in disallowing compensation for extraordinary services performed by executor in connection with the ancillary administration of the estate, nor in reducing from $115 to $75 the compensation on account of extraordinary services performed by executor's attorney.

[4-6] With respect to traveling expenses, "The representative is entitled to traveling expenses of himself and of his attorney or agent, when necessarily incurred to enable them to properly perform the duties of the trust. But no allowance should be made where there is no necessity for

travel, as where the matter can as well be attended to by mail. * * * So also traveling expenses incurred to procure appointment as a special administrator are not allowable even if his services should prove to be of great value to the estate. (In re Estate of Emerson, 175 Cal. 724, 167 P. 149.) Traveling expenses which pertain solely to the administration of the estate in a foreign country should be paid from the part of the estate located there. (In re Estate of Ortiz, 86 Cal. 306, 24 P. 1034, 21 Am.St.Rep. 44, saying that if these expenses might be allowed, then all the expenses of administration in the other country might be charged to the California estate.)" 11b Cal.Jur. 481, section 1039.

Again in the same work, page 854, section 1336, it is stated: "The expenses pertaining to the foreign estate should be paid from that part of the estate and not from the estate in California, although the domiciliary administration is here. In re Estate of Ortiz, 86 Cal. 306, 24 P. 1034, 21 Am.St.Rep. 44." See, also, In re Estate of Price, 136 Cal.App. 257, 28 P.2d 717.

The record reveals that appellant received a statutory fee of $200 in connection with the ancillary administration in the state of Nebraska and that certain expenses were paid in connection with the sale of the Kansas land before the appellant accounted for the same in the domiciliary proceeding in this state. Consequently, it would appear that the traveling expenses incurred by executor in connection with the ancillary administration should have been presented for allowance at the time the ancillary proceedings were closed and not in the final accounting of the domiciliary estate in California.

[7] Appellant contends that respondents "are estopped from contending it was unnecessary for appellant to make either of the two trips to Nebraska and to recover his reasonable expenditures for traveling expenses on said trips, for the reason that, as is shown by the evidence of appellant, heretofore set forth, they consented to these trips to Nebraska." The evidence upon this subject was conflicting and the court found against appellant's claim, therefore this court has no power to interfere in this regard.

For the reasons stated, the order appealed from is affirmed.

DORAN and WHITE, JJ., concurred.

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50 Cal.App.2d 398

In re REISS' ESTATE.

REISS v. REISS.

Civ. 11983.

District Court of Appeal, First District, Division 2, California.

March 11, 1942.

1. Wills ⚿31

Mere proof of mental derangement or of insanity in a medical sense is not sufficient to invalidate a will, but the contestant must prove either such complete mental degeneration as denotes utter incapacity to know and understand those things which the law prescribes as essential to the making of a valid will, or the existence of specific insane delusion which affected the making of the will involved.

2. Wills ⚿50

A testatrix is of "sound and disposing mind" and memory if, at the time of making her will, she has sufficient mental capacity to be able to understand the nature of the act she is doing, to understand and recollect the nature and situation of her property, and to remember and understand her relations to the persons who have claims upon her bounty and whose interests are affected by the provisions of the instrument.

See Words and Phrases, Permanent Edition, for all other definitions of "Sound and Disposing Mind".

3. Wills ⚿55(1)

In will contest, evidence sustained finding that testatrix did not have sufficient mental capacity to execute will.

4. Wills ⚿302(1)

In will contest, evidence sustained finding that deceased did not execute the will.

5. Wills ⚿386

In will contest, the proponent's testimony was to be weighed by the trial court.

6. Wills ⚿166(1)

In will contest, evidence sustained finding that execution of will was procured by undue influence exercised by proponent who was the son of the deceased.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Proceeding in the matter of the estate of Rosa Reiss, deceased, wherein Moses Joseph Reiss filed an application for an order admitting to probate the purported will of the deceased, which was opposed by Max Reiss, who filed a contest. From an adverse judgment, Moses Joseph Reiss appeals.

Affirmed.

Mark F. Jones and Sydney Tannen, both of Los Angeles, and H. O. Wallace, of Long Beach, for appellant.

Swaffield & Swaffield and Charles K. Chapman, all of Long Beach, for respondent.

STURTEVANT, Justice.

After the death of Rosa Reiss, her son, Moses Joseph Reiss, applied to the trial court for an order admitting to probate the purported will of the decedent. Max Reiss, her surviving husband, appeared and filed a contest. The petitioner answered the contest and the proceeding was heard before the trial court sitting without a jury. The contest was based on the grounds of lack of testamentary capacity, lack of proper execution, and on undue influence alleged to have been exercised by the petitioner. The trial court made findings in favor of the contestant on all three grounds and caused an order to be entered denying the application of the petitioner. From that order the latter has appealed. We will discuss each of the grounds of contest in the order above stated.

1. The decedent Rosa Reiss and Max Reiss were husband and wife. Rosa had been married twice. Her first husband's name was Katz. They had two sons, the petitioner, Moses Joseph, and a younger brother, Bernard. Both boys took the name of their stepfather. All were natives of Austria but came to America and located in the southern part of this state. At the time of her death Rosa was about sixty-six years of age. For some years she had been afflicted with diabetes. In January, 1934, she suffered a stroke and thereafter was paralyzed on the right side. Her face was distorted, she had little or no use of her right arm, and so little use of her right leg that she dragged it as she walked. Arterio sclerosis commenced to develop at a time prior to the stroke. Her family physician was Dr. L. D. Mahannah. He testified that he commenced to treat her in 1934. "Her mouth hung slightly open and her face was expressionless. There was not much expression in her eyes. The pupils reacted to light. One eye did not close. I tried to talk to her and it was difficult to carry on a conversation. Her speech was very thick and it was difficult to understand much, and her answers were not logical. I do not think she understood. She spoke slowly. I do not think she had the mental capacity to answer questions. She had no ability to carry on a coherent conversation. This continued to the time of her death. It existed in January, 1935. I made a diagnosis of arterio sclerosis. This is the hardening of the arteries as the different parts of the body do not get enough nourishment. There is not enough nourishment to the brain. There is a consequential effect on the brain making the patient mentally deficient. I have an opinion as to the degree of her mentality. She had the capacity of a six or eight year old child—if that old."

The petitioner and his wife and Max Reiss and the decedent all lived at Long Beach. It appears that the residences were not far apart. During the year 1934 the families visited each other at different times. In the latter part of July, or the first part of August, the decedent went to the house of Moses and remained there a few days. During that period of time Moses took her to his attorneys, Doyle, Clark and Thomas. Mr. Doyle waited on her. He prepared certain conveyances and a will. None of those papers were executed but remained in the possession of the attorneys. After the papers had been prepared the decedent did not return to execute them but did return to her own home and rejoined her husband. A few months later, on January 23, 1935, the decedent again went to Moses' house. The next day he again took her to the office of Mr. Doyle. All of the documents purport to have been signed on that date. If we understand the record correctly, on the afternoon of the same date the decedent again returned to her home. The next day the decedent and her husband called on Mr. Doyle and asked for the return of the papers. They were not returned and litigation followed. On February 26, the decedent was adjudged incompetent and her husband was appointed her guardian. A little later, in the month of March, a petition to restore her to competency was filed by her son Moses. Max Reiss appeared and opposed the petition. The trial court appointed Dr. Victor Parkin and Dr. P. E. Bowers to examine the alleged incompetent and report to the court. The examination was made and a very full report was thereafter made to the court. The petition to restore was denied and the litigation over the above mentioned documents continued. On January 12, 1936, Rosa died. A little later her son Moses sought to have the purported will admitted to probate. On the hearing of the contest the testimony of Dr. Parkin and Dr. Bowers was brought forth by the contestant. It will serve no purpose to state it in detail. However, among other things it may be recited that Dr. Parkin testified: "The arterio sclerosis of Rosa Reiss had affected her mentality in and of itself. I know that arterio sclerosis existed prior to the stroke. Arterio sclerosis could not be cured prior to the paralysis. I am certain she had a stroke of paralysis. I do not think she was much worse in March when I examined her than she was in January, 1935. The changes are too gradual to see. In that short time no noticeable change had taken place." Dr. Bowers testified: "I asked her if she had grown children and she said yes but she did not know how many. She did not know how long she had lived in America nor how long she had lived in California. She said she had had a stroke; she could not tell what happened; she did not know how long she had been in the hospital; she did not know who was president of the United States, or the mayor of Long Beach, or the governor of California. She said she did not know anything. * * * She was in a state of deterioration due to the effect of the disease of the blood vessels of the brain and of the body generally, and to the fact that she had chronic diabetes which also contributed to this condition. She was just an automaton, following the suggestion of anyone at all. She was incompetent, she was deteriorated and mildly demented, and had been so for not less than eighteen months to two years. * * * In my opinion Rosa Reiss was so affected; she had a state of chronic mental deterioration from which there was no change or recovery and no lucid intervals. It was a down-hill process every day. * * * She did not have an acute insanity but she had a dementing process, going down-hill, a mental deterioration; and since there was no recovery from that kind of a condition, then they have no lucid intervals. She was incompetent, demented, deteriorated."

There was not a particle of testimony by any medical expert in any manner controverting what has been recited above.

[1-3] Each party called witnesses who expressed opinions as laymen and as intimate acquaintances of the decedent respecting the mental sanity of the latter. Such evidence addressed to the capacity of of an automaton of course has little, if any, weight. In this state "It is well settled that mere proof of mental derangement or even of insanity in a medical sense is not sufficient to invalidate a will, but the contestant is required to go further and prove *either* such a complete mental degeneration as denotes utter incapacity to know and understand those things which the law prescribes as essential to the making of a valid will, *or* the existence of a specific insane delusion which affected the making of the will in question." (Italics ours.) Estate of Shay, 196 Cal. 355, 359, 237 P. 1079, 1080. In the instant case there is no testimony whatever tying the case to the second class. The testimony was directed wholly to the first class. It is also settled law that "A testator is of sound and disposing mind and memory if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property, and to remember, and understand his relations to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument." Estate of Sexton, 199 Cal. 759, 764, 251 P. 778, 780. By its findings of fact the trial court found in effect that the mind of the decedent was unsound within the rule just quoted. A most cursory examination of the evidence hereinabove recited discloses that the finding of the trial court was clearly supported.

[4] 2. Passing to the claim that there was a lack of proper execution of the will, additional facts should be recited. Max Reiss and the decedent were a frugal couple. They accumulated a large amount of property. Both worked hard to contribute to the accumulation. Some of their funds were invested in real estate and some were in bank deposits. Apparently all stood under joint tenancy agreements. There is evidence that the decedent at times expressed a wish to so arrange her affairs that her share should stand of record in her name. She expressed that wish to the end that she should remain independent and have funds to live on. The record does not disclose a particle of evidence that she ever asked anybody to prepare a will for her. The proponent in numerous places testified that she

never mentioned will to him and he did not to her. When she called on Mr. Doyle he expressed the opinion to her that the joint tenancy agreement could be broken by making certain conveyances and he undertook to prepare and cause those conveyances to be made. However, the making of the will arose purely collaterally and, as hereinabove stated, without any request being made by the decedent. A photostatic copy of the instrument is contained as an exhibit in the record. At the end of it there are some scratches in ink where the signature should be. It is quite impossible to say that the two scratches are the writing of Rosa Reiss. That is of the date of January 24, 1935. The same comment is equally applicable to a document written on the same day by Mr. Doyle addressed to Farmers and Merchants Bank and claimed to have been signed by the decedent. Another document written on January 25, 1935, acknowledged before a notary public on the same date, contains a signature that is quite plain and distinct. Another exhibit is a photostatic copy of the signature of the decedent written on a card when opening a savings bank account on June 30, 1931. That signature is quite plain and quite distinct. Bearing in mind that the trial court had all of the documents before it, and saw and heard the witnesses, we are quite unable to state that said court erred in finding as a fact that the decedent never executed the will.

[5, 6] 3. The remaining attack is the assertion that there is no evidence showing the will was made by undue influence exercised by the decedent's son Moses. As shown above it was the contention of Moses in the trial court that his mother never sought to make a will, that he never sought to have her make a will, and that Mr. Doyle never did. However, the evidence is clear that Moses was the son of the decedent, that down to the year 1934 their relations had been agreeable and that in many respects he had acted and was acting as a confidential agent of his mother. At the time the will was written the decedent was a guest in the home of Moses. At the time the will was signed the decedent was again a guest in the home of Moses. On different occasions Moses had taken his mother to different attorneys. Among others he took her to Mr. Doyle. Mr. Doyle was not of her selection, was not her attorney, and there was evidence to the effect that Moses promised to pay Mr. Doyle for his services. After the papers above mentioned were written in August, Moses continued to remain active and obtain data so that Mr. Doyle could draw up legal papers. Just why the papers were not signed in August the record is not clear. However, when the decedent returned to Moses' house in January, he said to Mr. Doyle, "Now is the time, let's go. I don't want to take any more chances." Moses testified to making that statement. His brother Bernard Reiss testified that in January, just before their mother died, Moses said to him, "I fixed it all right. If Max wants as much as four cents he has got to ask me about it, and if there is even a button off a shoe you and I get half of it." Immediately after the funeral, at Moses' house, he told Bernard of the papers that had been signed. Moses' wife interposed, "You know she was not right mentally." Moses answered, "What matters—she signed." Immediately after the papers had been signed by the decedent, and on the same day, she was allowed to leave Moses' home and return to her own home. In presenting his case the proponent never explained any of the foregoing facts. He interposed some denials but the truth of those denials was properly to be weighed by the trial court. In the case entitled Estate of Graves, 202 Cal. 258, commencing on page 262, 259 P. 935, commencing on page 936, the court said: "Three well-established facts, among others, which are recognized as being indicative of undue influence, or a subversion of a decedent's volition, stand out clearly in the record: The relations between appellant and the decedent afforded to appellant an opportunity to control the testamentary act; the decedent's condition was such as to permit of a subversion of her freedom of will; the appellant was active in procuring the instrument to be executed." We think that the instant case falls clearly within the classifications so indicated, and that this court may not say that the trial court erred in making the finding complained of.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

50 Cal.App.2d 229

MAKZOUME v. MAKZOUME.

Civ. 11997.

District Court of Appeal, First District, Division 2, California.

Feb. 27, 1942.

1. Husband and wife 🔑278(1)

Separation agreements, made in contemplation of divorce, providing for division or adjustment of property rights, and not procured through fraud, undue influence, or coercion, are highly favored in the law. Civ. Code, § 159.

2. Divorce 🔑249(2)

A wife suing for divorce, by pleading and proving a prior separation agreement relating to division or adjustment of property rights, including both community and separate property, "waived" her claim to an adjustment by the court of the respective rights in the community property, and asked for alimony in the sum agreed upon. Civ.Code, §§ 146, 159.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

3. Divorce 🔑235

The matter of awarding the innocent spouse alimony is left, in first instance, to trial court's discretion, but this discretion is not arbitrary, but must be exercised along legal lines, taking into consideration circumstances of parties, their necessities, and financial ability of husband; and in a legal sense discretion is "abused" whenever, in its exercise, a court exceeds bounds of reason, all the circumstances before it being considered. Civ.Code, § 137.

See Words and Phrases, Permanent Edition, for all other definitions of "Abuse of Discretion".

4. Divorce 🔑249(2)

The provision, in a property settlement agreement between husband and wife made in contemplation of divorce, that $75 monthly, which husband, earning $400 a month, agreed to pay as alimony, was in itself evidence that the amount agreed to be paid, was a reasonable and fair sum for that purpose.

5. Divorce 🔑249(2)

There is no rule requiring that terms of property settlement in separation agreement be adopted in divorce decree, but, unless court specifically declares agreement to be illegal and against public policy, agreement stands, and may be treated as independent contract subject to such construction and judicial disposition as terms and circumstances warrant.

6. Divorce 🔑249(2), 261

Where divorce decree modifies or supersedes some provision of property settlement agreement, one party may have concurrent remedies, but a defaulting party may be bound by both the decree and the agreement.

7. Divorce 🔑254

Where wife suing for divorce prayed for custody of minor child, for award for support of child, and for alimony for herself, in accordance with prior separation agreement, interlocutory decree accepting portion of settlement agreement relating to custody and maintenance of child and attorney's fees, but not mentioning other portions of settlement agreement, required reversal as leaving parties in doubt whether decree intended to adopt or reject agreement, and as not determining issue presented.

8. Judgment 🔑20

A judgment must be "definitive", in that decision itself must purport to decide finally rights of parties on issues submitted by specifically denying or granting remedy sought by action, and converse is also true, and every definitive determination of rights of parties in proceeding before a competent tribunal is a "judgment".

See Words and Phrases, Permanent Edition, for all other definitions of "Definitive" and "Judgment".

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action for divorce by Gladys Charles Makzoume against Victor Antoine Makzoume. From so much of an interlocutory decree for plaintiff as did not mention a prior separation agreement and property settlement between the parties and failed to confirm property settlement agreement and to award any alimony, plaintiff appeals.

Reversed and remanded with directions.

Mark M. Cohen and Irwin M. Fulop, both of Los Angeles, for appellant.

No appearance for respondent.

NOURSE, Presiding Justice.

Plaintiff sued for divorce on the grounds of cruelty, and prayed for the custody of the minor child of the marriage, for an award for support and maintenance of the minor child, and for alimony for herself, all in accordance with the terms of a prior separation agreement and property settlement. The defendant defaulted and a trial was had upon the complaint. All the material allegations of the complaint were proved and the separation agreement was received in evidence. The trial court entered an interlocutory decree upon the grounds alleged, awarded plaintiff custody of the child, made provision for its maintenance, but did not specifically mention the agreement of the parties, and made no provision for the support of the plaintiff. The latter has appealed from that portion of the decree failing to confirm the property settlement agreement and failing to award her any alimony. The respondent does not contest the appeal.

[1] The agreement in evidence made a division or adjustment of the respective rights of the parties in both community and separate property. It is specially authorized by section 159 of the Civil Code. When such agreements are not procured through fraud, undue influence, or coercion, they are highly favored in the law. Hensley v. Hensley, 179 Cal. 284, 287, 183 P. 445.

[2] Having pleaded and proved the agreement, the appellant waived her claim to an adjustment of the respective rights in the community property, and asked for alimony in the sums agreed upon. If the agreement is to be ignored the community property should be awarded appellant in accordance with the provisions of section 146 of the Civil Code. The record fails to disclose any reason why the agreement should not have been approved.

[3] In all actions of this character the matter of awarding the innocent spouse alimony is left in the first instance to the discretion of the trial court. Sec. 137 of the Civ.Code. But this discretion is not arbitrary. "* * * it must be exercised along legal lines, taking into consideration the circumstances of the parties, their necessities, and the financial ability of the husband. * * * In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason,—all the circumstances before it being considered." 1 Cal.Jur. 965.

[4] Here the evidence is that the husband had an income of $400 a month; there is no evidence that the wife had any income or property of any disclosed value. The property settlement agreement was itself evidence that the sum of $75 a month, which the husband agreed to pay as alimony, was a reasonable and fair sum for that purpose. See 27 Cal.Jur, 232, and Divani v. Donovan, 214 Cal. 447, 455, 6 P.2d 247, for the analogous rule that the contract price is some evidence of reasonable value, though the contract itself be unenforceable. There was also evidence that the defendant was able to pay the amount agreed upon, and that it was necessary for the support of the wife. There was thus a sufficient showing to entitle plaintiff to some award in the nature of alimony, and no showing to the contrary.

[5, 6] The failure to approve or disapprove the settlement agreement leaves the issues of the litigation unsettled and in confusion. There is no rule requiring that the terms of such an agreement be adopted in the decree, but "Unless the court specifically declares the agreement to be illegal and against public policy, the agreement stands and may be treated as an independent contract subject to such construction and judicial disposition as the terms, facts and circumstances warrant. Roberts v. Roberts, 83 Cal.App. 345, 256 P. 826; Gummerson v. Gummerson, supra [14 Cal.App.2d 450, 58 P.2d 394]; Armstrong v. Armstrong, supra [132 Cal.App. 609, 23 P.2d 50]. If the decree modifies or supersedes some provision of the agreement, one party may have concurrent remedies, but a defaulting party may be bound by both the decree and the agreement." Robertson v. Robertson, 34 Cal.App.2d 113, 117, 93 P.2d 175, 178.

[7, 8] Herein lies the detriment to the appellant in the form of the decree appealed from. If the agreement had been approved by the trial court she would have the concurrent remedies of enforcing its terms, either by direct action on the contract, or by summary proceedings in the divorce action. The form of the decree entered does not determine this issue, which was properly presented and tried. By accepting the portion of the agreement relating to the custody and maintenance of the minor

child, and the portion relating to attorney's fees, the judgment leaves the parties in doubt whether it was intended to adopt or reject the agreement. The rule applicable here is well stated in 33 C.J. at page 1102, et seq.: "A judgment must be definitive. By this is meant that the decision itself must purport to decide finally the rights of the parties upon the issue submitted, by specifically denying or granting the remedy sought by the action. The converse of this proposition is also true, and every definitive determination of the rights of the parties in a proceeding before a competent tribunal is a judgment."

The portions of the decree appealed from are reversed, and the cause is remanded for the modification of the decree in accordance herewith.

STURTEVANT and SPENCE, JJ., concurred.

ADOLPH COORS CO. v. CORBETT et al.

Civ. 11713.

District Court of Appeal, First District,
Division 1, California.

March 2, 1942.

Hearing Granted May 1, 1942.
Appeal Dismissed Aug. 17, 1942.

1. Constitutional law 🔑77

The rule of the state board of equalization fixing size of containers for beer at 11, 12, 16, 22, 24, 32 and 64 ounces, where Legislature had fixed merely the maximum size at 64 ounces, was "substantive legislation" which board had no power to enact. Const. art. 20, § 22, as amended in 1934; Gen.Laws 1937, Act 3796, §§ 38, 38e, 53.6.

See Words and Phrases, Permanent Edition, for all other definitions of "Substantive Legislation".

2. Constitutional law 🔑77

A ministerial officer may not under the guise of a rule and regulation, thought to be necessary to carry out and accomplish the purpose of an act, vary or enlarge the terms or conditions of a legislative enactment.

3. Statutes 🔑208

In seeking to discover legislative intent, proximity of language to subject under discussion is not essential.

4. Constitutional law 🔑62
Intoxicating liquors 🔑15

Even if statute fixing maximum size for containers of beer contained express authorization for rules and regulations by state board of equalization with respect to sizes smaller than the maximum size fixed by statute, that would be an improper "delegation of legislative power" to enact substantive legislation. Gen.Laws 1937, Act 3796, § 53.6.

See Words and Phrases, Permanent Edition, for all other definitions of "Delegation of Legislative Power".

5. Intoxicating liquors 🔑7

The statute fixing maximum size for containers of beer at 64 ounces does not authorize state board of equalization to make rules and regulations with respect to sizes smaller than the 64-ounce maximum. Gen. Laws 1937, Act 3796, § 53.6.

6. Intoxicating liquors 🔑7

The statute dealing with wholesale selling price of beer, publication of prices, and the maintenance of such prices and providing, immediately following a penal provision designed to prevent violation of the effective posted prices, that state board of equalization adopt other rules and regulations which will foster and encourage the orderly wholesale marketing and wholesale distributing of beer does not authorize a rule of the board fixing sizes of containers for beer, since the doctrine of "ejusdem generis" applies and the rules authorized are those having to do with stabilization of wholesale prices of beer. Gen. Laws 1937, Act 3796, § 38e.

See Words and Phrases, Permanent Edition, for all other definitions of "Ejusdem Generis".

7. Statutes 🔑194

The doctrine of "ejusdem generis" means that where general and specific words, relating to the same things are associated together, they take color from each other, and the general words are restricted to a sense analogous to that of those less general.

KNIGHT, J., dissenting.

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Adolph Coors Company against John C. Corbett and others for declaratory relief and for an injunction to prevent the enforcement of a rule establishing the size of beer containers. From a judgment of dismissal, plaintiff appeals.

Reversed.

Laurence Berger, of Los Angeles, for appellant.

Corbet & Selby, John Selby, Russel Shearer, and Paul Thomas, all of San Francisco, amici curiæ, on behalf of appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondents.

GOODELL, Justice pro tem.

This suit for an injunction and declaratory relief was brought by the appellant, a Colorado corporation, and Albion Brewing Co., Inc., a California corporation, to prevent the enforcement of a rule establishing the size of containers, adopted by the State Board of Equalization under the Alcoholic Beverage Control Act on June 15, 1938, effective July 16, 1938. The litigation was commenced between those dates, and a preliminary injunction was issued. Notwithstanding a judgment in defendants' favor, the injunction was continued in force which stayed the enforcement of the rule pending the appeal.

The challenged rule fixes the size of containers for beer, other than draught beer, at 11, 12, 16, 22, 24, 32 and 64 ounces, and prohibits its wholesale marketing or distribution in containers of other sizes.

The complaint alleged that the appellant, whose product is manufactured in Colorado, was the only distributor and importer selling beer in California in 8 oz. bottles, and that it had invested approximately $50,000 in bottles and equipment to handle such 8 oz. bottles here; that there was a definite demand among the consumers here for beer in bottles of that size; that appellant's sales thereof had increased from approximately 3,000 cases a month in 1937 to approximately 25,000 in 1938, such sales being in excess of $350,000 per annum, and that a good will "of inestimable value" had been established, which the enforcement of the rule would destroy. Appellant alleged further, and now claims, that the rule is arbitrary, without the jurisdiction of the board, discriminatory, an abuse of discretion on the part of the board, and an unwarranted interference with the right of plaintiffs to freely contract.

It was alleged in the complaint, and is urged on appeal, that article XX, section 22, of the state Constitution reserves to the state the exclusive right *to regulate* the manufacture and sale of intoxicating liquor, and that the board has been granted only the power *to license* the same, and that any regulation not contained in the act is reserved to the legislature or to the people; that the rule is void because it bears no real or substantial relation to, and does not promote or protect, the public health, morals, safety or welfare.

A general demurrer was overruled and the defendants answered. At the trial the defendants objected to the introduction of any evidence upon the ground that the complaint did not state facts sufficient to constitute a cause of action, which objection was sustained and a judgment of dismissal entered, from which this appeal was taken.

The question presented for decision is, whether the board has the power to prohibit, by rule or regulation, the sale of beer in containers other than those of 11, 12, 16, 22, 24, 32 and 64 ounce sizes, *where the legislature itself has gone no further than to fix the maximum size at 64 ounces.*

The present Alcoholic Beverage Control Act was adopted in 1935 (Stats.1935, ch. 330, pp. 1123-1153; Deering's Gen.Laws 1937, Act 3796). In 1937 it was amended in many respects (Stats.1937, ch. 681, p. 1934; ch. 758, pp. 2126-2178) and again in 1939 and 1941; but it is with the act as it read in 1938, when the rule was adopted and the suit brought, that we are concerned.

The 1934 amendment of section 22 of article XX of the Constitution provides that the State of California "shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of intoxicating liquor within the State," and that "The State Board of Equalization shall have the exclusive power to license the manufacture, importation and sale of intoxicating liquors in this State, and to collect license fees or occupation taxes on account thereof and shall have the power, in its discretion, to deny or revoke any specific liquor license if it shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals."

Although the act contains many scattered provisions empowering the board to adopt rules and regulations, section 38 seems to be the general authorization for rules and regulations. It provides that: "The board shall administer all of the provisions of this act and to that end shall prescribe all necessary rules and regulations to carry out such provisions * * *."

It is not, however, under this section that the Board claims the power to make the rule in question; it is under section 38e that such power is claimed, and the notice of hearing so stated.

The rule in question reads in part as follows: "Beer containers for beer other than draught beer shall be of the following sizes: 11, 12, 16, 22, 24, 32 and 64 ounce; containers for draught beer shall be of the following sizes: ⅛, ¼, ½ and full barrels. No other sizes of containers shall be used in the wholesale marketing or wholesale distribution of beer in this State, whether such beer is manufactured in, or imported into, this State * * *."

That part of section 38e upon which the board relies as the basis for this rule, reads as follows: "The board may adopt such other rules and regulations as will foster and encourage the orderly wholesale marketing and wholesale distribution of beer; provided, that no such action shall be taken by the board except after public hearing and ten (10) days notice to all licensed manufacturers of beer in California of the time and place of such hearing and of the character of the action intended to be taken by the board."

Is the rule merely a regulation designed to administer and carry out the provisions of the act, or is it, in reality, a piece of legislation?

At the time the rule was promulgated section 53.6 of the act provided (and still provides) that no beer intended for sale in California (except for export) "shall be contained in bottles, jugs or cans having a capacity of more than 64 ounces." It expressly permitted the possession and sale of "draft or unpasteurized beer * * * in metal or wood kegs of a capacity of three and one-half (3½) gallons or more." For bottled beer, then, the legislature *prescribed no minimum container capacity at all;* for draught beer, however, it saw fit to prescribe a minimum container capacity *but prescribed no maximum.*

The same section prescribed that "wine shall not be packaged or bottled in any flask containers of less than one-half gallon which are of the same or similar type used for the packaging or bottling of distilled spirits."

The fixing of the 64-ounce maximum was, of course, the exercise of a legislative function. That being true, it follows that the fixing, by rule 35a, of the 11-ounce minimum was likewise the exercise of a legislative function. As the amici curiae brief puts it: "This shows quite clearly that Rule 35A adds a restriction to the Act because, giving validity both to the Act and to the rule, the law would be, beer must not be sold in containers larger than 64 ounces, *and shall only be sold in containers of 11, 12, 16, 22, 24, 32 and 64 ounces.*" (The emphasis is counsel's.)

[1, 2] The rule does not speak upon an administrative subject or upon a question of procedure. It is just as positive with respect to minimum and intermediate sizes of containers as is the act itself with respect to the maximum size. Lewis' Second Edition of Sutherland on Statutory Construction, volume I, section 89, has this to say with respect to legislative power: "The constitution vests this power in the legislature; it must there remain by force of the constitution. It is exclusively vested in the legislature. The legislature cannot divest itself of the power, nor impart it to others, except in accordance with this distinction, though there are some recognized exceptions which will presently be considered. Legislative power is delegated contrary to the maxim stated when the legislature attempts to confer on others *a power of substantive legislation,* to be exercised independently or in conjunction with the legislature * * *." (Emphasis ours.) The minimum and intermediate provisions found in the rule are, in our opinion, just as certainly "substantive legislation" as the maximum provision found in the act. In Boone v. Kingsbury, 206 Cal. 148, 161, 273 P. 797, 804, the Supreme Court said, "That a ministerial officer may not, under the guise of a rule and regulation, thought to be necessary to carry out and accomplish the purpose of an act, vary or enlarge the terms or conditions of a legislative enactment, has often been the subject of judicial decision." This was said with respect to a regulation promulgated by the surveyor-general under a rule-making power in which he "attempted to impose burdens upon the applicant not imposed by statute by requiring personal service of notice, and, under certain circumstances, publication of notice of the filing of an application for a permit." This, it will be observed, was a matter of procedure as distinguished from the drawing of a line, or the fixing of a limit, as was attempted by rule 35a. In that case the court on this point (206 Cal. at pages 162, 163, 273 P. at page 804) quoted from United

States v. George, 228 U.S. 14, 21, 33 S.Ct. 412, 57 L.Ed. 712; Williamson v. United States, 207 U.S. 425, 462, 28 S.Ct. 163, 52 L. Ed. 278; United States v. United Verde Copper Co., 196 U.S. 207, 215, 25 S.Ct. 222, 49 L.Ed. 449; and Morrill v. Jones, 106 U. S. 466, 467, 1 S.Ct. 423, 27 L.Ed. 267; and cited Waite v. Macy, 246 U.S. 606, 609, 610, 38 S.Ct. 395, 62 L.Ed. 892.

A case which bears upon this question rather directly is In re McLain, 190 Cal. 376, 212 P. 620, where the legislature in the 1919 Motor Vehicle Act fixed the maximum rate of speed at 35 miles per hour. However, section 22a of the act provided that the Highway Commission could fix the maximum rate of speed at less than the rate established by law over certain parts of a highway. The commission established the maximum rate at 15 miles at the point in question; McLain drove at 28, and was prosecuted under the act for a violation of the commission's rule. On a writ of habeas corpus the court held that this was an unconstitutional delegation of legislative power, saying (190 Cal. at page 379, 212 P. at page 621): "It is settled, of course, beyond controversy, that the power conferred upon the Legislature to make laws cannot be delegated by it to any subordinate body." It must be borne in mind, in comparing the McLain case with the case at bar, that in the 1919 Motor Vehicle Act the legislature by the use of unequivocal language made the delegation, while here, as will be presently developed, it is more than questionable if the act, either in section 38e or elsewhere, pretends to make any such delegation. But if it does, the reasoning of the McLain case applies. See, also, In re Peppers, 189 Cal. 682, 688, 209 P. 896.

[3-5] In the Alcoholic Beverage Control Act there is not to be found in or around the place where ordinarily it would be looked for, any indication by the legislature that the board should have any rule-making power with respect to the size of containers. Nowhere in section 53.6 where the 64-ounce maximum is prescribed, is there a word as to rules or regulations with respect to other sizes, or vesting the Board with any discretion, in this or any other respect. At the same time, throughout the act there are numerous instances where the legislature, in dealing with a specific subject, has then and there empowered the board to make rules in connection with such subject; for example, in section 4 (sale of a stock of liquor after revocation or surrender of license); in section 5 (proportionate license fee for a fractional year); in section 6(r) (sales to non-licensees within government reservations or parks); in section 6.5 (giving away of samples); in section 21 (notice of hearing of protests); in section 22a (annual report of wine manufacturers); in section 23b (claims for exemption of tax); in section 38a (additional and supplemental reports). There are other places where the legislature authorizes the board to prescribe forms; for example, in section 21 (notices of intention to engage in business, and of application for on-sale licenses); in section 24.4 (the keeping of records); in section 24.7 (bonds); in section 26 (statement of quantity of wine and beer sold); in section 67.5 (reports by boats and railroads). Sections 23b and 24.2 expressly leave it to the board to fix the tolerance in accounting for beverages lost. Section 25 prescribes the exact form of bond to be furnished, but leaves it to the board to fix its amount. We are mindful of the fact that in seeking to discover legislative intent proximity of language to the subject under discussion is not essential, but when it is borne in mind that in the large number of instances in this act where the legislature has taken the trouble to immediately tie in the authorization for rules and regulations with individual subjects—many of them comparatively unimportant—the absence of similar language in section 53.6 is conspicuous. Under the rule quoted from Sutherland even if the section contained express authorization for rules and regulations with respect to sizes smaller than the 64-ounce maximum, that would be an improper delegation of the power to enact "substantive legislation." The fact remains, however, that no such authorization is found in section 53.6 at all.

In addition to section 53.6 prescribing a minimum with respect to draught beer, and a minimum with respect to certain wine containers, it is interesting to note that the legislature in 1937 (before rule 35a was promulgated) amended section 34 of the act dealing with distilled spirits licensees. The 1935 act (p. 1141) made it unlawful to sell distilled spirits in packages containing more than one gallon, thus providing, as it does with respect to beer, simply a maximum. In 1937, however, Stats.1937, p. 2155, section 34e, the legislature saw fit to add a minimum provision. It permitted the one-gallon maximum provision to stand and added that after December 31, 1937, it should be unlawful for any rectifier or wholesaler to deliver, or for any on or off-sale distilled spirits licensee to sell or have in his possession, distilled spirits in packages containing less than one-half pint.

To sum up: In 1937 the legislature saw fit to prescribe *a minimum* provision for wine, *maximum and minimum* provisions with respect to distilled spirits, and a *maximum provision only* with respect to bottled beer (it provided a minimum of 3½ gallons for beer in metal or wooden kegs). The board, however, within a year thereafter, by rule 35a, wrote into the law a minimum provision respecting beer containers thereby "legislating" upon a subject with respect to which the law-making body in its wisdom had seen fit to remain silent, and at the same time "legislating" with respect to intermediate sizes of bottled beer containers.

In Adolph Coors Co. v. Liquor Control Commission, 99 Utah, 246, 105 P.2d 181, a divided court held that the liquor board of that state had no power to legislate as to the minimum size of beer containers where the statute, as in the instant case, provided nothing but a maximum. This case is relied upon by appellant. Although we are in accord with the reasoning of the majority opinion, no reliance need be placed thereon for the reason that the statutory and constitutional provisions were dissimilar from those here involved.

[6] For other reasons we are satisfied from the language and structure of the act, and particularly from a consideration of the company in which section 38e is found, that that section was not designed to cover such a subject as is found in rule 35a. In the brief of amici curiae in support of the appellant this point is presented and the ejusdem generis and noscitur a sociis rules are invoked. We think they apply in this case. As already pointed out, the respondents rely upon section 38e of the act. That being so, an examination of that section is in order. Section 38e was added to the act in 1937 (pp. 2159–2161). It is lengthy and is broken up into six paragraphs. By this section each manufacturer, importer and wholesaler of beer is required to file and thereafter maintain on file with the board a written schedule of his sale prices for beer sold in this state; such schedules may be changed from time to time by filing new ones. The first schedule becomes effective immediately; the amendatory ones become effective ten days after being filed. Then there is a proviso with respect to the filing of schedules "to meet lower posted and filed competing prices in a trade area" and provision, in such cases, as to effective dates. Such price schedules, the section says, are subject to public inspection and are in no sense confidential. Upon the filing of these schedules—original or amendatory—"all prices therein stated shall be strictly adhered to by the filing licensee and any departure or variance therefrom * * * shall constitute and be a misdemeanor." There are two provisions vesting the board with power to prescribe the form of the schedules. The section then goes on to provide that "Any director, officer, agent or employee of any licensee who knowingly assists or aids in the violation of this section or any effective posted price or any rule or regulation of the board passed to carry out the provisions of this section shall be guilty of such violation equally with the licensee." Then follows the paragraph authorizing "other rules and regulations" quoted above, which is followed by another paragraph, again dealing with prices and marketing, reading as follows: "No manufacturer, importer or wholesaler mentioned in this section shall be prohibited the right of choice of customers, nor shall any such licensee be prohibited from dividing his customers into functional classes and establish different prices for the same articles for such different functional classes, such different functional classes being based upon the manner in which such classes sell beer, as wholesaler or retailer." The succeeding paragraph sets up the machinery for court action by any trade association to enjoin violations "of this section," with damages as well. The last paragraph provides safeguards for the licensee against the revocation of his license for "a violation of the provisions of this section."

[7] From the foregoing review of section 38e it will be seen that what the legislature dealt with therein was the wholesale selling price of beer; the publication of prices; the maintenance of such prices and strict adherence to them. Immediately following a penal provision designed to prevent the "violation" of effective posted prices is found the language relied upon to support rule 35a, viz., "The board may adopt such other rules and regulations as will foster and encourage the orderly wholesale marketing and wholesale distribution of beer * * *." A reading of section 38e shows that the preceding and succeeding parts of that section do, in fact, deal with "the orderly

wholesale marketing and wholesale distribution of beer." On behalf of the appellant it is argued that when, in the middle of this section, the legislature speaks of "other rules and regulations" the word "other" must be limited to wholesale marketing and distributing practices of the same kind, to wit, relating to prices, price cutting, meeting competitive prices and adequate disclosure of prices. Rules and regulations were mentioned in the earlier part of the section in connection with a specific subject—the filing of price schedules, therefore, it is not at all surprising to find provision for "*other* rules and regulations" later on in the same section. The interpretation for which appellant contends finds support in the fact that that part of the section next following the rules and regulations provision continues to deal with the subject of prices, price discrimination and different prices for customers in different functional classes. In short, that part of section 38e upon which the respondents rely to support a rule dealing with the size of containers finds itself sandwiched in between two provisions dealing with price stabilization, a subject utterly foreign to that of the size of containers. As already noted, the general grant of the rule-making power is found in section 38, yet the respondents do not rely upon that section, and section 53.6 which does deal with the size of containers is utterly silent with respect to rules and regulations. "The doctrine of 'ejusdem generis' simply means that where general and specific words, relating to the same things are associated together, they take color from each other, and the general words are restricted to a sense analogous to that of those less general." 23 Cal.Jur., 755, section 130. We are satisfied that that doctrine applies in this case and that the language found in section 38e was not designed to authorize such a rule as 35a, but must be confined to such rules for "the orderly wholesale marketing and wholesale distribution of beer" as have to do with the stabilization of the wholesale prices of that beverage.

Other points are urged by appellant. One is that in rule 35a certain beverages defined in the act as "beer" were excluded from the operation of the rule, the argument being Tux Ginger Ale Co., Ltd., v. Davis, 12 Cal.App.2d 73, 54 P.2d 1122 that where the act has defined a beverage the board cannot by rule supply a different definition. Another, that rule 35a is an improper exercise of the police power in that it does not tend to promote or protect the public health, safety, morals or welfare. It is not necessary to discuss these and other points, in view of the conclusion at which we have arrived.

In our opinion, the judgment appealed from should be, and it is, reversed.

PETERS, P. J., concurred.

KNIGHT, Justice (dissenting).

I am unable to concur in the conclusion reached in the majority opinion that the matter of fixing the size of containers in which beer shall be marketed and distributed at wholesale in this state constitutes a legislative function that can be accomplished only by the passage of an act of the legislature. In so holding the majority opinion not only reverses the judgment of the trial court, but the effect of the decision, as I construe it, is to strike from the Alcoholic Beverage Control Act that paragraph of section 38e whereby the legislature has expressly authorized the Board of Equalization to adopt such "rules and regulations as will foster and encourage the orderly wholesale marketing and wholesale distribution of beer," and to throw into a state of uncertainty the question of the validity of other rules and regulations adopted by the board pursuant to section 38 of said act, wherein the legislature has declared that "The board shall administer all of the provisions of this act and to that end shall prescribe all necessary rules and regulations to carry out such provisions." It is my conviction that the authority to fix the size of beer containers does not constitute a purely legislative act, but is a matter the legislature, under well-settled principles of constitutional law, may properly delegate in whole or in part to the Board of Equalization, and that by appropriate legislation it has so delegated such authority, with certain limitations by the enactment of that portion of section 38e above quoted.

In considering the question of delegation of power, it should be kept in mind that the state Constitution, unlike the federal Constitution, is not a grant of power, but is a limitation of power; consequently the legislature is not restricted as to its legislative powers nor the mode of their exercise unless restrained by express words of the Constitution or by necessary implication therefrom. Sheehan v. Scott, 145 Cal. 684, 79 P. 350; Mendenhall v. Gray, 167 Cal. 233, 139 P. 67; Mitchell v. Winnek, 117 Cal. 520, 49 P. 579; Beals v. Board of Sup'rs of Amador County, 35 Cal. 624. It is a fundamental principle of constitutional law, therefore, that while the legislature may not delegate to a state board or officer its power to enact laws, it may nevertheless, and in many situations must necessarily, authorize things to be done by others which it may properly do itself. To quote from California Jurisprudence (vol. 5, p. 678): "This rule that the legislature cannot delegate its powers, is, however, only true in its most general sense. It has been said that to establish a principle that whatever the legislature may do, it shall do, or else it shall go undone, would be almost to destroy the government. While the legislature cannot delegate its general legislative authority, still it may authorize many things to be done by others which it might properly do itself. Necessarily regarding many things, especially affecting local or individual interests, the legislature may act either mediately or immediately. The object to be accomplished, or the thing permitted, may be specified, and the rest left to the agency of others, with better opportunities of accomplishing the object, or doing the thing understandingly." And again on page 681 it is said: "It is an equally well-recognized principle that the legislature, notwithstanding it may do things itself, may nevertheless authorize them to be done by ministerial officers or boards when it believes that they can do them more effectively than it can itself." In fact it is expressly noted in the quotation from Sutherland on Statutory Construction, set forth in the majority opinion, that to the general rule prohibiting delegation of power "* * * there are some recognized exceptions. * * *" Where authority is thus delegated, the commission or board upon which it is conferred is, of course, accountable to the courts for any abuse or unjust exercise of the discretion with which it is vested. 5 Cal.Jur. 681.

Here as pointed out in the majority opinion the legislature fixed the maximum size of beer containers, but manifestly it does not follow as a matter of law necessarily or at all from the fact that it has done so, that the function of fixing the size of beer containers constitutes a purely legislative act; and it seems clear that by authorizing the Board of Equalization to adopt such rules as will foster and encourage the orderly wholesale marketing and distribution of beer, the legislature fully intended to delegate to the board the right of standardizing containers in any size within the maximum fixed by the legislature, if in the judgment of the board such action was deemed necessary. The general object of most regulations for the standardization of weights and measures is the prevention of fraud, and to provide a method by which purchasers of commodities may protect themselves from short weights and measures and be able to obtain the quantity of the property purchased. Such was evidently one of the purposes in the adoption of rule 35a here assailed.

In support of the conclusion that there has been an illegal delegation of power, the majority opinion cites and to a large extent relies upon the cases of In re McLain, 190 Cal. 376, 212 P. 620, and In re Peppers, 189 Cal. 682, 209 P. 896. But an examination of the decisions therein clearly demonstrates that neither case is in point for the reason that there the legislature attempted to delegate to a state board the power to declare by rule what acts would constitute a crime; and it is well settled that the legislature may not delegate any such power. That is not the situation here. Violations of rule 35a at most subject the violator to a revocation of his license to market and distribute beer at wholesale.

Nor in my opinion can it be said that there is anything in Boone v. Kingsbury, 206 Cal. 148, 273 P. 797, that is here controlling. The question of delegation of power was not discussed, and apparently was not a determining factor. It was a case where a state officer under the guise of general rule-making authority attempted to enlarge upon a legislative act by promulgating a rule prescribing a certain requirement inconsistent with and repugnant to the law itself. In the Utah case (Adolph Coors Co. v. Liquor Control Commission, 99 Utah 246, 105 P.2d 181), which as will be noted was instituted by the appellant herein, the same question here involved was there presented, but as stated in the majority opinion herein the statutory and constitutional provisions there under consideration were dissimilar to those here involved. However, I do not understand that the majority members of the court there held that because the legislature fixed the maximum, the liquor board did not have the power to fix the minimum size of beer containers. As I read the case, three of the five members of the court expressly dissented from that view.

Furthermore, in the present case, more or less significance is attached to the wording of the constitutional provision itself wherein it declares that "the *State of California* * * * shall have the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of intoxicating liquor within the State * * *." (Italics ours.) But when the provision is considered in the light of its historical background, the real purpose in so wording it becomes apparent. That is to say, prior to the adoption of the Eighteenth Amendment to the federal Constitution, the power to license and regulate the sale of liquor in this state was vested in cities and counties, and not in the state; and following the repeal of the Eighteenth Amendment by Congress but before the repeal was ratified by a sufficient number of states, California, in 1932, in anticipation of such ratification, amended the state Constitution by adding section 22 to article XX whereby the licensing and regulating of the sale of liquor was not returned to cities and counties, but was made a state affair; and the present 1934 amendment merely enlarged upon the provisions of the 1932 enactment. It would seem unreasonable to hold, therefore, that because the new state constitutional provision was so worded it was the intention to prohibit the legislature from delegating any of its powers of regulation to the Board of Equalization.

The judgment of the trial court, in my opinion, should be affirmed.

WEST KEY NUMBER SYSTEM

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50 Cal.App.2d 337

CORPORATION OF AMERICA et al. v. DURHAM MUT. WATER CO., Limited.

Civ. 6687.

District Court of Appeal, Third District, California.

March 5, 1942.

1. States 🔑104

Where state government acts in a proprietary or business capacity, its contracts and dealings are construed by same rules and with like effect as those of private citizens.

2. States 🔑104

Verbal contract executed between State Land Settlement Board superintendent and a landowner regarding water rights must be considered in light of rules of law governing similar contracts between private individuals.

3. Frauds, statute of 🔑144
States 🔑68

Where oral contract between State Land Settlement Board's superintendent and landowner regarding delivery of water to the owner's land was carried out by delivery of water under the board's jurisdiction from 1919 to 1928 and from 1928 to 1938 under supervision of the board's successor in interest, latter would be bound by the superintendent's acts under the doctrine of "ostensible authority" and was "estopped" to raise the statute of frauds as a defense to the validity of the contract in view of the presumption that the superintendent had performed his official duty in making the contract. Code Civ.Proc. § 1963.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop" and "Ostensible Authority".

4. Estoppel 🔑114

In action for declaratory relief regarding water rights, plaintiffs could claim that defendant and its predecessor in interest were estopped from asserting invalidity of oral contract regarding water rights, although estoppel was not specifically pleaded, where the contract regarding water rights was alleged to have been an executed one, since in such case it is not necessary to anticipate a defense thereto by pleading estoppel.

5. Frauds, statute of 🔑144

Although a contract may be within the statute of frauds, yet, if the conduct of the party relying thereon has been such as to raise an equity independent of the contract, he may be estopped to make that defense.

6. States 🔑68

Where one who was superintendent and executive officer of State Land Settlement Board was in charge of office and negotiated contracts for sale of land and was in charge of matters relating to the irrigation system, plaintiffs' predecessor, who made oral contract with such superintendent regarding water rights, was reasonably justified in dealing with such superintendent.

7. Action 🔑6

In action for declaratory relief involving an oral contract alleged to have been entered into by predecessors in interest of the respective parties concerning delivery of irrigation water to lands of plaintiff, court had jurisdiction to render judgment upholding validity of contract where, in addition to usual allegations for declaratory relief, complaint contained allegations for specific performance and court found that oral agreement had been made and fully performed for 19 years, since, the proceeding being equitable in nature, court should not be restricted in determining issues of entire controversy. Code Civ.Proc. § 1060.

8. Waters and water courses ⚷247(1)

In action involving oral contract made between predecessors in interest of the respective parties concerning delivery of irrigation water to lands of plaintiff, judgment in effect that contract, providing for delivery perpetually and without cost to plaintiff's predecessor of two second feet of water, with right of accumulation, was valid and existing, was not erroneous because placing no limitation on plaintiffs' right to accumulate their flow of water since right to accumulate water was of necessity limited to capacity of ditch.

◆

Appeal from Superior Court, Butte County; James O. Moncur, Judge Assigned.

Action for declaratory relief by corporation of America and others against Durham Mutual Water Company, Limited. From the judgment, defendant appeals.

Affirmed.

Grayson Price, of Chico, for appellant.

Jerome D. Peters, of Chico, for respondents.

STEEL, Justice pro tem.

This appeal is from a judgment in favor of plaintiffs in an action for declaratory relief.

The question presented involves an oral contract alleged to have been entered into by the predecessors in interest of the respective parties hereto concerning the delivery of irrigation water to the lands of the plaintiffs. The trial court found the agreement to exist and upheld its validity.

To facilitate an understanding of the situation we consider it necessary to set forth the facts in some detail. The record discloses that plaintiffs' predecessor in interest, one Robert W. Durham, was the owner of certain lands known as the "Durham Ranch," together with appurtenant riparian water rights, situate near the town of Durham in Butte County, west of and adjacent to Butte Creek; that the State Land Settlement Board, predecessor in interest of the defendant herein, which was created by an act of the legislature (Statutes of 1917, page 1566) for the purpose of acquiring land for rural farms, purchased a considerable acreage including riparian rights on Butte Creek, which project became known as "Durham Land Colony," and included an area on both sides of Butte Creek. These lands were sold in small parcels with the appurtenant water rights to individual farmers, the board agreeing to deliver the water to the respective parcels at cost. By a decree rendered in the Superior Court of Sutter County in 1920, the plaintiffs' predecessor, Robert W. Durham, was adjudged to be the owner of two cubic feet per second (80 miner's inches) of the waters of Butte Creek, and the State Land Settlement Board to be the owner of forty second feet or sixteen hundred miner's inches. In 1919 the board desired to deliver water to certain parcels of land west of Butte Creek and south of the Robert W. Durham lands, and in preparation therefor it became necessary to obtain rights of way for a high line ditch to transport such water. The plan of supply was by gravity flow, and a diversion dam was built on Butte Creek some four or five miles upstream, and the water then taken by means of a ditch on the easterly side of Butte Creek down to the Colony lands. At a point approximately a mile northerly on the Robert W. Durham lands a portion of such waters was diverted west across Butte Creek by means of a siphon to supply Durham's land and those above referred to lying south of Durham's land.

The board's superintendent, George C. Kreutzer, contacted the landowners west of Butte Creek in connection with obtaining the necessary rights of way for the new ditch, and in one instance secured a written agreement from one of the owners granting such right of way across their lands directly north of Durham's land. It appears that Durham was not willing to sign such an agreement as the one proposed, and insisted that in consideration of granting the right of way across his land, the board agree to deliver to him perpetually and without cost to him, his two second feet of water, with the right of accumulation, that is, to allow it to accumulate so that if he did not use his allotment one day he would be entitled to twice that amount the second day, and so on to the capacity of the ditch.

It is Durham's testimony that Kreutzer agreed to this, and the ditch was constructed accordingly. In addition Durham paid to the board the sum of $125 toward the construction of the permanent diversion dam on Butte Creek, which circumstance lends support to the suggestion of permanence of the plan or agreement in question. The Durham lands, prior to this agreement, had its own system of ditches which had supplied water to the lands for many years.

Upon completion of the ditch in question the waters were delivered without cost by the board, and later by its successor the defendant herein, from 1919 until 1938, when appellant demanded that the plaintiffs, the present owners of the Durham lands, place their lands and water rights upon the same basis as other land owners served with water, and pay for the delivery thereof in the same manner. Plaintiffs refused to do this, and appellant thereupon declined to deliver further water to them without cost. The instant action followed.

[1, 2] One of the main contentions urged by the appellant on this appeal is that the verbal contract found to have been executed between Kreutzer and Durham, which appellant disputes, is not legally enforceable for the reason that Kreutzer, the superintendent, acted without authorization of the board, and being a public official representing a public body, one dealing with him as such, comes within the rule of being charged with knowledge of, and is bound at one's peril to ascertain the extent of his power or authority to bind the public body for which he purports to act. While this is the rule as applied to functions of the state government acting in a governmental capacity, the rule has been relaxed in cases where public bodies contract with private parties and thus act in a proprietary or business capacity. In such an event its contracts and dealings are construed and measured by the same rules and with like effect as those of private citizens. Brown v. Town of Sebastopol, 153 Cal. 704, 96 P. 363, 19 L.R.A.,N.S., 178; Sacramento County v. Southern Pac. Co., 127 Cal. 217, 59 P. 568, 825; and also Meyer v. State Land Settlement Board, 99 Cal.App. 337, 278 P. 452. It will be seen, therefore, that the contract here must be considered in the light of rules of law governing similar contracts between private individuals.

[3] Appellant contends that the board was unaware of the terms of the oral contract, although the record is silent in that regard. The superintendent, George C. Kreutzer, had died prior to the trial and no member of the board as it had theretofore existed, and which consisted of five members, was called to testify. The arrangement for the delivery of the water to the Durham lands continued from 1919 to 1928 under the board's jurisdiction, and from 1928 to 1938 under the supervision of the appellant, without inquiry or dispute whatsoever upon the part of either as to the conditions or terms upon which the water was being so delivered. It would appear, therefore, that insofar as knowledge of the arrangement is concerned that the legal effect of the doctrines of ostensible authority and estoppel in pais would apply and render the contract valid and enforceable, supported with the presumption "That official duty has been regularly performed." Code Civ.Proc., section 1963; American System, etc., v. Breakers Hotel Co., 217 Cal. 67-71, 17 P.2d 138; West American Finance Co. v. Pacific Indemnity Co., 17 Cal.App.2d 225-236, 61 P.2d 963.

[4] Appellant next questions the validity of the contract under the statute of frauds. Respondents claim that the board and its successor, the defendant here, are estopped from asserting its invalidity under the doctrine just referred to, while appellant urges that this claim is not available to the respondents for the reason that estoppel was not specifically pleaded. This is true in cases where the doctrine is relied upon as a defense, however, in a plaintiff's pleading, such as we have here, where the contract is alleged to have been an executed one, it is not necessary to anticipate a defense thereto by pleading an estoppel. The instant case is factually similar to the case of Corporation of America v. Harris, 5 Cal.App.2d 452, at pages 461, 462, 43 P.2d 307, 311, wherein it is said:

[5] "Factually the case is similar to Feeney v. Clapp, 126 Cal.App. 729, 15 P.2d 178, 180. There a lease was entered into by Margaret Feeney, as lessor, and W. O. Clapp, as lessee. The former believed that the firm of F. H. Woodruff & Sons was

the real party at interest, a member of said firm having advised Mrs. Feeney's agent that it would be convenient to name Clapp as lessee and that the latter would be given written authority to act. The authority was not given and in a suit against the firm to recover installments of rent the plaintiff prevailed. The doctrine of estoppel was invoked to sustain the judgment and, in commenting on the subject, the appellate court says: 'The firm members claim that the contract alleged was within the statute of frauds, * * * and consequently that they were not bound, but it is plaintiff's position that they were estopped to assert the statute. On this question the finding was that defendants Woodruff immediately after the execution of the lease entered into possession, paid the rent, and received the crops and other benefits thereunder; and this finding is also supported. Although a contract may be within the statute of frauds, yet if the conduct of the party relying thereon has been such as to raise an equity outside of and independent of the contract, he may be estopped to make that defense.' See, also, Schlesinger & Sons v. Kohler & Chase, 103 Cal.App. 195, 284 P. 244; Wood Estate Co. v. Chanslor, supra [209 Cal. 241, 286 P. 1001].

"Appellant's claim that estoppel must be pleaded is without merit. It has been held that when the doctrine is relied upon as a defense, it must be pleaded if there is an opportunity to do so (Peerless Motor Co. v. Sterling F. Corp., 139 Cal.App. 621, 34 P.2d 738); but the rule does not apply to a plaintiff's pleadings (McCreery v. Charlton, 185 Cal. 37, 195 P. 670; Llewellyn Iron Works v. Abbott Kinney Co., 172 Cal. 210, 155 P. 986). The court, however, must make a finding on estoppel when its decision is based thereon, which finding is sufficient if it recites facts from which an estoppel necessarily follows. Zenos v. Britten-Cook Land, etc., Co., 75 Cal.App. 299, 242 P. 914."

[6] It appears that Kreutzer, the superintendent and executive officer of the board, was in charge of the office of the board and negotiated contracts for the sale of lands within the colony as well as for the purchase of rights of way for irrigation ditches, and was generally in charge of all matters pertaining to the irrigation system serving the lands of the colony. Under such circumstances Durham, as well as all others having occasion to transact matters of business with the board, were reasonably justified in dealing with Kreutzer, who was held out, tacitly at least by the board as having authority to negotiate and consummate all transactions necessary to put into operation the working plan for which the colony was created.

[7] Appellant further contends that the trial court had no jurisdiction to render judgment in this matter because declaratory relief (Section 1060, Code Civ.Proc.) is not applicable to disputed oral contracts, and that the parties must pursue their remedy at law for a determination of such disputed facts. The case of Transport Oil Co. v. Bush, 114 Cal.App. 152-161, 1 P.2d 1060, is cited in support thereof. While the cited case contains language which suggests support to such contention, the later case of Herrlein v. Tocchini, 1933, 128 Cal.App. 612-617, 18 P.2d 73, 74, appears to have expressly overruled it on this point as dicta. There the court said: "The first point relied on for reversal is that the trial court had no jurisdiction of the action. In support of this contention it is urged that declaratory relief, as provided for in part 2, title 14, chapter 8, of the Code of Civil Procedure, is not applicable to disputed oral contracts and hence was not available to plaintiffs in the present action. The point is without merit. Appellants cite the case of Transport Oil Co. v. Bush, 114 Cal.App. 152, 1 P.2d 1060, as containing the proper construction of our declaratory relief statute. A careful examination of this case reveals that the language relied on by appellants is dicta. Moreover, in the later case of Tolle et al. v. Struve et al. [124 Cal.App. 263], 12 P.2d 61, 62, the same question is elaborately considered and determined adversely to appellants' position here. In that decision the court declares: 'We do not feel called upon to follow appellant into the field of foreign legislation and decision on this point, nor to engage in an analysis of the provisions of our own declaratory relief statute, for the reason that we consider this question to be definitely foreclosed by the decision of our own Supreme Court in Hess v. Country Club Park (213 Cal. 613), 2 P.2d 782. In that case the plaintiff, who held certain real property under a deed containing certain restrictive provisions, sought and secured declaratory relief adjudging that by reason of the change in condition and character of the neighborhood, it was no longer suitable

for residence purposes, and hence the restrictions were no longer binding or enforceable. The sole question involved in that proceeding was dependent upon the determination of a question of fact. * * * Unless the Supreme Court sees fit to recede from the position taken in this case, which seems entirely improbable, it can be no objection to a proceeding for declaratory relief that it involves and depends upon the determination of a question of fact.' "

It is true the complaint here contains the usual allegations for declaratory relief, but it also contains allegations for specific performance, and the court found that an oral agreement had been entered into and had been fully performed for a period of nineteen years. While the court refused to decree specific performance because of the indefinite length of time involved requiring constant personal supervision, the judgment in effect is that the contract is valid and existing, and it would follow that in case of breach thereof a remedy at law for damages would be available to respondent.

The proceeding being equitable in nature the court should not be restricted in determining the issues of the entire controversy and thereby avoid further litigation in that regard.

[8] Appellant further complains that the judgment is erroneous in that it placed no limitation on respondents' right to accumulate their flow of water, and therefore illegally interferes with the water rights of others not parties to the action. We fail to find merit in this contention. The right to accumulate or pool the water must of necessity be limited to the capacity of the ditch. When the oral agreement was entered into the ditch had not been built, and the evidence fails to show its size or capacity. However, by way of illustration let us assume it will carry ten second feet. Respondents own a flowage of two second feet which, if used continuously, would amount to sixty second feet per month of thirty days. By pooling the accumulation they would be entitled to ten second feet for a period of six days in one month, and the remaining twenty-four days appellant would be entitled to the entire flowage, including the water belonging to the respondent. This operation is nothing more or less than rotating the water supply to the end that it will be applied most beneficially, thereby securing the maximum benefits from the increased supply of water. The other owners and users of water in the colony are members of appellant here, and as such are so represented in this action.

From an examination of the entire record we are satisfied that the conclusion reached by the trial court is proper and finds substantial evidentiary support therein. The judgment is affirmed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

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50 Cal.App.2d 855

BABIONE v. SANGUIENETTI et al.

Civ. 3039.

District Court of Appeal, Fourth District, California.
March 11, 1942.

Appeal and error ⚷787

Where clerk's certificate showed that no request for transcript was ever filed, that no proceedings for a bill of exceptions were instituted or pending and that time to institute such proceedings had expired, and a letter from appellant's attorney stated that appellant had abandoned appeal, appeal was dismissed.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by T. E. Babione against H. Sanguienetti and others. From an adverse judgment, plaintiff appeals. On defendants' motion to dismiss appeal.

Motion granted and appeal dismissed.

J. W. Heard, Jr., of Bakersfield, for appellant.

L. M. Linneman, of Dos Palos, for respondents.

PER CURIAM.

The respondents have regularly moved to dismiss this appeal on the ground that neither the transcript or appellant's points and authorities have been filed within the required time or at all. It appears from the clerk's certificate that no request for the transcript was ever filed; that no proceedings for a bill of exceptions were instituted and none are now pending, and that the time to institute such proceedings has expired. A letter to the court from the attorney for the appellant states in effect that the appellant has abandoned the appeal.

The motion is granted and the appeal is dismissed.

50 Cal.App.2d 306

SALADA BEACH PUBLIC UTILITY DIST. v. ANDERSON.

Civ. 6633.

District Court of Appeal, Third District, California.

March 3, 1942.

Rehearing Denied April 2, 1942.

1. Limitation of actions 🔑43

The statute of limitations in a declaratory action does not begin to run against the right to maintain it until an actual controversy has accrued or occurred. Code Civ. Proc. §§ 337, 338, 340, 343, 345.

2. Limitation of actions 🔑43

In action by public utility district for declaratory judgment establishing rights and duties of parties in respect to sale of bonds of district to defendant when he was a director of district, in which action defendant filed cross-complaint for amount of bonds and interest, finding that action was barred by limitations was not warranted. Gen.Laws 1937, Act 6391; Code Civ.Proc. §§ 337, 338, 340, 343, 345.

3. Municipal corporations 🔑231(1)

A sale of bonds issued by public utility district to director of district was a "contract" within statute prohibiting any director or other officer of district from being interested in any contract awarded by board of directors, and sale was therefore void, but validity of bonds was not affected thereby. Gen.Laws 1937, Act 6391, § 47.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract".

4. Action 🔑6

Where sale of bonds of public utility district to director of district was void under statute prohibiting director to have any interest in contract awarded by directors, district was entitled to retain proceeds from the sale and was not "estopped" from maintaining suit for judgment for declaratory relief for purpose of establishing rights and duties of parties in respect of the sale without first restoring or offering to restore benefits received from sale. Gen.Laws 1937, Act 6391, § 47.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

5. Municipal corporations 🔑231(1)

The statute providing that no director of a public utility district shall be interested in any contract awarded by directors, covers all contracts, irrespective of their character, as against contention that it does not apply to district's sale of its bonds to a director because contract is one wherein directors have no discretion as to terms and price. Gen.Laws 1937, Act 6391, §§ 32, 47.

Appeal from Superior Court, San Mateo County; Warren V. Tryon, Judge Assigned.

Action by Salada Beach Public Utility District against M. O. Anderson for declaratory relief respecting the sale of the district's bonds, in which defendant cross-complained for judgment for the amount of bonds and interest due thereon. From an adverse judgment, plaintiff appeals.

Reversed with directions.

R. A. Rapsey, of San Bruno, for appellant.

Durward Herndon, of San Francisco, for respondent.

TUTTLE, Justice.

This action was commenced to secure a judgment under declaratory relief, with the object and purpose of establishing the rights and duties of the parties in respect to the sale of bonds issued by appellant. Respondent filed a cross-complaint asking for judgment against appellant in the amount of the face value of the bonds, and interest due thereon. Findings were made in favor of respondent upon all issues, and judgment was entered against appellant in the amount prayed for in the cross-complaint. The appeal is from the judgment.

Appellant is a public utility district, organized under the provisions of chapter 560, Statutes of 1921, p. 906, Deering's Gen.Laws, 1937, Act 6391. To cover the cost of proposed improvements, it issued and sold to respondent, for par and accrued interest, bonds with a face value of $7,000. Respondent paid for the bonds in cash. At the time of the purchase, the latter was a director of said district. He was present at the directors' meetings which authorized such sale, but did not vote on the authorizing resolutions. The bonds matured at various times, commencing with 1936. At one of such meetings, held February 21, 1931, $5,000 worth of bonds were sold, while on a later date, June 31, 1931, $2,000 worth were sold.

The trial court found that the action was barred by the provisions of sections 337, 338, 340, 343 and 345 of the Code of Civil Procedure. No attempt is made by either party to point out the particular section relied upon. However, respondent does state his position, in support of the finding, as follows: "The statute of limitation begins to run against appellant from the date of the delivery of the bonds for a valuable consideration, since the purpose of the action is to cancel its obligation to pay the value of the bonds (Sechrist v. Rialto Irr. Dist., 129 Cal. 640, 62 P. 261.)"

[1, 2] The action here, however, is not to cancel the bonds, but to secure an adjudication relative to the validity of the sale to respondent. Furthermore, "The statute of limitations in a declaratory action does not begin to run against a right to maintain the same, until an actual controversy has accrued or occurred. * * *" Anderson on Declaratory Judgments, page 281, sec. 108. Respondent does not point out wherein the action is barred under the foregoing rule. It is fair to assume, however, that the controversy arose shortly before, or at the time of the filing of the complaint. In any event, the record does not show that the bar of any of the statutes can be interposed under the rule stated above. The finding has no support, and may be disregarded.

[3] It is next contended that as respondent was a director of appellant when he purchased the bonds, the sale to him was void under the following provisions of the chapter mentioned above: "No director or any other officer of the district shall in any manner be interested, directly or indirectly, in any contract awarded or to be awarded by the board of directors, or in the profits to be derived therefrom; and for any violation of this provision such officer shall be deemed guilty of a misdemeanor, and such conviction shall work a forfeiture of his office, and he shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

Appellant relies chiefly upon the case of Shasta County v. Moody, 90 Cal.App. 519, 265 P. 1032. There, Moody, while a supervisor, did printing and advertising for the county, and presented a claim therefor. The claim was paid, and the action was brought to recover the amount of such payment, upon the ground that the transaction was void, as contravening section 920 of the Political Code, which provides as follows: "Members of the legislature, state, county, city, and township officers, must not be interested in any contract made by them in their official capacity, or by any body or board of which they are members." The opinion holds that the contract was void. The language of the section in question here is very similar, except that it provides a penalty.

A sale is a contract. 55 C.J. 36, sec. 1. In Berka v. Woodward, 125 Cal. 119, 128, 57 P. 777, 780, 45 L.R.A. 420, 73 Am.St. Rep. 31, it is said: "Our statutes are general in prohibiting any officer from being interested in such contracts, and, if ever there was an occasion for its strict enforcement, it certainly exists in a case such as this, where the contractor is a member of the common council, whose duty it is to make such contracts on behalf of the city. He cannot be permitted to place himself in any position where his personal interest will conflict with the faithful performance of his duty as trustee, and it matters not how fair upon the face of it the contract may be the law will not suffer him to occupy a position so equivocal and so fraught with temptation."

In Stockton Plumbing & Supply Co. v. Wheeler, 68 Cal.App. 592, 229 P. 1020, 1024, this court observed: "The principle upon which public officers are denied the right to make contracts in their official capacity with themselves or to be or become interested in contracts thus made is evolved from the self-evident truth, as trite and impregnable as the law of gravitation, that no person can, at one and the same time, faithfully serve two masters representing diverse or inconsistent interests with respect to the service to be performed. The principle has always been one of the essential attributes of every rational system of positive law, even reaching to private contractual transactions, whereby there are created between individuals trust or fiduciary relations. The voice of divinity, speaking from within the sublimest incarnation known to all history, proclaimed and emphasized the maxim nearly two thousand years ago on occasions of infinite sacredness."

It is our opinion that, following the numerous adjudications of the question in this state, the sale comes within the scope of section 47 of the chapter mentioned, and that the transaction was therefore void. This, however, does not in any manner effect the validity of the bonds in question.

It is the contention of respondent that the sale was not such a contract as is contemplated by section 47. It is there provided that no director shall be interested in "any contract." We are unable to accept such a narrow construction. The tendency of the law is to widen, rather than circumscribe such statutes.

[4] It is also contended by respondent that appellant may not retain the benefits received, and that the proceeds from the sale were expended for lawful purposes. The answer to such contention is found in the Moody case [90 Cal.App. 519, 265 P. 1034] where numerous authorities are cited. It is there said: "Appellant strenuously contends that the county is estopped from maintaining this action without first restoring, or offering to restore, to him the benefits received from the job work, printing, advertising, etc. There is no merit in this contention. The contracts being void under the express provisions of the statute, and also being against public policy, there is no ground for any equitable considerations, presumptions or estoppels."

[5] In this connection respondent further contends that the contract was one where the directors had no discretion as to terms and price, and that the rule in the Moody case could not be reasonably applicable to such a situation. Section 32 of the chapter gives the directors the right to fix the rate of interest upon the bonds. This is at least one instance in which they may exercise a measure of discretion. We believe, however, that the section should be construed to cover all contracts irrespective of their character. The legislature has made no exceptions.

The judgment is reversed, with directions to the trial court to make its findings and enter judgment in accordance with the views herein expressed.

THOMPSON, Acting P. J., and HELD, Justice pro tem., concurred.

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50 Cal.App.2d 254

WEADON et al. v. SHAHEN et al.

Civ. 2965.

District Court of Appeal, Fourth District, California.

Feb. 27, 1942.

1. Judgment 🔑222

A judgment from which it could be determined that it was rendered for $1,213.76, principal, $233.93, accrued interest, and $10 costs, was not void because it was carelessly drawn, and contained statement that it was for total sum of $1,213.76 with interest from date of judgment, and the latter statement could be disregarded as "surplusage".

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

2. Abatement and revival 🔑45

An action by superintendent of banks to recover an indebtedness owed to a bank which had been taken over by the superintendent did not abate by reason of termination of the office of the superintendent and could be continued by his successor in the name of the original superintendent, since the office of superintendent is a continuing state office without regard to individual who may fill it, and the superintendent as an individual had no interest in the action. Code Civ.Proc. §§ 385, 674.

3. Judgment 🔑244

Where action was brought by superintendent of banks on an indebtedness owed to a bank which had been taken over by the superintendent, the fact that judgment was rendered and recorded in the name of the superintendent, although at time judgment was rendered the superintendent had been succeeded by another, did not render the abstract of judgment void as against subsequent purchasers of the judgment debtor's land, since the judgment was an incident of the office of the superintendent of banks and not of the individual superintendent. Code Civ.Proc. §§ 385, 674.

4. Judgment 🔑768(1)

The fact that abstract of judgment which was recorded in county recorder's office contained abbreviations which were in common use and easily understandable did not render the abstract void as against subsequent purchasers of judgment debtors' land.

5. Judgment 🔑768(1)

The omission of dollar marks before figures, showing amount of judgment in abstract of the judgment which was recorded in county recorder's office, did not render the abstract void as against subsequent purchasers of judgment debtors' land.

6. Banks and banking 🔑63½

The fact that superior court, on day of hearing of petition to confirm sale of remaining assets of bank which had been taken over by superintendent of banks, permitted amendment of petition by inserting a judgment among the listed assets, and required no new notice to be given, did not render entire proceeding void, and purchaser of assets could enforce lien of another judgment which was originally included among the assets sold, in absence of anything indicating fraud in the sale, especially since order confirming sale had become final long before the attack on the sale was made. St.1909, p. 87.

7. Execution 🔑172(4)

Testimony of special deputy superintendent of banks that he regarded a certain judgment listed among assets of bank which were sold by superintendent of banks to be of no value and so informed the purchaser could not negative purchaser's testimony that he regarded the judgment of value and included his estimate of such value in total price paid by him, and therefore execution sale of land owned by judgment debtors at time judgment was rendered could not be restrained on ground that no "consideration" was paid for the judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

8. Action 🔑63

The doctrine of "laches" is based on knowledge of facts and acquiescence in them to the damage of the other party.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

9. Execution 🔑75

Where judgment in favor of superintendent of banks on an indebtedness of bank which had been taken over by superintendent was entered September 18, 1936, and thereafter investigation was made to discover any assets belonging to judgment debtors, but the superintendent did not learn that debtors owned certain lands, or that it was subsequently sold to parties who improved it, purchaser of remaining assets of the bank could not be restrained from selling the land under execution which was issued October 11, 1940, on ground that superintendent and purchaser were guilty of "laches".

10. Estoppel 🔑52

Generally, in order for doctrine of "estoppel" to apply, the party estopped must be apprised of facts and must intend that his conduct shall be acted on, or so act that party asserting estoppel had right to believe it was so intended, and the party asserting estoppel must be ignorant of the true state of facts, and must rely on the conduct to his injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

11. Estoppel 🔑70(3)

Where purchaser of remaining assets of bank which had been taken over by superintendent of banks did not know that a judgment included among assets constituted a lien on land and did not know that the land was subsequently sold, and that improvements had been placed thereon, the purchaser was not "estopped" from enforcing his judgment by execution sale of the land, since knowledge is an essential element of "equitable estoppel" and without knowledge there could be no such estoppel.

See Words and Phrases, Permanent Edition, for all other definitions of "Equitable Estoppel" and "Estop".

12. Execution 🔑171(1)

Where land which was subject to a judgment lien was sold by judgment debtors and was thereafter improved, a subsequent owner of the judgment could not be re-

strained from selling the land under execution because he refused an offer to accept admitted value of land without the improvements, on ground that he had refused an offer to do equity.

◆

Appeal from Superior Court, San Bernardino County; Frank A. Leonard, Judge.

Action by Claude T. Weadon and others against Elias Shahen and others, to restrain sale of plaintiffs' property under execution issued on judgment rendered in a certain action. From judgment restraining the sale, the defendants appeal, and plaintiffs move to dismiss the appeal.

Motion to dismiss denied, and judgment reversed.

John A. Hadaller, of San Bernardino, for appellants.

Guthrie & Curtis, of San Bernardino, for respondents.

MARKS, Justice.

This is an appeal from a judgment restraining the sale of plaintiffs' property under an execution issued on a judgment rendered in the case of Edward Rainey, Superintendent of Banks of the State of California v. Clarence C. McIntosh and Metta McIntosh. Plaintiffs have moved to dismiss this appeal. Defendant Shay is sued in his official capacity as Sheriff of San Bernardino County. Hereafter we will refer to Elias Shahen as the defendant.

Prior to September 17, 1936, Clarence C. McIntosh and Metta McIntosh were indebted to the San Bernardino County Savings Bank which had been taken over by Edward Rainey, then the Superintendent of Banks of the State of California. In his official capacity Rainey brought suit against Mr. and Mrs. McIntosh and judgment was recovered against them. The judgment was dated September 17, 1936, and was filed and entered the following day. Friend W. Richardson had succeeded to the office of Superintendent of Banks but was not substituted as plaintiff in the action. The important part of that judgment reads as follows: "It is therefore ordered, adjudged and decreed that Plaintiff recover of and from Defendants the sum of Twelve Hundred Thirteen and 76 ——— dollars ($1213.76), together with the sum of $233.93 interest from April 16, 1934, to date hereof; together with attorney's fees in the sum of xxxx, total of $1213.76, with interest thereon at the rate of seven per cent per annum from date hereof until paid, and with plaintiff costs and disbursements amounting to the sum of $10.00."

On September 22, 1936, Friend W. Richardson, as Superintendent of Banks, caused the following abstract of judgment to be recorded in the office of the County Recorder of San Bernardino County:

"In the Superior Court of the State of California. In and for the County of San Bernardino. Edward Rainey, Superintendent of Banks of the State of California, Plaintiff, -vs- Clarence C. McIntosh and Metta McIntosh, Defendants. No. 37045. Date of Entry of Judgment: September 18th, 1936. Judgment Debtors: McIntosh, Clarence C., McIntosh, Metta. Judgment Creditors: Edward Rainey, Supt. of Banks, etc. Amount of Judgment: Judg. 1213.76. Int. 233.93. Costs. 10.00. Where entered in Judgment Book: Vol. 70. Page 287."

Mr. and Mrs. McIntosh owned the two lots in question, situated in the mountains north of San Bernardino. By deed, dated September 6, 1938, and recorded September 10, 1938, they conveyed these lots to Elienor H. Braniger. She paid $250 for them but obtained no certificate of title.

On September 6, 1938, Mrs. Braniger agreed to sell the lots to Claude Weadon and Raymond L. Cannon for $250. When the purchasers had paid the full purchase price Mrs. Braniger conveyed one of the lots to Claude T. Weadon and Madge Weadon, his wife, and the other to Raymond L. Cannon and Opal Lee Cannon, his wife. Both deeds were recorded on March 31, 1939. No search of title to the lots was made and it is admitted that neither Mrs. Braniger nor her grantees had any actual notice or knowledge of the judgment against Mr. and Mrs. McIntosh nor of the recorded abstract of that judgment.

In October, 1938, Mr. and Mrs. Weadon commenced the construction of a mountain cabin on their lot. This cabin was completed about June 1, 1940, at a cost of about $2,300. $300 of this amount was expended after January 8, 1940.

In April, 1939, Mr. and Mrs. Cannon commenced the construction of a mountain cabin on their lot which they completed about October 1, 1940, at a cost of about $2,300, $400 being expended after January 8, 1940.

During the last of December, 1939, E. W. Wilson, who had succeeded to the office of Superintendent of Banks, filed his petition in the Superior Court of San Bernardino County for an order authorizing him to sell the remaining assets of the San Bernardino County Savings Bank to Elvin E. Webb who had bid $12,600 for them. The petition was set for hearing for January 8, 1940, and notice was ordered to be given by the posting of a copy of the court's order for five days.

A list of the assets to be sold was attached to the petition. When the matter came on for hearing it was discovered that one judgment had been omitted. By leave of court there was added to the list, under the heading "Judgments," "Claud A. Adams 3,102.39 (now on appeal re execution after 5 years 4 Civ. No. 2465)." Included among the judgments originally listed was "5920—C. C. McIntosh 1,213.76."

Elias Shehan, defendant here, bid $21,500 for the assets which bid was accepted and the sale confirmed, and the assets, including the Adams judgment were subsequently assigned to him.

A special deputy superintendent of banks, in charge of the liquidation of the San Bernardino County Savings Bank, gave the following testimony about a conversation with Shahen concerning the value of the judgments: "We discussed the value of every asset that we had for sale, including the sale of these judgments, or the value of these judgments, and I told him I did not think the value of the judgments —they had no value, there was no value to them. I didn't know as they had. It seems that they do, but I told him they did not."

On the other hand, Shahen testified that in estimating the value of the assets to be sold for the purpose of determining the amount of his bid, he placed an estimated value of between seventy-five and eighty per cent of their unpaid balances on the secured notes, and between fifty and sixty per cent on the unsecured notes and judgments.

A former deputy superintendent of banks produced a copy of a letter to the depositors in the San Bernardino County Savings Bank in which the assets of the defunct bank were listed and no value was placed on the judgments. There is nothing in the record to suggest that Shahen had any knowledge of this letter.

The trial court found that the abstract of judgment did not comply with the provisions of section 674 of the Code of Civil Procedure and that, therefore, there was no lien created on any property belonging to Mr. and Mrs. McIntosh.

Counsel for plaintiffs seek to support this finding upon two grounds: (1) That the judgment is too uncertain to be intelligible; and (2) that the abstract of judgment was not in due form in that (a) Rainey was not Superintendent of Banks when the judgment was recovered, (b) that unintelligible abbreviations were used in it, and (c) that there are no dollar signs before the figures there appearing.

[1] It must be admitted that the judgment was most carelessly drawn. However, we experience no difficulty in gathering from it that judgment was rendered for $1213.76, principal, $233.93, accrued interest, and $10 costs. See, Snodgrass v. Hand, 220 Cal. 446, 31 P.2d 198. The words and figures "total of $1213.76, with interest thereon at the rate of seven per cent per annum from date hereof until paid," are surplusage and may be disregarded.

[2, 3] The argument that the abstract of judgment is void because Edward Rainey had ceased to be Superintendent of Banks and had been succeeded by Friend W. Richardson at the time the judgment was rendered and the abstract recorded lacks merit. The office of Superintendent of Banks is a continuing state office without regard to the individual who may fill it. The Superintendent of Banks, as an individual divorced from his office, had no interest in the action. The judgment, therefore, was an incident of the office and not of the individual. The action was brought to perform a duty pertaining to the office which was especially enjoined by statute. Such an action does not abate by reason of the termination of the term of office of the incumbent (1 Am.Jur. 49) and we can see no good reason why it may not be continued by the successor in the name of his predecessor in office. Sec. 385, Code Civ.Proc. The abstract of judgment certainly conveyed the information to any one who might inquire that the Superintendent of Banks of the State of California had secured a money judgment against Mr. and Mrs. McIntosh.

There is nothing in Huff v. Sweetser, 8 Cal.App. 689, 97 P. 705, to the contrary.

This case involved the lien of a judgment rendered against Grace B. M. Emerson after she had married and when her true name was Grace B. M. Odell and under which name she had sold the property upon which the lien of the judgment was claimed. The court was of the opinion that no lien was created because a search of the record by the purchaser would not have disclosed any judgment rendered against his grantor, Mrs. Odell, which was her correct name when he purchased the property and when the judgment was obtained against her in the name of Emerson. We have no such situation here. A search of the record would have disclosed the judgment against Mr. and Mrs. McIntosh.

[4] We need not consider the argument made as to each of the abbreviations used in the abstract of judgment. They are all in common use, are easily understandable, and do not render the instrument void. See, 6 Cal.Jur. 289, and cases cited; Hanford Mercantile Store v. Sowlveere, 11 Cal.App. 261, 104 P. 708.

[5] We cannot regard the omission of the dollar marks before the figures in the abstract of judgment important. Those figures follow the words "Amount of Judgment." Such judgments for which liens may be secured are rendered for dollars and cents. See, Dyke v. Bank of Orange, 90 Cal. 397, 27 P. 304.

We therefore must conclude that the recording of the abstract of judgment created a valid lien on the real property in San Bernardino County owned by Mr. and Mrs. McIntosh.

The trial court found that on the day of the hearing of the petition to confirm the sale of assets, the superior court permitted the amendment of the petition by the insertion of the judgment against Claud A. Adams among the listed assets and required no new notice to be given. Plaintiffs argue that as no notice of the hearing of the petition, as amended, was given, the entire proceeding is void and that Shahen acquired no title to any of the property described therein. It cannot be questioned that if the Adams judgment had not been written into the petition on the day of the hearing the notice given was entirely proper. Adams is not contesting the validity of the sale of the judgment against him.

We are cited to no decisions under the Bank Act, St.1909, p. 87, on this problem. However, there might be an analogy between this class of sales and sales under execution.

The case of Mitchell v. Alpha Hardware & Supply Co., 7 Cal.App.2d 52, 45 P.2d 442, 444, involved the legality of a sale under execution where the notice of sale described part of the property sold as being in the wrong county. In upholding the validity of the sale the court said: "We find no allegation in the complaint and no testimony in the record indicating any fraud in the sale conducted by the sheriff, nor do we find anything in the record indicating that the amount of the bid was not adequate, or that the properties were not sold for all that they were reasonably worth. Neither is there anything in the complaint or in the record indicating that any errors made by the sheriff in his notice of sale misled any purchasers, or prevented a fair and honest sale of the properties. The notice indicating the properties to be sold referred to the judgment, and in some part of the notice mentioned Nevada instead of Sierra county. There being nothing in the record and nothing in the complaint indicating that the notice was misleading, prejudicial, or injurious, we think the rule set forth in the case of Frink v. Roe, 70 Cal. 296, 11 P. 820, 822, applicable, to wit: 'A failure to give the proper notice of a sale of real estate under execution does not invalidate the sale'."

[6] As there is nothing before us to indicate fraud or wrong in the sale, other than, perhaps, the error in allowing the amendment to the petition, the rule announced in the Mitchell case should be applied here. Further, the order confirming the sale has long since become final.

The trial court found "that said judgment was appraised at no value by said Superintendent of Banks, and was represented to said defendant, Elias Shahen, to be of no value, and was considered to be of no value by said defendant, Elias Shahen, at the time he purchased the same; that said defendant, Elias Shahen, paid no consideration for said judgment * * *."

[7] We can find no evidence in the record supporting the important part of this finding. Evidence by the special deputy superintendent of banks that he regarded the McIntosh judgment to be of no value and so informed Shahen cannot negative Shahen's testimony that he regarded the judgments of value and included his estimates of those values in the total price bid by him. The assets were sold

as a unit and certainly the price of $21,500 paid for them is a substantial consideration. In view of Shahen's testimony a portion of that sum must be held to have been paid for the McIntosh judgment.

The trial court found that the conduct of Shahen and the Superintendent of Banks constituted laches which prevented Shahen from enforcing his lien. The argument on this question points out the lapse of time between September 18, 1936, the date of filing and entering the McIntosh judgment, and October 11, 1940, when execution on that judgment was issued. Plaintiffs further point to the fact that during this time they spent money in purchasing the lots and erecting their cabins. Particular stress is laid on the admonition of the law to the Superintendent of Banks to promptly collect the assets of a bank which he takes over.

[8] The doctrine of laches is based on knowledge of the facts and an acquiescence in them to the damage of the other party. Verdugo Canon Water Co. v. Verdugo, 152 Cal. 655, 93 P. 1021; Garstang v. Skinner, 165 Cal. 721, 134 P. 329; 10 Cal.Jur. 528, et seq., and cases cited.

[9] The evidence is undisputed that the deputies superintendent of banks, or at least one of them, caused an investigation to be made after September 18, 1936, to discover any assets that might belong to Mr. or Mrs. McIntosh; that some heavily encumbered property was found in Los Angeles County but that none was discovered in San Bernardino County; that he, or they, did not know that Mr. and Mrs. McIntosh owned the lots in question and did not know of the sales to Mrs. Braniger or to the plaintiffs; that they did not know that the plaintiffs had improved the properties. With this undisputed evidence in the record they cannot be held guilty of laches as the important element of knowledge is lacking so that no inference of acquiescence can be drawn.

Shahen testified he first learned in September, 1940, that Mr. and Mrs. McIntosh had formerly owned the lots in question; that prior to that time he knew nothing of those lots nor of the McIntosh ownership of them nor that plaintiffs had any interest in them or had improved them. This evidence is undisputed. There is an entire lack of anything pointing to knowledge or acquiescence upon which laches must be based.

The trial court found that Shahen was estopped to enforce his judgment by execution sale.

[10] The necessary elements of estoppel are set forth in 10 Cal.Jur. 627, as follows: "In general, four things are essential to the application of the doctrine of equitable estoppel: first, the party to be estopped must be apprised of the facts; second, he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; third, the other party must be ignorant of the true state of facts; and fourth, he must rely upon the conduct to his injury."

[11] We have already summarized Shahen's testimony concerning his lack of knowledge of the lots in question, of their ownership, and of the improvements placed upon them by plaintiffs. Knowledge is an essential element of equitable estoppel and without knowledge there can be no such estoppel.

[12] Finally, the trial court found that as plaintiffs had offered to do equity, and as their offer had been refused, defendant should be enjoined from proceeding with his execution sale. The offer referred to is an offer made by plaintiffs in open court to pay defendant $300, which was then the admitted value of the two lots without the improvements. In arguing this question counsel for plaintiffs makes frequent, if veiled, reference to that famous trial of fiction where Portia starred.

No matter how seriously the plaintiffs may expect sympathy because of the predicament in which they find themselves, we must find a lawful reason to support the judgment if it is to be affirmed. This we cannot do. We cannot, as Portia did, find a convenient statutory penalty to defeat the claim against them. The question of the power of a court of equity to permit plaintiffs to remove their improvements before the sale, if a sale may still be made, is not now involved and need not be considered.

The motion to dismiss is denied. The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concurred.

50 Cal.App.2d 413

ARMER v. DORTON et al.

Civ. 2674.

District Court of Appeal, Fourth District, California.

March 11, 1942.

Rehearing Denied April 9, 1942.

1. Damages ⇨159(5)
Pleading ⇨126

Where complaint alleged that plaintiff was deprived of the use of his automobile for 21 days and that the reasonable value of the use was $105, denial contained in the answer, which merely stated that defendants denied each of the allegations, and did not deny that reasonable value of use of automobile was a lesser sum, constituted a "negative pregnant" so far as value of the loss of use was concerned, and was an "admission" that reasonable value of the loss of use was any sum less than $105, and authorized judgment for $104 for loss of the automobile without proof of value of such loss.

See Words and Phrases, Permanent Edition, for all other definitions of "Admission" and "Negative Pregnant".

2. Automobiles ⇨244(35, 37)

Evidence sustained judgment against truck driver and owner of truck, for damage to plaintiff's automobile which was parked along curb and was struck by the truck after it collided with another vehicle, on ground that truck driver was negligent in exceeding speed limit in crossing intersection at which view was obstructed, and that such negligence proximately contributed to the collision which resulted in the striking of the plaintiff's automobile. Vehicle Code, § 511, St.1935, p. 177.

3. Appeal and error ⇨1012(1)

It was the function of the trial court as trier of facts to weigh the evidence.

Appeal from Superior Court, Kern County; Warren Stockton, Judge.

Action by Arvel B. Armer against R. H. Dorton and others for damage to automobile and loss of use thereof, as a result of striking of automobile by a truck which had come in contact with the named defendant's vehicle. From an adverse judgment, defendant T. F. Knafla and another appeal.

Judgment modified and as modified affirmed.

Brittan & Mack, of Bakersfield, for appellants.

Harvey, Johnston & Baker, of Bakersfield, for respondent.

SCHOTTKY, Justice pro tem.

In an action by respondent against defendant Dorton and defendants and appellants Knafla and Mohawk Petroleum Corporation, respondent recovered judgment against all three defendants for damages to his automobile and for the loss of the use thereof. Appellants appeal from such judgment.

Truxton Avenue, in Bakersfield, runs east and west and contains in the center a parkway protected by a cement curb. The parkway is 25 feet 6 inches wide and the pavement on each side is 28 feet 8 inches wide. B Street runs north and south and is 54 feet 10 inches wide. The parkway on Truxton Avenue does not extend to the extended curb line of B Street but stops 14 feet from it on each side. The parkway is grown up with trees and shrubs and the intersection is a so-called "blind" intersection.

According to the evidence, appellant Knafla was operating the truck of appellant Mohawk Petroleum Corporation easterly along Truxton Avenue, and defendant Dorton was operating his automobile in a westerly direction on said avenue. Respondent's automobile was parked at the south curb of Truxton Avenue, close to the corner of B Street and in front of Mercy Hospital. As appellant Knafla was proceeding across the intersection of B Street and Truxton Avenue, the front of defendant Dorton's automobile came in contact with the right rear side of the truck, just ahead of the rear wheels. As a result of the impact the driveshaft and brake line controlling the hydraulic brakes on the truck broke and the rear of the truck swung around to the south in an arc and before it came to rest it struck the parked automobile of respondent, causing damage to it.

The trial court found that the damage to respondent's automobile was caused by the combined and concurring negligence of defendant Dorton and appellant Knafla, and awarded respondent judgment against all three defendants for $312.58 damages and $105 for loss of the use of the automobile.

Appellants contend that there is no evidence supporting the judgment in any sum for the loss of the use of respondent's automobile. It must be conceded that the only evidence in the record on this point, not stricken out by the trial court, was that respondent had to travel 39 miles to and from work each day, that he was deprived of his automobile for six weeks while it was being repaired, that he borrowed another automobile to use, and that he estimated that the reasonable cost per mile of operating his automobile was five cents. Such evidence is, of course, insufficient to show the value of the loss of use of the automobile.

[1] However, as respondent points out, the complaint alleged that respondent was deprived of the use of his car for 21 days and that the reasonable value of such use was $105, and the only denial in appellants' answer is a denial of each of said allegations, without any denial that the reasonable value of the use was a lesser sum. Respondents contend that this constitutes an admission of a loss in any sum less than $105, and that no proof is required. Under the authorities it must be held that a denial in such form is a negative pregnant, so far as the value of the loss of use is concerned, and that appellants' answer must be taken as an admission that the reasonable value of the loss of use was any sum less than $105. In the case of Preston v. Central California, etc., Irr. Dist., 11 Cal.App. 190, 104 P. 462, 465, the court said:

"The answer * * * is as follows: 'Said defendant denies that the defendant became justly or otherwise indebted to B. E. Hooper for a balance on account for labor and services, or labor or services, rendered said defendant by said B. E. Hooper between the 1st day of March, 1907, and the 1st day of September, 1907, or any other time, in the sum of $413.56.'

"It is at once apparent that the foregoing denial involves a negative pregnant, the denial being in the precise sum alleged in that count of the complaint, and therefore an admission of an indebtedness of any lesser amount. Blankman v. Vallejo, 15 Cal. 638; Towdy v. Ellis, 22 Cal. 650; Estee's Pleadings, § 3174."

In Connecticut Mutual Life Insurance Co. v. Most, 39 Cal.App.2d 634 at page 640, 103 P.2d 1013, at page 1017, where the answer of defendant merely denied that the specific amount alleged in plaintiff's complaint to be due was due, the court said: "Under proper rules of pleading the allegations might be construed as an admission that all but a single dollar of the amount claimed due was actually due and payable. The allegation of the answer, containing as it does a negative pregnant, was evasive and wholly insufficient to raise the issue of payment. Blankman et al. v. Vallejo, 15 Cal. 638, 639, 645; Marsters v. Lash, 61 Cal. 622, 624; Westbay v. Gray, 116 Cal. 660, 663, 48 P. 800; Provident Gold Min. Co. v. Haynes, 173 Cal. 44, 48, 159 P. 155; Janeway & Carpender v. Long Beach [Paper & Paint] Co., 190 Cal. 150, 153, 211 P. 6; Motor Investment Co. v. Breslauer, 64 Cal.App. 230, 240, 221 P. 700."

[2, 3] Appellant next contends that there is no evidence that appellant Knafla was negligent. We find no merit to this contention. Section 511 of the Vehicle Code, St.1935, p. 177, provides that the prima facie speed limit is 15 miles per hour when traversing such an intersection, "if during the last one hundred feet of his approach to such intersection the driver does not have a clear and unobstructed view of such intersection and of any traffic upon all of the highways entering such intersection for a distance of 100 feet along all such highways." It is admitted by all parties that this was a so-called "blind" intersection. There was evidence that appellant Knafla was operating the truck at the rate of 30 miles an hour when he entered the intersection and it is admitted that after his brakes were applied the front of his truck moved forward just a few feet but due to the fact that the driveshaft and brake line broke the rear end of the truck swung to the right in an arc until it was farther to the east than the front of the truck, striking and damaging respondent's automobile, from which the court might reasonably infer that the truck must have been traveling at a speed of more than 15 miles per hour. It is perhaps true that defendant Dorton, in making a left turn into the south half of the intersection, was more negligent than appellant Knafla, but the trial court was certainly justified in holding that the excessive speed at which appellant Knafla was traveling proximately contributed to the collision which resulted in the rear of the truck striking respondent's automobile, and that the concurring negligence of defendant Dorton and appellant Knafla combined to make them both liable. It is the function of the trial court to weigh the

evidence and the record abundantly sustains the judgment in this case.

The judgment is modified by reducing it to the sum of $416.58, and as so modified, the judgment is affirmed. Respondent is to recover his costs on appeal.

BARNARD, P. J., and MARKS, J., concur.

50 Cal.App.2d 344

PRENTICE v. BERTKEN et al.

Civ. 2657.

District Court of Appeal, Fourth District, California.

March 5, 1942.

Hearing Denied April 30, 1942.

1. Malicious prosecution 🔑42

A justice of the peace, district attorney, and deputy district attorney were "judicial and quasi-judicial officers" so as to be exempt from civil liability for malicious prosecution, even though there may have been malicious or corrupt conduct in exercise of jurisdiction.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Officer" and "Quasi-Judicial Officer".

2. Malicious prosecution 🔑42

Highway patrol officer who swore to complaint against plaintiff for allegedly operating an overloaded truck could not be considered either a "judicial officer" or a "quasi-judicial officer" so as to be exempt from civil liability for malicious prosecution even though there might have been malicious or corrupt conduct. Vehicle Code, St.1935, p. 93.

3. Malicious prosecution 🔑42

Public policy does not require that doctrine of immunity be extended so far as to exempt from civil liability a peace officer who maliciously and without cause initiates a prosecution against a citizen.

4. Appeal and error 🔑917(1)

In passing upon question whether demurrer was properly sustained, court must accept as true the allegations of the complaint.

5. Malicious prosecution 🔑51

In action for malicious prosecution, it must be alleged that prosecution is at an end either by alleging that defendant was acquitted of the charge or by alleging facts showing legal termination of the prosecution complained of in favor of defendant prior to commencement of the action.

6. Malicious prosecution 🔑51

In malicious prosecution action, allegation that defendant attempted to coerce plaintiff to be arraigned on certain charges but that plaintiff refused to be arraigned, and that thereupon and prior to commencement of malicious prosecution action, all proceedings relating to and taken upon the second complaint legally ceased and terminated favorably to plaintiff, did not allege facts showing that prosecution had terminated in favor of plaintiff, since the refusal to be arraigned does not terminate criminal proceeding and mere allegation that all proceedings had legally ceased and terminated was but a "conclusion".

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

Appeal from Superior Court, Kern County; William L. Bradshaw, Judge.

Action by Burr H. Prentice against G. M. Bertken and others for damages for malicious prosecution. From a judgment of dismissal entered after defendant's general demurrer to plaintiff's amended complaint had been sustained without leave to amend, plaintiff appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Burr H. Prentice in pro. per., for appellant.

Earl Warren, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and Thomas Scott, Dist. Atty., and John B. Young, Deputy Dist. Atty., both of Bakersfield, for respondents.

SCHOTTKY, Justice pro tem.

Appellant appeals from a judgment of dismissal entered after respondents' general demurrer to appellant's amended complaint had been sustained without leave to amend.

Briefly summarized, the amended complaint alleged: that plaintiff was doing business under the fictitious name of "Smileage Company"; that defendant Anderson was the Justice of the Peace of the Fourth Township in Kern County; that defendants Scott and Palmer were, respectively, District Attorney and Deputy District Attorney of Kern County; that defendant Bertken was a California Highway Patrol Officer; that on October 5, 1937, said defendants "entered into a collusion and conspiracy, and in furtherance thereof" filed in said justice's court a complaint against appellant and one T. R. Driskell, alleging falsely that they had violated the Vehicle Code, St.1935, p. 93, by operating an overloaded truck and trailer on the highway; that said case was heard in said justice's court on November 3, 1939; that appellant was found guilty; that an appeal was taken to the superior court and said conviction was reversed and a new trial ordered in the superior court; that on April 26, 1940, said charge was dismissed in the superior court; that on December 22, 1939, said defendants "further conspired and colluded together, and in furtherance thereof did falsely, maliciously and fraudulently and without probable cause therefor," cause to be filed a second criminal complaint wherein appellant, designated as the "Smileage Company," was charged with the same offense as was charged in the first complaint; that defendants "falsely, fraudulently, maliciously and without probable cause" caused a summons to be issued in which defendant Smileage Company was ordered to appear in said justice's court, which summons was served on appellant, and that upon appellant appearing in said court, said defendants "in furtherance of said unlawful conspiracy, falsely, fraudulently, maliciously and without probable cause therefor, unlawfully attempted to coerce appellant to be arraigned" on said charge, but appellant refused to be arraigned and prior to the commencement of this action all proceedings upon said second complaint legally ceased and terminated favorably to appellant; that respondents knew that the justice's court had no jurisdiction to proceed on said second charge; and that respondents did all of these things "with the deliberate design and intent to institute and maintain false and fraudulent charges against plaintiff * * * maliciously and without probable cause. * * *"

It will be noted that respondents are respectively justice of the peace, district attorney, deputy district attorney and highway patrol officer. The principal question discussed in the briefs is whether or not the respondent public officials are liable in a civil action for damages alleged to have been sustained through the prosecution of a criminal action with malice and without probable cause.

The case of Cooke v. Bangs, C.C., 31 F. 640, was a case where a justice of the peace committed a person for contempt, and on such person being liberated on habeas corpus, recommitted him on a fresh warrant for the same offense. It was held that the justice of the peace was not amenable to a civil action for false and malicious imprisonment although his action in making the second commitment was erroneous, and although it was alleged that he acted maliciously. In an opinion written by Justice Brewer, of the Supreme Court, sitting as a circuit justice, the court said, at page 642 of 31 F.: "With respect to all judicial officers,—justices of the peace, as well as judges of the higher courts,—the settled law of the supreme court of the United States, and I think the plain intimation of the supreme court of this state, is that, where they act within their jurisdiction, they are not amenable to any civil action for damages. No matter what their motives may be, they cannot be inquired into."

In Pearson v. Reed, 6 Cal.App.2d 277, at page 287, 44 P.2d 592, at page 597, the court, in reversing three separate judgments against the city prosecutor of Los Angeles, said: "The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case. Not only would the prosecutor himself be subjected to groundless suits, but his deputies likewise would be accused. The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded, and we would have moved away from the desired objective of stricter and fairer law enforcement. We are well aware of the fact that in thus shielding the public prosecutor against actions of this sort the rule may work hardship and injustice in individual cases. But there is no middle ground to be occupied in the matter; either all such suits are to be tolerated or none. We are confronted with the not unusual situation that calls for the subordination of the rights of the few to the interests of the whole body of the public. The doctrine of immunity is not for the benefit of the few who might otherwise be compelled to respond in damages. It is for the benefit of all to whom it applies, that they may be free to act in the exercise of honest judgment, uninfluenced by fear of consequences personal to themselves. This again is not for their personal advantage or benefit. It is only that they may be enabled to render a better public service."

In White v. Brinkman, 23 Cal.App.2d 307, at page 313, 73 P.2d 254, at page 257, the court said: "District attorneys and public prosecutors are vested with certain quasi judicial powers; and in the official exercise of those powers they enjoy civil immunity as fully as judges themselves, even though they act with evil motives or corruptly. Says the court in Smith v. Parman, 101 Kan. 115, 116, 165 P. 663, L.R.A. 1917F, 698: 'The public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up performs much the same function as a grand jury. If, while he has a question of that kind under advisement, he is charged with notice that he may have to defend an action for malicious prosecution in case of a failure to convict, his course may be influenced by that consideration, to the disadvantage of the public. * * * We think the reason for granting immunity to judges and grand jurors applies with practically equal force to a public prosecutor in his relations to actions to punish infractions of the law. There is no great danger that abuse of power will be fostered by this exemption from civil liability, for the prosecutor is at all times under the wholesome restraint imposed by the risk of being called to account criminally for official misconduct * * * or of being ousted from office on that account.' In the same strain the Supreme Court of Wisconsin in Re Bentine, 181 Wis. 579, 587, 196 N.W. 213, 214, 216, quoted from Wight v. Rindskopf, 43 Wis. 344, 354, the following passage: 'A public prosecutor is a quasi judicial officer, retained by the public for the prosecution of persons accused of crime, in the exercise of a sound discretion to distinguish between the guilty and the innocent, between the certainly and the doubtfully guilty.'"

And again at page 317 of 23 Cal.App.2d, at page 259 of 73 P.2d: "The principle is one so well established as to have become elementary; and it affords protection in general to officers and public servants exercising judgment and discretion in the discharge of their duties, howsoever they may be called. Among those in whose behalf the rule has been successfully invoked have been members of a board of health, county supervisors, food inspectors, registrars of voters, election inspectors, and other officers and commissioners charged with duties of various kinds involving judgment and discretion." See, also, Cooper v. O'Connor, 69 App.D.C. 100, 99 F.2d 135, 118 A.L.R. 1440.

[1, 2] It seems clear from the authorities that the respondents Anderson, Scott and Palmer come within the rule exempting judicial and quasi-judicial officers from civil liability even though there may be malicious or corrupt conduct in the exercise of jurisdiction. However, we believe that the respondent Bertken, the highway patrol officer who swore to the complaint, cannot be considered either a judicial or a quasi-judicial officer, and that it would be a dangerous doctrine to extend the rule exempting public officials or officers from civil liability further than it has already been extended.

As was said in the case of Cooper v. O'Connor, supra, at page 141 of 99 F.2d: "In several of the cases in which the rule of immunity has been applied the rationalization used has been that the particular defendant was a judicial officer, or was engaged in a judicial determination, or was so closely associated with the judicial process as to make necessary his protection from harassment in order to protect the judicial process. It must be admitted that this rationalization does not apply with equal force to the appellees, other than Rover and Goldstein. Even police, detectives and investigators—the group into which Simon falls—are generally not trained for participation in judicial determinations; and are sometimes apt to become oppressive in administration of their duties, unless kept under close restraint by prosecutors and judges. In the case of the other appellees, it can be persuasively argued that even though their assistance was necessary for successful prosecution, it was possible for the Attorney General or the United States District Attorney to appoint them special assistants for the purpose, as was done in the case of Yaselli v. Goff, supra [2 Cir., 12 F.2d 396, 56 A.L.R. 1239]; thus avoiding an undue extension of a rule which may come to be a dangerous limitation upon the rights of a free people."

Some confusion has arisen as to just how far immunity should be extended, and it has been held to apply to such public officials as members of a board of health, registrars of voters, election commissioners, building inspectors and other officers and commissioners charged with duties of various kinds involving judgment and discretion. These cases have sought to show that the particular officer or officers involved were performing quasi-judicial functions. No case has been cited, and we have been unable to discover any, in which a police or peace officer was held to be exempt from civil liability in an action for malicious prosecution, where he has acted maliciously and without probable cause.

[3, 4] While it may be considered as settled public policy that judicial and quasi-judicial officers acting within the scope of their jurisdiction are exempted from liability for malicious prosecution, even though they have acted without probable cause and with malice, it seems to us that courts have already extended the rule to a dangerous extent. We do not believe that public policy requires that the doctrine of immunity be extended so far as to exempt from civil liability a peace officer who maliciously and without cause initiates a prosecution against a citizen. The briefest reflection will lead one to conclude that to do so might be dangerous to the rights of a free people and lead to great oppression and injustice. In the instant case we are, of course, only passing upon the question as to whether or not the demurrer was properly sustained and must necessarily accept as true the allegations of the complaint.

[5] In actions for malicious prosecution it must be alleged that the prosecution is at an end either by alleging that defendant was acquitted of the charge or by alleging facts showing the legal termination of the prosecution complained of in favor of defendant prior to the commencement of the action. Holliday v. Holliday, 123 Cal. 26, 55 P. 703; Carpenter v. Nutter, 127 Cal. 61, 59 P. 301; Plum v. Becket, 120 Cal.App. 507, 7 P.2d 1111; Wilson v. Troy, 19 Cal.App.2d 156, 64 P.2d 1141.

[6] We believe that the amended complaint fails to allege facts showing that the prosecution in question terminated in favor of appellant. Paragraph VIII sets forth, in substance, that defendants attempted to coerce plaintiff to be arraigned on said charges but that plaintiff refused to be arraigned; "and that thereupon, and prior to the commencement of this action, all proceedings relating to and taken upon said second complaint legally ceased and terminated favorably to this plaintiff." This allegation falls far short of alleging facts showing that the prosecution in question terminated in favor of appellant. In fact, it does not allege facts showing that said prosecution ever terminated. At most, appellant alleged that he refused to be arraigned on the charge, and "that thereafter all proceedings * * * legally ceased and terminated favorably to the plaintiff." A refusal to be arraigned does not terminate a criminal proceeding and a mere allegation that all proceedings legally ceased and terminated is but a conclusion without any other facts alleged to support it. There is no other allegation on this subject.

In view of the foregoing, we conclude that the amended complaint does not state a cause of action, and that the court below properly sustained the demurrer thereto.

The judgment is affirmed.

BARNARD, P. J., and MARKS, J., concurred.

50 Cal.App.2d 417

PEOPLE v. HERNANDEZ.

Cr. 546.

District Court of Appeal, Fourth District, California.

March 11, 1942.

1. Criminal law 🔑1023(9, 10)

Where after jury found the defendant guilty of failing to provide for a minor child he applied for probation and court suspended the imposition of sentence and granted probation and no judgment or sentence was pronounced the order granting probation was not appealable. Pen.Code, § 270.

2. Criminal law 🔑1130(4)

Where defendant appealing from nonappealable order granting probation obtained on affidavit an extension of time in which to file his opening brief to March 2, 1942, and no brief was filed and no appearance in opposition to motion to dismiss was made at the time set for hearing on March 10, 1942, the motion to dismiss would be granted and the appeal would be dismissed.

◆

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

A Rudy Hernandez was convicted of failing to provide for a minor child and he appeals from an order granting probation. On motion to dismiss the appeal.

Motion granted and appeal dismissed.

J. M. Lopes, of Visalia, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

PER CURIAM.

[1] The defendant was charged with the violation of section 270 of the Penal Code in failing to provide for a minor child. A jury having found him guilty, he applied for probation. The court suspended the imposition of sentence and granted probation. No judgment or sentence was pronounced and it follows that the order granting probation is not appealable. In re Phillips, 17 Cal.2d 55, 109 P.2d 344, 132 A.L.R. 644, and cases there cited.

[2] The appellant obtained, on affidavit, an extension of time in which to file his opening brief to March 2, 1942. No brief was filed and no appearance in opposition to the motion to dismiss was made at the time set for hearing which was on March 10, 1942.

The motion is granted and the appeal is dismissed.

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50 Cal.App.2d 475

STEELDUCT CO. v. HENGER-SELTZER CO. et al.

Civ. 13281.

District Court of Appeal, Second District, Division 2, California.

March 16, 1942.

Rehearing Denied April 8, 1942.

Hearing Denied May 14, 1942.

1. Contracts 🔑155

Where manufacturer's selling agents were responsible for the terms of a letter contract between the parties, all ambiguities in the contract were required to be resolved against agents.

2. Principal and agent 🔑9

Where original contract between manufacturer and its selling agents provided that either party might cancel contract on ten days' written notice to the other, and subsequent letter contract for five years, intended to continue relationship for a definite period of time, was induced by agents' letter stating that they might find themselves "out on a limb" if there was a change in manufacturer's officer personnel, provision for cancellation on ten days' written notice was impliedly eliminated from and was superseded by letter contract.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Suit by the Steelduct Company against the Henger-Seltzer Company and others for injunctive relief, for an accounting, and for damages. From an adverse judgment, plaintiff appeals.

Reversed.

Evans, Pearce & Campbell, of Los Angeles, for appellant.

Derthick, Cusack & Ganahl, of Los Angeles, for respondents.

HANSON, Justice pro tem.

This is a controversy between a manufacturer of steel conduits and tubings and its agents who had exclusive right to sell the products in Southern California and Arizona. The primary question is whether the agents had a right to cancel the contract, which was made for a definite period, and if not, what are the rights and remedies of the manufacturer.

In the court below the manufacturer, conceiving that it was entitled to an injunction, an accounting and damages, instituted its suit in equity. On the hearing the trial court interpreted the contract between the parties as permitting either to cancel it on ten days' written notice, and, as the agents had given such notice, concluded that there was no basis for either an accounting or damages, nor for an injunction because of alleged inequitable acts. From the judgment entered against it the manufacturer has appealed.

The original written contract entered into between the parties on September 1, 1928, provided that either party thereto might cancel the contract on ten days' written notice to the other. In March, 1938, respondents by letter urged that a new contract be made, as their investment in the agency was heavy and they might find themselves "out on a limb" if in due course there was a change in the officer personnel of appellant. A few days later respondents submitted a letter contract addressed to themselves for signature by appellant, stating that it, or something substantially similar, would meet their views. This letter contract was signed by appellant and forwarded to respondents, who endorsed their acceptance thereon. It reads as follows:

"Youngstown, Ohio,
"May 31, 1938.

"J. H. Collier,
"President & Treasurer,
"Henger-Seltzer Company,
"Los Angeles, Calif.

"Gentlemen:

"This is to confirm our agreement appointing the Henger-Seltzer Company as our exclusive agents for Southern California for a period of five years on such lines of our manufacture as they have been regularly handling heretofore.

"It is understood that they will, throughout this period, maintain an organization sufficient to adequately represent us in that market and that they will handle no lines conflicting with our own.

"The basis of remuneration will be the same as is now in effect, or as may be mutually agreed upon from time to time.

"The purpose of this agreement is to continue the mutually satisfactory relationship we have had with each other for some years with an understanding for a definite period of time which we hope may be further extended at the end of this period.

"Yours very truly,
"The Steelduct Company,
"J. C. Collier,
"President."

[1, 2] Respondents on March 10, 1939, having been appointed agents for another competing manufacturer, gave written notice to appellant that they were terminating the agreement. Appellant by wire refused to accept the cancellation and advised respondents it would expect them to maintain their contract. Respondents' position here is that they were entitled to cancel on ten days written notice, as the ten-day provision, in the original contract was not superseded by the letter contract of May 31, 1938. We see no merit in the contention.

It is abundantly clear from the letter of respondents, which induced appellant to execute the letter contract, that respondents desired a definite term contract without a right of cancellation. A contract that was to endure for a term of five years with a right of cancellation on ten days written notice with or without cause, would have left them "out on a limb", exactly as they felt they were by the terms of the contract of September 1, 1928. The letter contract did not in terms adopt or reject the provisions of the earlier contract, but it is plain from the language used that the terms thereof were to govern, except the provision for cancellation, which we think was impliedly eliminated. The respondents were responsible for the terms of the letter contract, and so all ambiguities therein are to be resolved against them. The court's finding that the contract was validly terminated ten days after the notice was given is not sustained by the record.

Respondents' further contention that they had just cause for cancellation is plainly an afterthought. Such cause, if any, was not made the basis for cancellation. Moreover, the evidence does not sustain the contention and there is no finding on it.

Appellant contends that the court committed further error in that (1) it did not direct an accounting and (2) in denying an injunction. It is obvious that the trial court could not award an accounting in view of its finding that the contract had been validly terminated. That the trial court did not purport to adjudicate on that issue is fully borne out by the findings. Moreover, it seems evident from the record that the trial court disposed of the claim for injunction on exactly the same basis. What the trial court might have found in respect to these issues, if it had concluded there was no right to cancellation, we have no means of knowing. Hence we leave the matter open.

Without pronouncing definitely on the matter, it appears to us that on this record appellant has misconceived its remedy. It would seem, as indicated in Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 88 P.2d 698, 89 P.2d 386, that its remedy is at law and not in equity. As that case is a sufficient guide for the parties we see no need to expand upon it.

Judgment reversed.

MOORE, P. J., and McCOMB, J., concurred.

* * *

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50 Cal.App.2d 467

SHAW v. McCASLIN et al.

Civ. 13194.

District Court of Appeal, Second District, Division 2, California.

March 16, 1942.

Hearing Denied May 14, 1942.

1. Evidence 🔑441(11)

Contention that a note was given with the understanding that it created no legal obligation of the makers and that payee would not attempt directly or indirectly to enforce it constituted no legal defense to suit on the note; showing of facts supporting such contention being barred by the parol evidence rule.

2. Evidence 🔑441(11)

In suit on a note, parol evidence that note was given with the understanding that it should create no legal obligation of the makers and that payee would not attempt to enforce it was inadmissible under the "parol evidence rule".

See Words and Phrases, Permanent Edition, for all other definitions of "Parol Evidence Rule".

3. Bills and notes 🔑103(1)
Fraud 🔑12

Representations, allegedly made by payee to induce execution and delivery of a note, that payee wanted note to show to commissioner of corporation to prove that transaction involving advances to makers was a loan rather than illegal sale of interest in oil and gas lease in which makers were the lessees and to use as collateral were not "false representations" as to then existing fact but merely "promissory representations" as to future conduct which were neither actionable nor matters of defense in suit on the note.

See Words and Phrases, Permanent Edition, for all other definitions of "False Representation" and "Promissory Representation".

4. Bills and notes 🔑451(1)

In suit on a note, a defense based on written contract entered into by parties to the note coincident with execution and delivery of the note must be measured by the terms of the contract and by such evidence only as is necessary to solve ambiguities of the contract.

5. Bills and notes 🔑451(1)

A written contract, entered into by the parties to a note coincident to execution and delivery of the note, in so far as such contract purported to be a security for the note in that makers agreed to hold 50 per cent. of the working interest in an oil and gas lease, in which makers were lessees, as security and to account to holder of note for 50 per cent. of net proceeds from sales of hydrocarbon products from leaseholds, gave rise to no defense against suit on the note.

6. Mortgages 🔑36

In suit on a note, the burden of proving that written contract entered into by parties coincident to execution and delivery of note constituted a mortgage of realty so that action could not be maintained on the note except by way of a foreclosure action was upon defendants.

7. Bills and notes 🔑451(1)

Where written contract, entered into by parties to note coincident to execution and delivery of note, purported to make 50 per cent. of the working interest in an oil and gas lease, in which makers were lessees, security for the note, portion of contract indicating that note represented a one-half interest in the working interest in lease and that if a permit to transfer to payee such interest could not be procured from commissioner of corporations, the makers and payee would operate total working interest as limited partners did not constitute a legal defense against suit on the note.

8. Pleading 🔑8(4)

Defendants' allegations with respect to the alleged meaning of a contract, entered into by the parties to note sued on coincident to the execution and delivery of the note, and pleaded in support of their defense of want of consideration for note had no effect in making out such defense, where conclusions of pleader as to meaning of contract were not supported by the language thereof.

9. Appeal and error 🔑757(1)

It is the duty of counsel to submit their case to the District Court of Appeal in their briefs and not to expect the court to read the entire record.

10. Pleading 🔑370

Issues are made by the pleadings, and not by the evidence introduced at trial.

11. Appeal and error 🔑171(3)

Where trial court's findings go beyond what appear to be the issues as made by the pleadings, it may be assumed, in the absence of any claim to the contrary, that counsel and trial court united in trying the case on the theory that such matters were within the issues, and the theory, as thus disclosed, is binding on review.

12. Pleading 🔑427

The admission of evidence outside the issues as made by the pleadings does not enlarge the issues, except where the trial court permits an amendment of the pleadings to conform to proof.

13. Pleading 🔑236(5)

Whether an amendment of pleadings to conform to proof should be granted rests largely in the discretion of the trial court.

14. Appeal and error 🔑236(2)

In order to preserve a right of review on a theory allegedly supported by evidence in the record, but not within the issues as made by the pleadings, request should be made for permission to amend the pleadings to conform to proof.

15. Appeal and error 🔑757(3)

In order to sustain contention that there is no substantial evidence to sustain trial court's findings, appellant must set forth in his brief the evidence bearing on such question, or at least refer the District Court of Appeal to the pages and lines of the transcript where such testimony appears.

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Suit by Frank L. Shaw against W. E. McCaslin and others to recover on a promissory note, with a separate count for money had and received. From a judgment in favor of plaintiff, defendants appeal.

Judgment affirmed.

Milo W. Horn, of Long Beach, for appellants.

Frank L. Simons, of Los Angeles, for respondent.

HANSON, Justice pro tem.

This is a suit upon a promissory note in the principal sum of $15,000, with a separate count for money had and received. Respondent, who was the payee of the note, recovered judgment against appellants, its makers, for the sum of $13,500 and attorney fees of $500, less certain amounts which the court found had been paid by appellants to respondent. As the evidence disclosed that plaintiff had advanced to the defendants the sum of $13,500, and the court found that this sum represented the consideration for the note, the trial court concluded the recovery should be limited to that sum and so gave judgment accordingly.

Essentially the only question presented to us by appellants is whether there was substantial evidence to sustain the judgment. However, as the solution of that question depends largely on the issues, we think it will help clarify the controversy to narrate briefly a part of the factual background.

The defendants were lessees in an oil and gas lease, which while duly executed had not been delivered to them and it was not deliverable until they should bring in an oil well on the property and comply with certain conditions. The defendants proceeded with the drilling of a well, but shortly ran out of ready money to carry on the operation. At that time, March, 1939, plaintiff was induced to advance defendants $5,000, with the understanding that thereby he was to have an undivided interest in lessees' interest in the lease. He was told that an application for a permit to sell interests was on file with the corporation commissioner but no permit had been issued. Later the defendants found they were again short of money and so plaintiff was again induced to invest $5,000. Under like conditions he made further "investments" until his total outlay was $13,500. The well was completed and placed on production on April 25, 1939. It was a small producer. Prior to August 4, 1939, the commissioner of corporations initiated an investigation to ascertain whether the defendants had sold interests in their lease. The record indicates that the defendants told the commissioner that they had not sold any interests but that the money they had received from plaintiff represented a loan by him to them. A controversy ensued between plaintiff and the defendants, and as a result defendants on August 4, 1939, gave plaintiff the note in suit and coincident therewith the parties entered into a written contract. The contention of the appellants as to the effect of these documents is set up in their answer.

The first defense urged in the answer is that the note was without consideration, that it was made and delivered with the understanding and agreement of the parties thereto that it created no legal obligation on the part of the makers and that plaintiff as payee thereof agreed he would not directly or indirectly enforce or attempt to enforce collection of it. The second defense was predicated on the terms of the written contract above referred to. Shortly stated, the contract recites that appellants mortgage to respondent a one-half working interest in the oil and gas lease (mentioned above) to secure payment of a certain note made by them to respondent (the note in suit); that the note evidences a one-half interest in the working interest in the lease; that as long as the note is outstanding appellants will pay over to respondent one-half of the proceeds of any oil or gas sold from the leasehold, subject to the lessor's interest therein, except that they will retain one-third of such half until they have in their hands therefrom the sum of $1,500; that the parties shall make a joint application to the commissioner of corporations for a permit enabling appellants to transfer title to a half interest in the lease to respondent; that if such permit is not granted respondent and appellants shall operate the leasehold as a limited copartnership, so that respondent shall have a one-half working interest and all profits therefrom; that the well already drilled on the leasehold constitutes a joint venture of appellants and respondent. On the issues as thus made the case went to trial.

[1-3] We think it self-evident that the first defense is not a legal defense, and so evidence to sustain it was inadmissible. The private understanding or intent entertained by appellants was immaterial. What they promised was determined by the normal meaning and implications of their written promissory note, not by their intent as to the effect it should or should not have or what respondent would or would not do with it. Appellants attempted to make out that respondent led them to make the note on the ground he wanted it for two purposes: first, to show it to the commissioner of corporations so as to indicate his transaction with appellants involved a loan of money and not a purchase of securities for which a permit was required; second, to use the note as collateral with his bank. Whatever the truth may have been, it is evident that the parol evidence rule barred the appellants from submitting their version of the transaction. Moreover, on their own theory of it, as set forth in the first defense, it is evident that the claimed representations were but promissory representations as to future conduct and not false representations as to then existing facts. Promissory representations are neither actionable nor matters of defense. Yuba Mfg. Co. v. Stone, 39 Cal.App. 440, 179 P. 418; Hartke v. Abbott, 106 Cal. App. 388, 289 P. 206; First Nat. Bank v. Sagerson, 283 Pa. 406, 129 A. 333; Investors' Finance Co. v. Bodnar, 87 Colo. 498, 289 P. 599; Bushnell v. Elkins, 34 Wyo. 495, 245 P. 304, 51 A.L.R. 13.

[4-7] The second defense being based on the written contract is to be measured by its terms, aided by such evidence only as is necessary to solve its ambiguities. In its essence the contract purports to be a

security for the note, in that appellants agree to hold 50% of the "working interest" in an oil and gas lease as security for the note and to account to the holder of the note for 50% of the net proceeds from any sales they may make of hydrocarbon products from the leasehold. By the terms of the contract the security represented by it is denominated a mortgage. It is apparent that this phase or portion of the contract gives rise to no defense against a suit on the note. If the pleader intended to raise the point that the contract was a mortgage of realty and that the action could not be maintained on the note except by way of a foreclosure action, he utterly failed to make any such issue. It was for the defendants and not the plaintiff to carry the burden. State Savings Bank v. Albertson et al., 39 Mont. 414, 102 P. 692; cf. Crescent Lbr. Co. v. Larson, 166 Cal. 168, 135 P. 502. The other phase or portion of the contract contains recitals and agreements indicating that the note sued upon represented a one-half interest in the "working interest"; that the parties, respondent and appellants, would join in an application to the commissioner of corporations for a permit so that appellants could transfer to respondent the one-half working interest they held in their names to secure the note; that if such a permit could not be procured the parties would operate the total working interest as limited partners, the share of respondent to be 50% thereof. On the face of the contract, with one exception shortly to be noted, there is nothing which would indicate that any transmutation of the working interest as a result of a permit or because one could not be procured should vary the fact that the 50% working interest should continue as a security to the note until it was paid. The fact that the contract recited that the note represented 50% of the working interest does not detract from the terms of the contract. That statement could imply either that respondent had sold to appellants a 50% "working interest" or that he had loaned funds in the amount of the note which in turn represented the value of such interest. The one exception above referred to is found in the last paragraph of the contract, reading: "The parties hereto do state and agree that the drilling of a well upon the herein described premises has been, is and will continue to be a joint venture, according to the terms and arrangements agreed upon from time to time by and between the parties hereto under the varying circumstances as they develop. And the rights herein expressed and set forth are to be considered in the conjunctive and/or disjunctive and are cumulative." But the pleadings failed to interpret the paragraph and so created no issue with respect to it. We think it plain, then, that there is nothing in the contract which is inconsistent with the notion that it was a security merely to the note, much less that it was in any manner a defense to a suit on the note.

[8] However, in the second defense appellants not only set up the written contract but averred that the parties thereto, prior to its execution, had entered into an oral agreement by the terms of which respondent had agreed to enter into a mining copartnership or joint adventure with them to drill an oil well on the leasehold, and that he had agreed to supply $13,500 in cash towards the venture and an additional $1,500 out of his share of the profits; that while respondent had supplied cash in an amount of $13,500 towards the venture, it had been supplied strictly for that purpose and so did not represent any consideration for the note; that the written contract embodied and was intended to embody simply the oral agreements theretofore existing, and for that reason there was no valid consideration for the note; that the contract "was a novation of the right of the plaintiff under an implied contract to sue defendants for the return of money [for] * * * securities issued without permit"; that it was an account stated. These embellishments in the defense must be rejected for the simple reason that the conclusion of the pleader as to the meaning of the contract or its effect may not be entertained where it is not supported by the language of the contract.

[9-11] Entirely apart from these defenses, which created no legal issue, counsel for appellants contends that upon the trial below he introduced evidence entirely adequate to sustain defenses other than those set up in the answer, and that the trial court committed error in not sustaining them. Accordingly, he not only invites us to, but insists that we must, read the entire reporter's transcript, not only to ascertain that fact but, what is more, that we will then necessarily come to the conclusion that no credence can be given to respondent's testimony and that there is no substantial testimony to sustain the

case of respondent. In asking us to read the record below from cover to cover, including such matters as might be material along with all that is immaterial, counsel for appellants is altogether too generous with our time. We think his invitation requires us to suggest that it is the duty of counsel to submit their cases to us in their briefs. Initially, it needs to be observed that issues are made by the pleadings, not by the evidence introduced. For the trial court's conclusion reached upon the issues we turn, in a jury waived case, as here, to the findings and conclusions. Where the findings go beyond what appears to us to be the issues as made by the pleadings we are justified, in the absence of any claim to the contrary, in assuming that counsel and the trial court united in trying the case on the theory that such matters were within the issues. In that situation the theory as thus disclosed cannot be rejected when the case comes before us for review.

[12-14] But where, as here, the claim is made that issues not disclosed by the pleadings or the findings were nevertheless tendered upon the trial below, it is evident that various possibilities inhere in the suggestion. One is that the parties and the court united in trying the case on a theory not disclosed by the pleadings. But this, it is apparent, is quite improbable where, as here, the findings do not suggest such a theory. Another possibility is that while one of the parties submitted evidence on a theory not within the issues, it rested alone in his own mind. But it is fundamental that such evidence does not enlarge the issues, except where the trial court permits an amendment of the pleadings to conform to proof. In the instant case there is no showing in the briefs or by the clerk's transcript that there was a request for permission to amend, much less that it was either granted or denied. In any case, it rests largely in the discretion of the trial court as to whether an amendment of pleadings to conform to proof should be granted. In the absence of a request to amend, the record would not disclose that either the trial court or the opposing party was advised of the theories of defense resting in the mind of appellants' counsel, unless the record perchance should disclose the fact by comment either from the court or counsel for the other party. Even if it did, this would not give rise to reversible error. The proper way to preserve a right of review, in such a situation, is to request permission to expand the issues as made by the existing pleadings. Unless this be done counsel will too often find himself with a theory in his own mind but with no right to a review of the action of the trial court for failing to have guessed what he had in his mind.

[15] Where, as here, counsel contends there is no substantial evidence to sustain the findings he should have set forth in his brief the evidence bearing on that question, or at least have referred us to the pages and lines of the transcript where the testimony appears. However, it is evident from what we have said that a reading of the transcript could not change our views as to the disposition that must be made of the case.

As the pleadings set up no legal defense except want of consideration—and it is patent there was consideration—the evidence either way is without materiality where, as here, no legal defense is alleged.

Judgment affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

50 Cal.App.2d 457

Ex parte OCHOA.

Cr. 2217.

District Court of Appeal, First District, Division 1, California.

March 13, 1942.

Contempt 🔑**21**

Where, in discovery proceeding instituted by minor's guardian, trustee of minor's alleged trust fund obeyed citation to appear in probate court and submitted to oral examination concerning the withdrawal of the fund, but claimed title thereto, no legal ground existed for adjudication of contempt, and order directing that the trustee pay over the money and be imprisoned until she did so constituted an invalid exercise of probate court's jurisdiction. Probate Code, §§ 613, 614, 1552.

Habeas corpus proceeding by Violet M. Ochoa.

Writ of habeas corpus granted.

Alexander Mooslin and Joseph A. Brown, both of San Francisco, for petitioner.

Raymond D. Williamson and Edward D. Mabson, both of San Francisco, for respondents.

KNIGHT, Justice.

This is a proceeding in habeas corpus. At the time the writ was issued and served the petitioner, Violet M. Ochoa, was being imprisoned in the county jail by the sheriff of the city and county of San Francisco pursuant to a commitment issued by the superior court in and for said city and county "In the Matter of the Guardianship of the Estate of Violet Consuelo Giersch, a Minor."

The allegations of the petition for the writ have not been controverted, and it appears therefrom that the proceedings which led up to the issuance of the commitment were these: The guardian of the minor filed an affidavit in said court averring that the minor was the beneficiary of a trust fund established in a San Francisco bank, which fund was to be turned over to the minor when she reached her majority; that Violet Ochoa was the trustee of said fund, and that on October 20, 1941, the guardian was informed by said bank that on September 30, 1941, the trust funds had been withdrawn by the trustee. The guardian asked, therefore, that the trustee and the bank be cited to appear before said court "and be examined on oath, regarding said trust account * * *"; and a citation was issued directing the petitioner and the bank to show cause "why the trust account * * * was closed" and "what became of the funds on deposit therein." At the hearing, so the petition alleges, petitioner "averred and alleged and claimed that the money was her own and that she claimed title to said monies and that it was in truth and in fact not the property of the said minor." The minutes of the court recite that as a result of the hearing it was "ordered [that] Violet Ochoa be adjudged guilty of contempt of Court and ordered confined in the County Jail until the money withdrawn from Bank be paid to the Guardian."

Pursuant to such adjudication and order the following commitment was issued: "The citation hitherto issued for Violette Ochoa, also called Violette Crouzziare, citing her to show what became of certain funds on deposit in the above entitled estate coming on regularly for hearing this day and it appearing to the Court that the said Violette Ochoa, alias Violette Crouzziare, had used for her own use the sum of $400.00 belonging to the above named minor, and the said Violette Ochoa, alias, having refused in open court to obey the Order of this court requiring restitution of said funds: It is therefore ordered that Daniel C. Murphy, the sheriff of the City and County of San Francisco, take said Violette Ochoa, alias, and confine her to the County Jail of the City and County of San Francisco until she pays unto the Estate of the above named minor the sum of $400.00, and this is your warrant for commitment."

The discovery proceeding in the guardianship matter resulting in the adjudication of contempt was initiated and heard under the authority of section 1552 of the Probate Code, the material provisions of which are substantially the same as those embodied in section 613 of said code, pertaining to estates of deceased persons; and the concluding clause of section 1552 provides that the probate court may proceed against the person cited for examination in the same manner as in the case of estates of deceased persons. Probate Code, sec. 614. In defining the powers granted by the code sections pertaining to the estates of deceased persons, it is held that while the probate court is vested with full authority thereunder to compel a person to appear and be examined on an order relating to the discovery of the property such person is charged with having embezzled, concealed, smuggled or fraudulently disposed of and may punish as a contempt any disobedience to the orders the court has made in that respect, "the power of the probate court ends with the discovery of the property and the enforcement of the remedial provisions of the statute and does not extend beyond that. Accordingly, where the dispute between the persons cited and the representative of the estate involves the title to the property, the court of probate cannot in such proceedings determine the issue nor convict one of contempt for not obeying an order to deliver up such property, at least where his claim is supported by some evidence, for he is entitled to be heard according to the forms of law in an appropriate tribunal." 11A

Cal.Jur. 463, 464. Stated another way, "This provision of the code does not authorize the court, after the examination, to order such property to be delivered up to the executor or administrator or to be deposited as the court may order, when the title thereto is in dispute, and to imprison the respondent for contempt in failing to surrender disputed property to the court's control." 11A Cal.Jur., p. 467. Among the cases so construing said code sections are Ex parte Casey, 71 Cal. 269, 12 P. 118; Koerber v. Superior Court, 57 Cal.App. 31, 206 P. 496; Estate of Escolle, 134 Cal. App. 473, 25 P.2d 860.

Therefore in the present case, since petitioner obeyed the citation to appear in court and submitted to the oral examination concerning the withdrawal of said trust funds but claimed title thereto, no legal ground existed for the adjudication of contempt, and the order directing that she pay over the money and be imprisoned until she does so constitutes an invalid exercise of the probate court's jurisdiction. Counsel for the guardian so concedes.

It is ordered that the petitioner be discharged from custody and that the cash bail deposited with the clerk of this court be returned to the person by whom it was deposited.

PETERS, P. J., and WARD, J., concurred.

50 Cal.App.2d 478

BEAUDRY v. PETERSON.

Civ. 6665.

District Court of Appeal, Third District, California.

March 16, 1942.

Rehearing Denied April 15, 1942.

See 124 P.2d 637.

Hearing Denied May 14, 1942.

1. Sales 🔑459

Title to personalty, sold under conditional sales contract, is reserved in seller, though contract does not expressly so provide.

2. Sales 🔑479(1)

On default of buyer under conditional sales contract, seller has option to repossess property sold or sue for purchase price.

3. Sales 🔑479(15)

The seller's right to sue buyer for balance due on purchase price of personalty under conditional sales contract after buyer's default was not defeated by destruction of property by fire while in buyer's possession. Civ.Code, § 1742.

4. Sales 🔑467

A buyer, taking possession of personalty sold under conditional sales contract, assumes risk of loss thereof, as by fire. Civ. Code, §§ 1721 et seq., 1742.

5. New trial 🔑79

In action for balance due on purchase price of personalty, sold under conditional sales contract and destroyed by fire while in buyer's possession, where sufficiency of evidence to justify judgment for plaintiff was not mentioned in trial court's order granting defendant's motion for new trial, but memorandum of decision in document containing order stated that loss of thing sold follows title thereto and that title to personalty remained in plaintiff, such order was erroneous as not intended to permit re-examination of facts, but to apply different and erroneous view of law to court's findings, which supported judgment. Civ.Code, § 1742; Code Civ.Proc. § 657.

6. Sales 🔑467

In action for balance due on purchase price of mining machinery and equipment sold under conditional sales contract, where defendant never requested extension of time for required payments on ground that operation of mill, in which property was located when destroyed by fire, was prohibited by causes beyond his control and not due to his fault or negligence, as authorized by supplementary contract, but denied all liability under sales contract and was in default before fire, its occurrence was no excuse for his failure to make payments.

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by W. A. Beaudry against M. R. Peterson for the balance due on the purchase price of personal property sold to defendant by plaintiff. Judgment for plaintiff, and, from an order granting defendant a new trial, plaintiff appeals.

Reversed.

Ronald D. Wolfe, of San Francisco, for appellant.

Charles L. Gilmore, of Sacramento, for respondent.

DEIRUP, Justice pro tem.

Plaintiff sued upon a common count to recover the sum of $4,000 and interest. The trial court found in his favor and judgment was entered as prayed. Thereafter the court made an order granting a new trial, from which this appeal has been taken.

The findings of fact disclose that the plaintiff and the defendant M. R. Peterson (doing business under the name of Giant King Mining Company), who is the sole defendant in the action, entered into an agreement on October 11, 1939, for the sale and purchase of personal property. The agreement, omitting the description of the property, reads as follows:

"This Agreement, made October 11, 1939, between W. A. Beaudry, Seller, and Giant King Mining Company, Buyer, Witnesseth:

"That Seller agrees to sell and Buyer agrees to buy that certain mining machinery, equipment, etc., situate at the Three Star Mine, near Ophir, in Placer County, California, to-wit: * * * for the full purchase price of Six Thousand Five Hundred Dollars ($6,500.00), payable as follows:

"Two Thousand Dollars ($2,000.00) down, receipt of which is hereby acknowledged by Seller, and the balance of Four Thousand Five Hundred Dollars ($4,500.00) at the rate of Two Hundred Dollars ($200.00) or more per month on the 1st day of each month, commencing January 1, 1940, and until the full purchase price be paid, with interest at the rate of four per cent (4%) per annum, payable monthly in addition to the above mentioned monthly payments.

"Buyer may have immediate possession thereof, and shall keep the same in good order, condition and repair, usual wear and tear excepted.

"The failure or default of Buyer in any particular hereunder shall, at the option of Seller, cause all Buyer's rights in and to said property, and the whole thereof, to cease and terminate, and in such event Seller may retake said property, and the whole thereof, without necessity of force or legal action therefor, and all amounts paid him hereunder shall be retained by him as rental and as liquidated damages. The waiver of any failure or default of Buyer shall not be considered or construed as a waiver of any further or future failure or default.

"Time is of the essence of this agreement and contract, which is executed in duplicate and which binds the parties, and their and each of their heirs, successors, administrators, and assigns."

On the same day, and presumably at the time of the execution of the contract, the parties agreed as follows:

"The undersigned agrees that extension of time for payments will be made if necessary on account of the following reasons:

"If operations must stop or be delayed as a result of war in which the United States is a party, prohibition of operations by Federal Agencies or law, strikes, serious accidents prohibiting the operation of said property or mill, inability to obtain necessary operating materials in the open market, weather conditions, acts of God or other causes beyond control and due to no fault or negligence on your part.

"15% discount will be allowed if Mill is paid within one year."

Defendant took possession of the machinery after making the initial payment called for by the contract and installed it in a quartz mill. Thereafter he made further payments amounting to $500, leaving a balance of $4,000 unpaid on the principal. On May 16, 1940, virtually all of the machinery was destroyed by fire without fault on the part of either buyer or seller. The trial court found in favor of the plaintiff on all the issues raised by the pleadings. In reference to the supplementary agreement it found that the defendant "never requested an extension of time for payments due or to be due under said contract, but at all times since May 16, 1940, has denied any liability to pay said sum of $4,000.00 and interest or any part thereof."

[1-4] It is clear to us that the judgment is fully supported by the findings. The agreement was a conditional sales contract and the title was reserved in the plaintiff even though the contract does not so provide expressly. Katz v. People's Finance, etc., Co., 101 Cal.App. 552, 281 P. 1097; Bailly v. Loock, 103 Cal.App. 220, 284 P. 235. In the event of default the seller had the option to repossess the property or to sue for the purchase price.

Johnson v. Kaeser, 196 Cal. 686, 239 P. 324; Smith v. Miller, 5 Cal.App.2d 564, 43 P.2d 347. His right to bring such an action was not defeated by the destruction of the property, for it is now the law in this state, as it has been for years in the great majority of other jurisdictions (24 R.C.L. 494; 2a Uniform Laws Annotated, 196), that one who contracts to buy personal property by an agreement of this nature and takes possession of it assumes the risk of loss. This is provided unequivocally in section 1742 of the Civil Code, which reads as follows:

"Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that:

"(a) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.

"(b) Where delivery has been delayed through the fault of either the buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault."

Up to the time of the adoption of the Uniform Sales Act by the California Legislature in 1931 (Stats.1931, p. 2234, Civ. Code, sec. 1721 et seq.), it was the law of this state that the risk of loss followed the title to goods even though possession had been transferred under a conditional sales contract. Kirtley v. Perham, 176 Cal. 333, 168 P. 351; Potts Drug Co. v. Benedict, 156 Cal. 322, 334, 104 P. 432, 25 L.R.A., N.S., 609; Ross v. McDougal, 12 Cal.App. 2d 172, 55 P.2d 574; Cocores v. Assimopoulos, 4 Cal.2d 82, 47 P.2d 699. Holding that this was the established rule in California, the court said in Kirtley v. Perham, supra [176 Cal. 333, 168 P. 353]: "It is a well-settled proposition that an agreement of sale may transfer the right of possession to the vendee without transferring to him the title. Such was the effect of this agreement. The case, therefore, comes within the rule stated in Potts [Drug Co.] v. Benedict, supra [156 Cal. 322, 334, 104 P. 432, 25 L.R.A.,N.S., 609], that upon an executory agreement of sale, where title is retained in the vendor, although possession is given to the buyer, the loss entailed by the destruction or extinction of the subject-matter, without fault by either party, falls upon the vendor, and that he cannot recover any balance of the purchase price remaining unpaid, and is liable to the buyer for the repayment of the portions of the price previously paid."

It is obvious that the enactment of section 1742 of the Civil Code made this rule entirely obsolete and transferred the liability for loss from the seller to the purchaser under a conditional sales contract. In Kelly v. Smith, 218 Cal. 543, 24 P.2d 471, 474, it is said that the case of Kirtley v. Perham, supra, "is no longer of any authority, for the reason that the rule was changed by legislative enactment in 1931. * * * It will be observed that this legislative enactment is in keeping with the extensive use of the so-called conditional sales contract and the great expansion of credit which has accompanied it. The same reasons which prompt the application of the majority rule respecting risk of loss in California to personal property ought to be given consideration when considering the loss of improvements to real property. Besides bearing in mind the great development of trade through the medium of such contracts with reservations of title as security, we ought to consider upon whose shoulders devolves the responsibility of so caring for the property that fire will not occur, and how improper care will contribute to the hazard thereof."

The risk of loss should be borne by the purchaser because he is the one who has the use of the property and is in a better position to protect it. The record discloses that the defendant purchaser caused the quartz mill, including property described in the contract, to be insured and that he filed a proof of loss after the fire in which he made a claim for damages to at least a portion of the property. The record does not show how much, if anything, he collected from the insurer as compensation. This is immaterial in our view of the case, but these facts indicate that he recognized the legal obligation imposed by the contract to protect himself against loss.

[5] The order of the trial court was that: "The motion for a new trial is granted." Insufficiency of the evidence to

justify the judgment is not mentioned. But the signed document in which the order appears contains a memorandum of decision in which the judge of the trial court states that: "It is fundamental that where the thing sold is destroyed, the loss follows the title" and that the title to the personal property under consideration remained in the plaintiff, as was held in Sere v. McGovern, 65 Cal. 244, 3 P. 859. This statement of law is not equivalent to the declaration required by section 657 of the Code of Civil Procedure that, in the opinion of the court, the evidence was insufficient to justify the judgment and that the new trial was granted on that ground. On the contrary, it is obvious that the attention of the court was not directed to the provisions of section 1742 of the Civil Code, as enacted in 1931, and that its sole reason for granting a new trial was that, in its opinion, the findings did not support the judgment. There are authorities to the effect that where the nature of the order itself necessarily implies that the trial court deems it necessary to re-examine the facts, a statement in the order that the evidence is insufficient is not essential. Lucerne Country Club v. Beal, 21 Cal.App.2d 121, 68 P.2d 408; Secreto v. Carlander, 35 Cal.App.2d 361, 95 P.2d 476. But such an inference cannot be drawn in this case. The evidence was, in the opinion of the judge of the trial court, sufficient to justify the findings of fact and the findings did, as a matter of law, support the judgment. The purpose of the order was not to permit a re-examination of the facts in the case, but to apply a different view of the law to the findings. Since the court decided the case correctly in the first instance, a new trial should not be required.

[6] It was provided in the supplementary contract that the plaintiff would extend the time of payments under the contract if operations were delayed for certain reasons, including "causes beyond control and due to no fault or negligence" on the part of the defendant. Counsel for respondent contends that the fire in the mill must have prohibited the operation of the mill and was therefore an excuse for the failure to make payments under the contract. His position is not tenable. As found by the trial court, the defendant at no time requested an extension of time for this reason, but denied all liability under the contract. And the record shows that the defendant was in default before the time of the fire.

The order appealed from is reversed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

50 Cal.App.2d 407

Ex parte KORNER.

Cr. 1792.

District Court of Appeal, Third District, California.

March 11, 1942.

1. Constitutional law 🔑190
Criminal law 🔑1206(1)

The statute, giving the Board of Prison Terms and Paroles power to determine and redetermine the length of time of imprisonment within minimum and maximum terms prescribed by law without granting a hearing to the prisoner, was not "retroactive", and hence did not affect validity of an order of the board, made prior to the effective date thereof, revoking a prior order fixing term of imprisonment and fixing a longer term. Pen. Code, § 3020.

See Words and Phrases, Permanent Edition, for all other definitions of "Retroactive".

2. Criminal law 🔑1208(9)

The effect of judgment, sentencing one convicted for first degree robbery to imprisonment for not less than five years, was to sentence the accused to imprisonment for the maximum term prescribed by the statute, which was life, the accused being thereupon turned over to administrative board which was empowered under statute to determine how long he should be kept in prison. Pen.Code §§ 213, 671, 1168(1).

3. Criminal law 🔑1208(9)

The power of Board of Prison Terms and Paroles to redetermine the length of time of imprisonment under the 1935 amendment to the indeterminate sentence law was not limited insofar as any increase in the term was concerned by a provision added in 1931, to the effect that term could be lengthened after a hearing in the event of an infraction of the rules or an escape, but board was empowered to redetermine a sentence by the same process as had governed its action in first fixing term of imprisonment, taking into account such further facts as had come to its attention. Pen.Code § 1168(1).

4. Habeas corpus ⚿23

Where Board of Prison Terms and Paroles, by an order, entered on June 3, 1941, without granting a hearing to prisoner, rescinded prior action of the board, refixing alien prisoner's term of imprisonment at eight years with condition that he then be deported or released to employment, and put into effect its original order fixing the term at 50 years, Board did not act illegally under the indeterminate sentence law as it then existed so as to entitle prisoner to release from custody on writ of habeas corpus after expiration of the eight-year term, where prisoner by refusal to sign application for a transit visa had made his deportation impossible. Pen.Code § 1168(1).

Proceeding in habeas corpus by George Korner to secure release from custody.

Writ discharged.

George Korner, in pro. per., and Mervin H. Reith, of Sacramento, for petitioner.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

DEIRUP, Justice pro tem.

A writ of habeas corpus was issued by this court after a similar writ had been discharged by the Superior Court in and for Sacramento County. It appears from the record that the petitioner, George Korner, was convicted of first degree robbery in Santa Clara County and was sentenced to serve a term of not less than five years, Pen.Code, § 213; that he was received in the State Prison at San Quentin on May 11, 1936, and transferred to the State Prison at Folsom on February 25, 1937, and has been confined at that place ever since. The Board of Prison Terms and Paroles fixed his sentence at 50 years on November 30, 1938, and at the same time granted him a parole to become effective when he had served four years with the condition that he be released to the United States Immigration authorities for deportation to Germany. He did not take advantage of the parole. On October 3, 1940, the board issued an order in which it determined that the original sentence was excessive and refixed his term at eight years, with the last year on parole with the condition that he be deported or, in the event of a dismissal of the detainer by the immigration authorities, that he be released to employment in the State of California satisfactory to the State Parole Officer. On June 3, 1941, the board rescinded the action which it had taken on October 3, 1940, and put into effect the original order of November 30, 1938, in which the term was fixed at 50 years. This was done after information had been received from the immigration authorities to the effect that the petitioner had refused to sign an application for a Soviet *transit visa* to Germany, thereby making it impossible to deport him. If the order of October 3, 1940, had not been rescinded the petitioner would have been entitled to a release from prison on June 11, 1941, for at that time his term of eight years, reduced by normal credits and also by additional credits which had been allowed him for extra meritorious services, would have expired. It is the contention of the petitioner that the order by which the board reduced the term from 50 to eight years was valid but that the subsequent order in which it restored the original term was beyond its jurisdiction.

The following are the statutory provisions in the Penal Code, § 1168, which were in force at the time when the sentence was fixed at 50 years:

"(1) Imprisonment. Every person convicted of a public offense, for which imprisonment in any reformatory or State prison is now prescribed by law shall, unless such convicted person be placed on probation, a new trial granted, or the imposing of sentence suspended, be sentenced to be imprisoned in a State prison, but the court in imposing the sentence shall not fix the term or duration of the period of imprisonment.

"It is hereby made the duty of the warden of any of the State prisons to receive such person, who shall be imprisoned until duly released as provided for in this section. The term of imprisonment shall not exceed the maximum or be less than the minimum term of imprisonment provided by law for the public offense of which such person was convicted.

"The Board of Prison Terms and Paroles, or any board or commission that may be hereafter given authority so to do, may determine *and redetermine* after the expiration of the minimum term of imprisonment provided by law, except that in cases in which the minimum term of imprisonment is more than six months, the Board of Prison Terms and Paroles may determine after the expiration of six months from and after the actual commencement of such imprisonment, what length of time, if any, such person shall be imprisoned, unless the sentence be sooner terminated by commutation or pardon by the Governor of the State.

"When a prisoner has imposed upon him two or more cumulative or consecutive sentences, the Board of Prison Terms and Paroles may determine after the expiration of six months of his first sentence, what length of time he shall serve on all such cumulative or consecutive sentences.

"In case any convicted person undergoing sentence in any of the State prisons commits any infraction of the rules and regulations of the prison board, or escapes while working outside such prison under the surveillance of prison guards, or violates his parole, the Board of Prison Terms and Paroles may revoke any order theretofore made determining the length of time such convicted person shall be imprisoned, and make a new order determining such length of time not exceeding the maximum penalty provided by law for the offense for which he was convicted, unless the sentence be sooner terminated by commutation or pardon by the Governor of the State. *Such revocation and redetermination shall not be had except upon a hearing upon the question of such infraction or escape or violation and an adjudication by the board that such prisoner was guilty thereof, which adjudication shall be final. At such hearing such prisoner, unless outside the walls of the prison as an escape and fugitive from justice, shall be present and entitled to be heard and may present evidence and witnesses in his behalf.*"

In quoting these provisions we have placed emphasis upon the portions of the section which are most pertinent to the legal question involved in this proceeding.

Section 1168 of the Penal Code, also known as the indeterminate sentence law, enacted in 1917, Stats.1917, p. 665, contained no express provision in reference to the change of a sentence once fixed until 1929. In that year by amendment it was provided that:

"The term of imprisonment so fixed by the state board of prison directors, shall not thereafter be increased or diminished by said board for any reason whatsoever except as in this section provided." Stats. 1929, p. 1930.

[1] This new provision was eliminated in 1931 and the one which enabled the board to increase the term, after a hearing, in the event of an infraction of the rules or an escape was inserted. Stats.1931, p. 1053. In 1935 the power to redetermine the length of time of imprisonment was given to the board. Stats.1935, p. 1700. Aside from the substitution in 1937 of the Board of Prison Terms and Paroles for the State Board of Prison Directors, no further changes in the law relative to the fixing of terms were made until the act was revised in 1941, Stats.1941, p. 1080, and the provision for a change in the term in the event of an infraction of the rules or an escape was eliminated. The board now has power to determine and redetermine the length of time of imprisonment, within the minimum and maximum terms prescribed by law, in any case, without granting a hearing to the prisoner. Pen.Code, § 3020. This amendment, however, took effect after petitioner's term was lengthened and, of course, was not retroactive.

[2] It is to be borne in mind that what was done by the Board of Prison Terms and Paroles was not judicial in its nature. The judicial proceedings were terminated by the pronouncement of judgment by the trial court. That court, in legal effect, sentenced the petitioner to imprisonment for the maximum term prescribed by the statute, which is life. Pen.Code, §§ 213, 671; People v. Gonzales, 36 Cal.App. 782, 173 P. 407. Thereupon he was turned over to an administrative board which was empowered to determine how long he should be kept in prison. In re Daniels, 106 Cal. App. 43, 288 P. 1109; In re Lee, 177 Cal. 690, 171 P. 958; People v. McNabb, 3 Cal.2d 441, 45 P.2d 334; People v. Hayes, 9 Cal.App.2d 157, 49 P.2d 288. The powers of the board are defined by statute, and, as we have shown, the legislature has, from time to time, either placed limits upon the exercise of its discretion or given it more freedom of action. Thus it removed all doubt about the right of the board to redetermine a sentence by providing that it could not do so; then enabled it to do so in the event of a violation of rules or an escape; then gave it express power to redetermine as well as determine the term of imprisonment.

[3] Petitioner contends that the power to redetermine a sentence as given by the amendment of 1935 is limited, in so far as any increase in the term is concerned, by the provision added in 1931 to the effect that the term could be lengthened, after a hearing, in the event of an infraction of the rules or an escape; that otherwise it would be within the power of the board to penalize a prisoner who had broken the rules without permitting him to defend himself. It is clear to us, however, that the Legislature intended only to empower the board to redetermine a sentence by the same process as had governed its action in the first place, taking into account such further facts as had come to its attention which would satisfy it that the first order it had made was improper. There is much to be said in favor of allowing the board to correct its errors. Obviously, where there was a charge that the prisoner had violated rules, the board would grant a hearing if required by statute to do so.

[4] Petitioner calls attention to the discussion in the opinion In re Lee, supra, to the effect that the indeterminate sentence law was enacted in view of the modern penological thesis that the punishment should be made to fit the criminal rather than the crime, and that the purpose of the law was to aid in the rehabilitation of the prisoner by giving him an inducement to cooperate in order to secure an early release. Starting from this premise, he argues that to permit the board to increase the term would allow it to defeat the purpose of the statute. But the discussion in In re Lee must not be taken as being by way of a limitation upon the power of the Legislature to authorize the board to determine and redetermine the time of imprisonment. It merely indicated the most compelling reason for the enactment of such a law. But in the last analysis, the interests of society must predominate. Ordinarily those interests are conserved best by rehabilitating a criminal so that he can fit into our social system when he is released, and the promise of a short sentence as a reward for good behavior helps toward rehabilitation. But the Legislature has left the whole problem to the Board of Prison Terms and Paroles, and we cannot say that the board has not exercised its discretion fairly. It is apparent from the record that it took into account the nature of the crime, the reports that were given it by the judge of the trial court and the district attorney and other information that came to its attention, including the admitted fact that the petitioner was a citizen of a country with which this nation was in a state of undeclared war. We cannot evaluate all of the factors in relation to each other in this proceeding because they are not before us. We must therefore hold that the action of the Board of Prison Terms and Paroles was legal and proper.

It is ordered that the writ be, and it is, discharged.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

50 Cal.App.2d 418

BOARD OF EDUCATION OF SAN FRANCISCO UNIFIED SCHOOL DIST. et al. v. MULCAHY.

Civ. 11886.

District Court of Appeal, First District, Division 1, California.

March 12, 1942.

Rehearing Denied April 11, 1942.

Hearing Denied May 8, 1942.

1. Courts 🔑1

Where a court is accorded the power to hear and determine according to the law the truth of the charge made against a person, the court is exercising a "judicial function" and not an "administrative function". Const. art. 3, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Administrative Function" and "Judicial Function".

2. Courts 🔑1

In the exercise of an "administrative function" there is lacking the power to determine according to the law, and the most that such a function can embrace is the power to ascertain a fact or state of facts which will justify a course of action, but where it is concluded how the law operates upon a set of facts, the law must of necessity be declared. Const. art. 3, § 1.

3. Constitutional law 🔑74

Schools and school districts 🔑141(5)

The statute providing for judicial determination of truth of charges against teacher, and if true, whether they constitute sufficient grounds for teacher's removal, cast upon the court a "judicial function", and not an "administrative function" contrary to the Constitution. School Code, § 5.654; Const. art. 3, § 1.

4. Jury 🔑19(1)

The failure of statute setting up a special proceeding to provide for trial by jury does not render statute unconstitutional. Const. art. 1, § 7.

5. Jury 🔑12(1)

The constitutional guarantee of right to "trial by jury" refers to the right as it existed at common law, and does not secure right to trial by jury in any case which was not triable by jury as of right under common law of England. Const. art. 1, § 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Trial By Jury".

6. Jury 🔑19(12)

The failure of statute providing for judicial determination of truth of charges against teacher, and if true, whether they constitute sufficient grounds for teacher's dismissal, to provide for jury trial, does not render statute unconstitutional, since statute sets up a special proceeding, and constitutional guarantee of "trial by jury" does not secure the right in special proceedings. School Code, § 5.654; Const. art. 1, § 7.

7. Statutes 🔑96(1)

The legislation setting up machinery for dismissal of teacher who has attained permanent status under school code is not unconstitutional as "discriminatory" legislation attempting to deal with a particular class of teachers. School Code, §§ 5.653, 5.654; Const. art. 4, § 25.

See Words and Phrases, Permanent Edition, for all other definitions of "Discriminatory".

8. Statutes 🔑96(1)

The provision in statute authorizing appeal direct from judgment in special proceeding for determination of truth of charges against teacher, and if true, sufficiency of charges as grounds for teacher's dismissal, without extending trial court's power of granting new trial, did not render statute unconstitutional as "discriminatory". School Code, § 5.654; Const. art. 4, § 25.

9. Judgment 🔑201

Where a reference is general, findings in report of referees form sufficient basis to support the judgment of the court.

10. Pleading 🔑271

The failure to verify complaint or petition is a defect in pleading not affecting jurisdiction of court, and such defect can be cured by amendment.

11. Schools and school districts 🔑141(5)

That complaint filed within 30-day period of limitation was not verified did not deprive court of jurisdiction in proceeding for judicial determination of truth of charges against teacher, and if true, sufficiency of charges as grounds for teacher's dismissal, where properly verified complaint in identical language was filed long before the action was tried. School Code, § 5.654.

12. Schools and school districts 🔑141(5)

In proceeding for judicial determination of truth of charges against teacher, and if true, sufficiency of charges as grounds for teacher's dismissal, teacher was not entitled to 90-day notice and opportunity to correct alleged deficiencies, where charge against teacher was mental condition unfitting her to instruct or associate with children. School Code, §§ 5.652, 5.654.

13. Schools and school districts 🔑141(5)

In action for determination of truth of charges against teacher, and if true, sufficiency of charges as grounds for teacher's dismissal, any error in admitting testimony of psychiatrist in the first instance was rendered harmless by referees in disregarding such testimony. School Code, § 5.654.

14. Schools and school districts 🔑141(4)

In action for determination of truth of charges against teacher, and if true, sufficiency of charges as grounds for teacher's dismissal, charge of mental condition unfitting teacher to instruct or associate with children was sufficient to support judgment that teacher could be dismissed, where charge was sustained by the evidence. School Code, § 5.654.

15. Appeal and error 🔑1011(1)

Where there is evidence of a substantial nature to support finding, the finding will not be disturbed on appeal.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by the Board of Education of the San Francisco Unified School District and others against Margaret Clare Mulcahy for a determination as to whether charges against defendant constituted sufficient grounds for her dismissal as a teacher. From the judgment, the defendant appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

Chas. N. Douglas, of San Francisco, for appellant.

John J. O'Toole, City Atty., Walter A. Dold, Chief Deputy City Atty., and Irving G. Breyer, all of San Francisco, for respondents.

B. C. JONES, Justice pro tem.

This action was instituted under the provisions of section 5.654 of the School Code by the Board of Education of the San Francisco Unified School District. The defendant is a teacher who has been employed in the schools of the district for a number of years and who has enjoyed the privileges of tenure under the school system. On September 14, 1937, the superintendent of schools of the district filed charges against her with the Board of Education, notice of which she received. She thereupon requested that a hearing be had on the charges pursuant to the provisions of section 5.653 of the School Code. The plaintiffs then exercised the election accorded them under the provisions of section 5.654 and filed this action. In due course the defendant filed an answer to the complaint and the case was set down for trial. Acting in accordance with the stipulation of the parties and the provisions of section 5.654 the court appointed three referees to conduct the hearing and report their findings to the court. The findings of the referees sustained all of the charges against the defendant. Exceptions to the findings and report were then presented to the trial court. After exhaustive hearings the findings and report of the referees were confirmed by the court as they were originally presented, and a judgment entered that the board might dismiss the defendant as an employee of the school district. It is from this judgment that the defendant appeals.

The charges against the defendant were on four separate grounds: "1. Mental condition unfitting her to instruct and/or associate with children. 2. Unprofessional conduct. 3. Evident unfitness for service. 4. Refusal to obey a reasonable regulation prescribed for the government of the Public Schools by the San Francisco Board of Education."

The sections of the School Code under which the action has been taken have been attacked on several different constitutional grounds. It is contended that class legislation is effected in violation of section 25 of article IV; that the right of trial by jury is denied in contravention of section 7 of article I; and that administrative functions are cast upon the court contrary to section 1 of article III.

[1-3] As is said in Board of Education v. Ballou, 21 Cal.App.2d 52, 55, 68 P.2d 389, 391: "The Legislature in 1935, by amending the School Code, brought about very significant changes in the procedure for dismissing permanent teachers for cause. Administrative school officials were deprived of the power to dismiss permanent teachers for cause and it was made necessary for the governing board, in order to bring about a dismissal, to file a complaint in the superior court 'asking that the court inquire into such charges and determine whether or not such charges are true, and if true, whether or not they constitute sufficient grounds for the dismissal of such employee, under the provisions of this code, and for judgment pursuant to its findings.' The Legislature has placed upon the judges the duty of determining whether a teacher should be dismissed when charges such as incompetency are filed. A duty essentially administrative has been withdrawn from administrative officials and imposed upon officials exercising judicial functions."

That a judicial determination as to the competency of a teacher against whom charges are made may be interpolated between the initial charge and the final order of dismissal is supported by both reason and authority. It is both fair and logical that the existence of proper grounds should be judicially determined before a teacher may be deprived of her right to tenure. In Wheatley v. Superior Court, 207 Cal. 722, 279 P. 989, it is held that it may first be judicially determined by the superior court that the lands of an individual are susceptible of benefits before they may be included in a bridge and highway district. The procedure is not dissimilar to that here provided, where the superior court must first determine that the charges made against a teacher are true before she may be dismissed from her employment. It cannot be said that where a court is accorded the power to hear and determine according to the law the truth of a charge made against a person, the court is exercising an administrative and not a judicial function. In the exercise of an administrative function there is always lacking the power to determine according to the law. The most that it can embrace is the power to ascertain a fact, or state of facts, which will justify a course of action. Whitten v. California State Board of Optometry, 8 Cal.2d 444, 65 P.2d 1296, 115 A.L.R. 1. But when it is concluded how the law operates upon a set of facts the law must of necessity be declared.

[4-6] A statute which sets up a special proceeding such as we have in this case, but which does not provide for a trial by jury, is not for that reason unconstitutional. Cline v. Superior Court, 184 Cal. 331, 193 P. 929. There is no provision in the constitution guaranteeing the right to a trial by jury in all cases. As is said in Cline v. Superior Court, supra, at page 339 of 184 Cal., at page 932 of 193 P., "It is a settled proposition of law in this state that the right of trial by jury there referred to is the right as it existed at common law, and that it does not secure the right to a trial by jury in any case which was not triable by a jury, as of right, under the common law of England." Actions which are to be tried by a jury are enumerated in section 592 of the Code of Civil Procedure. This section was amended in 1874 narrowing the number of actions to be so tried, and in speaking of this amendment the court in Vallejo, etc., R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 556, 147 P. 238, 243, said: "It is evident that this amendment made a radical change regarding the right to a jury trial. Under its provisions, in all actions except those enumerated in the opening clause, the issues of fact are to be tried by the court. The language is too clear on this point to require interpretation or to permit construction. The amendment was evidently framed with a view of adopting the principle decided in Koppikus v. State [Capitol Com'rs], 16 Cal. 248, that is, that the constitutional guaranty of the right to jury trial, in section 7, of article 1, applies only to common-law actions and that it does not confer such right with respect to any action as to which it did not previously exist. Accordingly it has always been held that this guaranty does not secure the right in special proceedings. Dorsey v. Barry, 24 Cal. [449] 453; [People ex rel.] Heyneman v. Blake, 19 Cal. [579] 596."

[7] The contention of the defendant that the legislation setting up the machinery for the dismissal of a teacher who has attained a permanent status under the School Code is special and discriminatory and violative of section 25 of article IV in that it attempts to deal with a particular class of teachers, was made in the case of Grigsby v. King, 202 Cal. 299, 260 P. 789. It was there held that school boards are merely administrative agencies of the state created by statute, deriving all of their powers from the statute, and subject to all of the limitations imposed upon them by the legislature, and that a teacher is left free to seek employment in any district which she may select, the law operating only incidentally upon her. Such incidental operation, of course, affords no grounds of constitutional prohibition.

[8] Nor does the failure of section 5.654 to make mention of the power to grant a new trial render the section invalid under the provisions of section 25 of article IV of the constitution, as contended for by the appellant. A motion for a new trial is only a statutory remedy. Young v. Briggs, 17 Cal.App.2d 338, 61 P.2d 1223. There is nothing in the constitution pertaining to it, and if the legislature has seen fit to authorize an appeal direct from the judgment in a special proceeding of this character without extending to the court the power of granting a new trial, no discrimination is set up. As the court said in Lancel v. Postlethwaite, 172 Cal. 326, 156 P. 486, 487, "It cannot be doubted that the Legislature could still further limit such grounds at will, or even altogether abolish the right to make such a motion on any ground." The fact that it may be extended by the legislature to certain kinds of cases and not to proceedings of a different character creates no discrimination. The law in either instance is open to all who may by their acts bring themselves under it, and it operates only incidentally upon those who do.

[9] Another argument advanced by the appellant is that no findings were made by the court. The reference, however, was general and for the purpose of a complete hearing by the referees. When the reference is general, the findings and report of the referees form a sufficient basis to sup-

port the judgment of the court. Blalock v. Dunger, 205 Cal. 782, 272 P. 1048.

[10, 11] An additional contention is that the action was not commenced within the time limited by the statute, in that the complaint filed within the thirty-day period of limitation was not verified. The argument of appellant in this respect is predicated on the assumption that verification of the complaint is a jurisdictional requirement. While it is true that in certain actions, such as to quiet title, and practically all special proceedings, the law requires the complaint or petition to be verified, it is the established rule that failure to do so constitutes only a defect in pleading not affecting the jurisdiction of the court, and which may be cured by amendment. Security Trust & Savings Bank v. Fidelity & Deposit Co., 184 Cal. 173, 193 P. 102; Canadian Bank of Commerce v. Leale, 14 Cal.App. 307, 111 P. 759. The defect in the complaint here was corrected by a properly verified complaint in identical language filed long before the action was tried.

[12] The position taken by the appellant—that the case comes within the provisions of section 5.652 of the School Code, and that she was entitled to a ninety-day notice and an opportunity to correct the alleged deficiencies—is not tenable. This section expressly excepts physical and mental disability. In support of her position she makes the contention that the evidence produced is not sufficient to establish the charge of unfit mental condition. If this contention were sound, the case against her would, of course, fall, as the other charges come within the provisions of said section. Fresno City High School Dist. v. De Caristo, 33 Cal.App.2d 666, 92 P.2d 668.

[13-15] Criticism is particularly directed at the testimony of Dr. Twitchell, a psychiatrist. It is argued that the opinion given by him—that the appellant is a prosecutory type of a paranoid state, with no likelihood of improvement—is based entirely on hearsay, notwithstanding the doctor testified that he examined the appellant first in 1928 and again in 1937. The findings of the referees upon this particular charge, however, are not based upon the testimony of Dr. Twitchell. The report expressly states that the testimony of Dr. Twitchell was disregarded by the referees, and that they based their determination on other testimony in the case, particularly that of Miss Mulcahy herself. In the language of the report, "This state of mind is not only established by reputable witnesses whose honesty and integrity cannot be questioned, but its existence is also implicit in Miss Mulcahy's own testimony even when she is making denials." If any error occurred in admitting the testimony of Dr. Twitchell in the first instance, it was rendered harmless by the referees in disregarding it. The record discloses no prejudicial error, and contains ample evidence to support the finding of mental unfitness. This charge, being sustained by the evidence, is sufficient to support the judgment. In all cases where there is evidence of a substantial nature to support a finding it will not be disturbed on appeal. Webster v. Board of Dental Examiners, 17 Cal.2d 534, 110 P.2d 992.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

50 Cal.App.2d 405

In re MILLER'S ESTATE.

MILLER et al. v. MILLER.

Civ. 13269.

District Court of Appeal, Second District, Division 1, California.

March 11, 1942.

Hearing Denied May 8, 1942.

Executors and administratrix 🔑469(1)

Contentions that probate court was without jurisdiction to determine title to corporation stock and to determine whether corporation is alter ego of deceased, in probate proceeding, and that the issues could be raised only in connection with settlement of final account and not in settlement of account current, were without merit under the circumstances.

◆

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Proceeding in the matter of the estate of Robert Miller, deceased, wherein Louise Miller filed objections to appointment of Emma Miller as administratrix with will annexed and petitioned for appointment of Louise Miller as administratrix. From judgment approving account current of William Jones as executor and denying petition of Emma Miller, Emma Miller appeals.

Affirmed.

Willcox & Judson and Rupert B. Turnbull, all of Los Angeles, for appellant.

No appearance for respondents.

DORAN, Justice.

This is an appeal from two judgments of the Superior Court sitting in probate.

Robert Miller died on October 3, 1935. On November 5, 1935, William Jones was appointed executor of his will. On October 21, 1936, Raymond R. Hails filed a petition for revocation of letters and for his appointment as administrator with the will annexed of said estate. On December 31, 1936, Emma Miller filed an amended and supplemental petition for revocation of letters and for denial of petition of Raymond R. Hails for appointment as administrator of said estate, and for her appointment as administratrix with the will annexed. Thereafter, and on October 8, 1938, Louise Miller filed objections to the appointment of Emma Miller as administratrix with the will annexed and petitioned for her appointment as administratrix with the will annexed. Thereafter and on October 19, 1938, William Jones, as executor of the estate of said decedent, filed his account current and report of executor. Thereafter and on November 14, 1938, Emma Miller filed objections to the account current and report of executor. Thereafter the account current and petitions of the various parties came on regularly for hearing, at the conclusion of which appropriate findings of fact and conclusions of law in re account current were filed and the judgment followed.

At the same time there was heard the petition for letters of administration of R. R. Hails, objections of Emma Miller to his appointment, petition of Emma Miller for letters of administration, objections of Louise Miller to petition of Emma Miller, and petition of Louise Miller for letters of administration. These matters were also heard in the same court at the same time, before the same judge; findings filed and judgment entered accordingly. This appeal is from the two judgments above mentioned.

Without going into further details as to the facts, it is contended by appellant that the probate court is without jurisdiction to try and determine the title to corporation stock, and to determine whether a corporation is the alter ego of deceased, in a probate proceeding. Appellant relies on Stevens v. Superior Court, 155 Cal. 148, 99 P. 512; Bauer v. Bauer, 201 Cal. 267, 256 P. 820, 821. The cited cases are not in point. It is there held that: It is undoubtedly the rule "that the superior court, sitting in probate, is without jurisdiction to try the question of title to property as between a representative of the estate and *strangers to the estate.*" (Italics added.) See, also, Estate of Roach, 208 Cal. 394, 281 P. 607. No such state of facts is presented in the within appeal.

It is also contended that the issues decided could only be raised in connection with the settlement of the final account. No authorities tending to sustain appellant in this regard are cited in appellant's brief, the only one filed. Although the point is not therein mentioned, the action upon which the issues arose in the Stevens case, supra, was based on the "first annual account."

The judgments are affirmed.

YORK, P. J., and WHITE, J., concurred.

50 Cal.App.2d 436

AUSTIN et al. v. BOARD OF CIVIL SERVICE COM'RS OF CITY OF LOS ANGELES et al.

Civ. 12778.

District Court of Appeal, Second District, Division 1, California.

March 12, 1942.

1. Municipal corporations ⇨218(9)

A civil service employee is not necessarily denied right to have his case reviewed by the court because city charter provides that finding of civil service commission shall be conclusive, but test as to right of review is whether there was arbitrary action on part of city officers.

2. Mandamus ⟹72

Where a board or commission acts arbitrarily against vested rights of individuals, mandamus will lie to compel a recognition of such rights which it has denied in abuse of its discretion.

3. Municipal corporations ⟹206

Where city of Los Angeles, after purchasing utility owned by electric company, elected to retain former employees of company in its employ, as authorized by amendment to city charter, employees so retained were exempt from civil service provisions of charter, including any rule adopted by civil service commissioners pursuant thereto. St.1935, p. 2356, § 431.

4. Municipal corporations ⟹206

Where city of Los Angeles elected to retain former employees of electric company in city's employ after purchase of utility from company, as authorized by amendment to city charter providing that employees so retained shall be exempt from civil service provisions of charter, city properly laid off civil service employees before laying off retained company employees, where there was insufficient work for all employees. St. 1935, p. 2356, § 431.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding for writ of mandate by George E. Austin and others against the Board of Civil Service Commissioners of the City of Los Angeles and others to require city to suspend all former employees of electric company acquired by city who were retained in city's employ without complying with civil service requirements before civil service employees were suspended on account of a lack of work. From an adverse judgment, petitioners appeal.

Affirmed.

Leo B. Wayland and Frank L. Stearns, both of Los Angeles, for appellants.

Ray L. Chesebro, City Atty., S. B. Robinson, Chief Asst. City Atty., and Gilmore Tillman, Deputy City Atty., all of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

The City of Los Angeles, under a power contained in its city charter, owns and operates an electrical distributing system. The city charter also provides that employees of the city, carrying on this enterprise, are entitled to the benefits of a civil service system.

In 1937 a public utility owned by Los Angeles Gas and Electric Company was acquired by the city. Anticipating the acquirement of this, and possibly other utilities, and in order to fix the status of employees thereof who would thereby become employees of the city, the city charter was amended in 1935 by adding section 431, reading as follows: "Sec. 431. All persons employed in the operating service of any public utility hereafter acquired by the city, or any department thereof, at, and for at least one year immediately prior to, the date of such acquisition, may be retained and employed by the city, or such department, in their respective positions, as nearly as may be, and, so long as continuously so retained and employed in such positions, shall be exempt from the civil service provisions of this charter; provided, however, that no person not a citizen of the United States, shall be so retained and employed and that persons so retained and employed shall, within three months after such acquisition, conform to any residence requirements applicable to employees of said city, or department, in like positions." (Stats.1935, p. 2356.)

Upon the acquirement of the Los Angeles Gas and Electric Company property and in accordance with the above charter provision, a number of employees of the public utility became employees of the city. At the same time, and since then, there were and have been employed in the operation of the municipally owned system a number of civil service employees. For the purpose of distinction, we will hereafter refer to these two classes of employees as "public utility employees" and "civil service employees."

December 10, 1937, certain civil service employees were suspended for lack of work by the city. The city through its department of water and power, is empowered to determine the existence of a lack of work, and to suspend employees for that reason. In the event this is done, the Board of Civil Service Commissioners of the city determines whether such suspension violates any civil service rights of the suspended employee. The charter provides such determination shall be "final and conclusive." It is conceded that at the time there was in fact a lack of work which required the city to dispense with the services of at least some of its employees. These suspended civil service employees petitioned the superior court for a writ of mandate, which, if granted, in effect would have required the city to discharge all public utility employees first when there was lack of work. Demurrer was interposed to this petition; it was by the court sustained without leave to amend, and judgment was rendered as against the petitioners. From this judgment they have appealed.

Respondents contend that the judgment should be affirmed for two reasons: (1) Because the courts have no right to review on the merits the suspension of a civil service employee when such suspension has been sustained by the Board of Civil Service Commissioners; (2) assuming there is a power of review in the courts, if there is lack of work, the city may suspend civil service employees and retain public utility employees, in accordance with the right so to do specifically given to it by said section 431 of the charter.

Appellants contend (a) that there is a right of review in the courts by application of the writ of mandate; (b) that the charter does not give to public utility employees the right of retention as against civil service employees when there is lack of work; and (c) that by laying off civil service employees, public utility employees were given a preferred position.

[1, 2] A civil service employee is not necessarily denied the right to have his case reviewed by the courts, because a city charter provides that the finding of the Civil Service Commission shall be final and conclusive. The test as to the right of review is to be found in the answer to the query as to whether there was arbitrary action on the part of the officers clothed with authority under the charter. As was said by this court in Lotts v. Board of Park Commissioners, 13 Cal.App.2d 625, 634, 57 P.2d 215, 220: "* * * it has been uniformly held that if a board or commission acts arbitrarily against the vested rights of individuals under the law, and therefore against the law itself, the board has not strictly, as is frequently said, 'abused its discretion'—a term which is responsible for some confusion of ideas on this subject—but in contemplation of law, under those circumstances, the board has not exercised its discretion at all, but has sought to substitute its arbitrary determination in opposition to rights guaranteed individuals by law." Under proper circumstances there may be a right of review by the courts of the state in cases of this kind.

[3, 4] This leaves for consideration then the single question which is determinative of this case: Was the action of the city in laying off civil service employees before laying off all of the public utility employees proper under the provisions of the city charter, in view of the amendment embodied in section 431?

This question has been before our Supreme Court, and by that court determined adversely to all of the contentions of the appellants.

In the case of Wallis v. Board of Civil Service Commissioners, 11 Cal.2d 430, 80 P.2d 972, 81 P.2d 428, the status of the class of employees of the City of Los Angeles which we have herein denominated public utility employees was settled. In that case at page 435 of the reported decision, at page 975 of 80 P.2d, the court points out that section 431 of the charter is a special provision applicable to the class to which these public utility employees belong. "The people of the city have so provided in their charter and there can be no question of their power so to do." Also, on the same page the court says: "When the conditions are present, as here, and the employing board has elected to exercise that power, the persons employed are exempt from all the civil service provisions of the charter, which would necessarily include any rule adopted by the civil service commissioners pursuant to the civil service provisions of the charter. To hold otherwise would be to accord greater force to the rule than to the charter itself and to nullify the latter."

In the case at bar, there was nothing arbitrary in the action of the city in laying off civil service employees before public utility employees when there was lack of work. The city was authorized under its charter to do exactly what was done as recited in the complaint presented to us on the appeal.

The judgment is therefore affirmed.

YORK, P.J., and DORAN, J., concurred.

50 Cal.App.2d 45

JANSSEN v. LOS ANGELES COUNTY et al.

HIBBARD v. SAME.

Civ. 12622.

District Court of Appeal, Second District, Division 1, California.

Feb. 19, 1942.

Rehearing Denied March 16, 1942.
Hearing Denied April 16, 1942.

1. Appeal and error ⟹74

Minute orders granting nonsuits were not "appealable orders" where they were superseded by judgments of dismissal from which appeals were taken, but propriety of such orders could be reviewed on the appeal from the judgment of dismissal. Code Civ. Proc. § 956.

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

2. Eminent domain ⟹122

In condemnation proceedings, all damages present and prospective that are the natural, necessary or reasonable incident of taking the property sought to be condemned must be assessed. Const. art. 1, § 14.

3. Eminent domain ⟹243(2)

Where issues in condemnation proceeding were what was the market value of a parcel taken in 1935, and what damages would accrue to portion of land not condemned by reason of severance from portion condemned, and by reason of construction of improvement of San Gabriel river in manner proposed, and it could not have been anticipated at time of condemnation that as natural incident to improvement of river, landowners' land would be washed down the river, landowners were not precluded from recovering from flood control district for damages caused by washing away of land and destruction of trees on theory that such damage was an issue in condemnation proceeding and was finally determined therein. Const. art. 1, § 14.

4. Evidence ⟹10(5)

It is a matter of common knowledge that the San Gabriel river until recently flowed over and across lands privately owned.

5. Levees and flood control ⟹36

Where flood control district obtained easements from adjoining landowners for the purpose of construction and maintenance of a definite channel for the San Gabriel river and thereafter piling was driven alongside of bed of river, and material excavated from official channel was placed on strip of land back of piling and a wire fence in the form of a levee or embankment, and flood waters thereafter washed away part of adjoining landowners' land, adjoining landowners could not recover from district for damages on ground that plan to confine the waters of river in a single definite channel was inherently dangerous and wrong.

6. Levees and flood control ⟹36

Where flood control district obtained easements, drove piling and constructed embankment along land of abutting owners in effort to confine San Gabriel river to definite channel and thereafter flood waters damaged abutting owners' lands, owners alleging in effect that "from time immemorial" natural channel of river was sufficient and that certain trees removed by district had protected lands "from time immemorial" could not recover from district on ground that damage resulted from changing natural channel in absence of allegations or proof showing that river had a permanent channel, since allegation "from time immemorial" which is counterpart of expression since memory of man runneth not to the contrary and a poetic equivalent of "a long time" which is relative and indefinite was not sufficient as allegation of permanency.

See Words and Phrases, Permanent Edition, for all other definitions of "A Long Time" and "From Time Immemorial".

7. Levees and flood control ⟹36

Where no duty devolved on state to protect landowners from menace of flood waters of the San Gabriel river, flood control district could not be held liable for damage to landowners' land resulting from an unsuccessful attempt to confine waters of the San Gabriel river to a definite channel.

◆

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Consolidated actions for damage to land by Daisy Janssen and Hudson P. Hibbard, as trustee, etc., against the County of Los Angeles and others. From judgments of dismissal and from orders granting nonsuit, plaintiffs appeal.

Judgments affirmed. Appeals from orders granting nonsuits dismissed.

Hearing denied; CURTIS and CARTER, JJ., dissenting.

Hibbard & Kleindienst and J. Garrison Gemmill, all of Los Angeles, for appellants.

J. H. O'Connor, Co. Counsel, and J. F. Moroney and Arthur Loveland, Deputies Co. Counsel, all of Los Angeles, for respondents.

YORK, Presiding Justice.

The above-entitled actions, consolidated for trial, were brought by the respective plaintiffs, the legal owners of adjoining realty abutting the San Gabriel River, to recover damages for injury to their respective parcels of land. The defendants in each case are the county of Los Angeles, the Los Angeles County Flood Control District, C. H. Howell, who for a time was the chief engineer of said district, and Harold E. Hedger, Sr. (sued as Howard E. Hedger, Sr.) who was senior assistant chief engineer of the district from 1934 to 1938 and in charge of the work done in the San Gabriel River in 1935 and 1936, under the supervision of Chief Engineer Howell.

The injury here complained of is alleged to have been occasioned by the changing of the channel of the San Gabriel River by defendant in such a way that portions of plaintiffs' property and improvements were washed away during the heavy rains of March, 1938. The two parcels of land will be referred to in this opinion as the Janssen property and the Hibbard property.

[1] At the close of plaintiffs' case, defendants' motions for nonsuit were granted and judgments of dismissal were entered. Plaintiffs prosecute this appeal from the judgments of dismissal, as well as from the orders granting the nonsuit. While a minute order granting a nonsuit is not appealable where it was superseded by a judgment from which an appeal has been taken (Skaggs v. Taylor, 77 Cal.App. 519, 525, 247 P. 218; see, also, Scrimsher v. Reliance Rock Co., 1 Cal.App.2d 382, 390, 36 P.2d 688, and cases there cited), the propriety of such order may be reviewed upon the appeal from the judgment of dismissal. Sec. 956, Code Civ.Proc.

The record herein reveals that a resolution of the board of supervisors of said flood control district, dated October 30, 1935, provided that public necessity required the acquisition by the district of a heavily wooded strip of land across the east end of the Hibbard property for the construction and maintenance thereon of the official channel of the San Gabriel River. Accordingly, the county counsel was directed to institute proceedings for the purpose of condemning an easement across said land. The owner of the Janssen property granted a similar easement to the district.

In June, 1936, under a contract with said district, an independent contractor began installing a row of creosoted pilings driven into the ground approximately ten feet apart, along the west side of the river-bed from Florence Avenue (Easy Street) "upstream several hundred feet to and opposite * * * the Janssen property. On that piling was placed heavy redwood fencing held with wire." The top of the piling was approximately ten feet above the bed of the stream and five or six feet higher than the surface of the land adjoining the easement. Between the line of piling and the new east line of appellants' properties was a thirty-five foot strip of land which was a part of the easement acquired by the district through eminent domain proceedings and the grant from Janssen, as heretofore stated. The material which was excavated from the official channel was placed on this strip of land "back of the row of piling and wire fence * * * in the form of a levee or embankment." Before the contemplated improvement of the channel was made, the river made a sharp bend toward the south as it approached the Janssen property. This bend was changed to a gradual curve to the south in widening the channel of the river, the north line of the Janssen property being approximately at the center of such gradual curve. In straightening the channel it was necessary to clear away a thick growth of trees from the thirty-five foot strip, above referred to, which theretofore had afforded protection to appellants' land from the ravages of the river. At the time the work was begun there was in existence a row of untreated pilings covered with wire netting, northeast along the westerly bank of the river, commencing at the northerly edge of the Janssen property and extending upstream, but there is no evidence as to when or by whom such work was done.

In March, 1938, heavy rainfall on the drainage area of the river caused a flood which filled the river and washed a strip off the east end of the Janssen property and about 77/100ths of an acre from the northeast corner and east end of the Hibbard property. The flood waters also washed away some of the untreated pilings north of the Janssen property, as well as some of the creosoted pilings; debris and trees were carried back of these pilings, and some of the debris lay upon the pilings which were left in place. A portion of the dike west of the pilings was eroded. The soil on both properties adjacent to the river "is alluvial soil which erodes quite easily."

Appellants contend that respondents "are liable under Article I, Section 14 of the California Constitution because of damage resulting necessarily from planning, constructing and maintaining works that changed the natural channel of the river, and destroyed natural protection from the waters thereof." It is also urged that the court erred in sustaining objections to evidence which, it is claimed, tended to prove not only "the negligence of the District in planning and constructing works which changed the course of the San Gabriel River so as to divert waters upon plaintiffs' lands, but also * * * of taking and damaging private property for public use without compensation."

The consolidated appeal is presented to this court upon a bill of exceptions specifying twenty-seven erroneous rulings of the trial court in sustaining objections to proffered evidence.

It is urged by respondents (1) that "the trial court adopted the view early in the proceedings that the Los Angeles County Flood Control District as a state agency is not liable for damages resulting solely from the negligence of its officers and employees," and made its rulings rejecting appellants' proffered evidence "in conformity with such view"; and (2) that "the question of damage to the Hibbard property by the construction of the protection work contemplated in 1935 was completely adjudicated in the eminent domain proceeding."

In connection with point 2 above, the record shows that respondents were permitted to file an amendment to their answer herein alleging that the right of appellant Hibbard to be compensated for the destruction of the trees upon the parcel condemned was an issue in the condemnation proceedings and was finally determined therein. The judgment roll in the condemnation proceedings was introduced at the trial herein, from which it appears that two issues were presented to the jury in said proceedings, to wit: "First, what was the market value of said parcel (sought to be taken) on the 30th day of October, 1935? Second, the damages, if any, which will accrue to that portion of the land of said defendants not sought to be condemned by reason of its severance from the portion sought to be condemned and by reason of the construction of the improvement of the San Gabriel River in the manner proposed."

On the question of severance damages, the jury was instructed as follows:

"Severance damages, so-called, are the amounts to be awarded the defendants when the remaining property owned by them is depreciated in its market value by reason of the severance therefrom of the part sought to be condemned. In this case the taking of the part sought to be condemned will sever from the entire property owned by the defendants a portion of such property and you are called upon to find what extent, if at all, such remaining portion will be depreciated in its market value. In so doing you may consider what detriment, if any, such remaining portion will sustain by reason of the taking and severance therefrom of the part sought to be condemned and the construction thereon of the improvement, to-wit, the removal of all trees therefrom and the construction of a channel for the San Gabriel River. If you believe that such remaining portion will not suffer any depreciation in its market value by reason of such severance, the treatment of the part severed, and such construction, then it is your duty to find that no severance damages shall be awarded.

"If you find from all of the evidence that the property of defendants not herein sought to be condemned has sustained severance damages, you should award to the defendants such amount as you shall find such property to have been damaged, that is, the difference between the market value of the property on October 30, 1935, and before its severance from the property sought to be condemned in this action, and its value after such severance and with the improvements made in the manner proposed by the plaintiff."

The record does not disclose that any severance damage was awarded in the condemnation proceedings, and it is so asserted as a fact by appellants in their closing brief, where they call attention to the fact that the only issue respecting the property not condemned "was the diminution in market value by reason of the severance therefrom of the land condemned and by reason of the *construction* of the improvement;

no award was made covering the actual *taking,* i. e., the actual invasion 'by superinduced additions of water' (Pumpelly v. Green [Bay & M. Canal Co.], 13 Wall. 166 [20 L.Ed. 557]), resulting in the inundation and washing away of plaintiff's land, *thus making it a part of the stream-bed itself.*" (Italics included.)

[2] In Sutro Heights Land Co. v. Merced Irr. Dist., 211 Cal. 670, 694, 296 P. 1088, 1097, the court, quoting from Farmers' Reservoir & Irr. Co. v. Cooper, 54 Colo. 402, 130 P. 1004, said: " 'In condemnation proceedings all damages, present and prospective, that are the *natural, necessary, or reasonable incident of taking the property* sought to be condemned, must be assessed.' " (Italics added.)

Again, in Turpen v. Turlock Irr. Dist., 141 Cal. 1, 3, 74 P. 295, it is held that "damages caused by the seepage from faulty construction of the canal could not have well been anticipated, and were not included in the condemnation proceeding."

[3] It surely could not have been anticipated at the time of the condemnation proceedings in 1935 that as a natural, necessary or reasonable incident to the improvement of the San Gabriel River, appellants' land would be washed down the river. From what can be ascertained from the excerpts from the condemnation proceedings appearing in the record now before this court, it seems clear that the damages which appellants here allege they have sustained were neither considered nor determined in those proceedings.

Referring to respondents' argument, heretofore noted, to the effect that appellants' proffered evidence was properly rejected in conformity with the view adopted by the trial court early in the proceedings, it is shown by the record that the greater portion of the rejected evidence was offered in an attempt to prove that the plan for improvement of the channel of the San Gabriel River was inherently wrong in its inception.

Appellant states the major question as follows: "Does the inundation and washing away of privately owned land abutting a river, resulting from the change by a county and county flood control district of the natural channel of the river, followed by failure to provide adequate protection against, and a waterway sufficient to carry, the water which reasonably might be expected to flow in such river, when such adequate protection and sufficient waterway existed before said change, constitute taking and damaging of private property in violation of Article I, section 14, of the California Constitution?"

Appellants' opening brief sets forth the following under the heading "Opening Statement":

"The above entitled actions, consolidated for the purpose of trial and appeal, were brought by Daisy Janssen and Hudson P. Hibbard, Trustee for Kathryn Kleindienst Schlens and Louis Ball Kleindienst, the legal owners, respectively, of parcels of realty abutting the San Gabriel river in the county of Los Angeles, California, to recover damages for injury to their parcels of land occasioned by the *changing of the channel* of said river by the defendants in such a way that portions of said land and improvements were inundated and washed away.

"The complaint in each case alleges that more than one-half of the precipitation and runoff of the waters originating in Los Angeles County occur in the San Gabriel mountain area; that the principal stream of said area is the San Gabriel river which flows in a southerly direction into the Pacific Ocean; that such realty was and is situated on the western bank of the San Gabriel river, a short distance northerly of the point where said river is crossed by a road known as Florence avenue, formerly called Easy street, a public highway in Los Angeles County; that during periods of heavy rainfall the flow of water in this river reaches enormous proportions, and, if unchecked, would erode and inundate large areas of land adjacent thereto, which facts were known to defendants and each of them at all times mentioned; that in order to protect riparian lands, other than those of the plaintiffs, from inundation and erosion, defendants Los Angeles County and Los Angeles Flood Control District excavated, widened, straightened and executed works along the banks of said river." (Italics added.)

Briefly, it will be seen from the foregoing that the cause of action as argued by appellants is based on the contention that respondents changed the natural channel of the San Gabriel River in such a way that the alleged damage resulted. In this connection, it is not urged that the damage resulted from the negligence of officers and employees of a public corporation, but that the alleged damage resulted from the negligence of the corporation itself; that "the negligence or wrongful act of the state agency itself in planning and causing to be constructed works which reasonably should have been expected to," did in fact "cause the damage complained of." Quoting from appellants' brief: "Correctly stated, our contention is that defendants are liable under Article I, Section 14, of the California Constitution, because of damage resulting necessarily from planning, constructing and maintaining works that changed the natural channel of the river, and destroyed natural protection from the waters thereof. Not only was this point an issue raised by the pleadings, but evidence was offered and rejected in proof thereof * * *." Again quoting from appellants' brief for the purpose of setting forth in greater detail appellants' position, the following appears:

"For the convenience of the Court, and because of its importance to the real issues of this case, we quote the question as to which objection was sustained resulting in this exception:

"'Assuming that the work and the plan thereof consisted of piling or posts driven into the ground at intervals of ten feet, with heavy fence wire nailed to it on the river bed side, while piling or posts were driven in a line parallel to and 35 feet east of the easterly line of the present Hibbard-Kleindienst property, which piling or posts so driven extended from a point east of the northerly line of said property to Easy street, and that in connection with said piling an excavation was made on the east side thereof to the avenue level, and that the dirt from said excavation was placed on the west side of said line of piling or posts to act as protection against the flood waters that might get through the fence; basing your answer upon these assumptions, I will ask you, was such a plan and construction proper engineering?'

"We reiterate that respondents admit the witness' qualifications as an expert. Each assumption made in this hypothetical question was either actually in evidence or covered by an offer of proof that it was an accomplished fact and, in addition, was shown to have been a part of the *plan* under which defendants performed the work. The specific question based on this assumption goes to the very heart of the point at issue: Was the *plan* and *construction* proper engineering? In other words, was the *plan* inherently *dangerous* and *wrong?* If the answers to these questions were negative and affirmative respectively, it follows irresistibly that the *District itself,* as distinguished from its servants and employees, performed a wrongful act as to which it cannot claim immunity." (Italics included.)

In other words, it is appellants' contention, adopting substantially the language of appellants' brief, that if the Flood Control District, as a governmental agency, by planning and causing to be constructed works which were inherently dangerous and wrong, even though negligence of the governmental agency itself be a part of such planning and construction, all as distinguished from mere misfeasance of agents, servants and employees in negligently executing a proper plan, caused the injury complained of, such governmental agency must respond in damages.

The respondent Flood Control District's reply to the above argument is as follows, quoting from respondents' brief: "The improvements constructed by the District did not divert or propel the water of the river upon plaintiffs' lands. They merely failed to prevent said waters from going in the direction which they would have gone if there had been no protection work there at all. The plaintiffs were damaged *in spite of* what defendants did, not *because of* what defendants did." (Italics included.) Perhaps a more accurate statement would be, that the improvements merely failed to prevent said waters from going in the direction which they could or might have gone, if there had been no protection work there at all. Whether they *"would* have gone" is problematical. That the waters did in fact follow such a course is conclusive proof, however, of the possibility that they could or might do so.

Before giving further consideration to the contentions of the parties, it is important at this point to describe the San Gabriel River and as well the character of the territory traversed by its waters. For that purpose, although a matter of common knowledge, a description by those peculiarly qualified may be adopted with propriety. Referring to the territory as a large continuous plain, Mr. Fenneman describes it as follows:

"This plain represents mainly the combined deltas of the Los Angeles, San Gabriel and Santa Ana Rivers. Like the plains more remote from the sea, this one is therefore composed of detritus washed down from the mountains. * * *

"The western (area) traversed by the San Gabriel River is separated by the San Jose Hills from the larger eastern basin of the Santa Ana River. The alluvial slope near the mountains may be as steep as 500 feet to the mile, but it quickly flattens and near the southern margin may be 50 feet to the mile. * * * In this arid climate and with this porous material, such slopes are insufficient for erosion, and the surface of the plain remains essentially without local relief. * * *

"The streams of this section are actively degrading their mountain courses and are aggrading their valley reaches with corresponding rapidity. The amount of porous alluvium already laid down is so large that all streams sink in and disappear within a few miles of the mountain base, sometimes within a few hundred feet. Beyond the point of their disappearance in dry weather, their courses may be traced as dry 'washes' or 'sand washes,' used only in time of flood when the stream reaches farther out on the alluvial slope. Such stream courses commonly consist of a network instead of a single channel. The larger streams have more or less continuous washes reaching to the sea but all such streams are 'interrupted,' i. e., their courses consist of alternating stretches of dry wash and flowing water. Where the alluvium is deep and porous, the water percolates slowly through it in a down stream direction but does not appear at the surface except in time of flood. Where the underlying rock approaches the surface and obstructs percolation, the stream flows at the surface." (Physiography of the United States by Nevin M. Fenneman.)

Mr. Hill, in referring to the San Gabriel River, among others, describes them as follows:

"It is a further anomaly that the older portions of our rivers, as seen in the areas of our valley plains, are apparently the least indented ('canyoned'), inasmuch as their traces are constantly being filled and abandoned by processes of distributive aggradation." Robert T. Hill, Southern California Geology, p. 215.

Manifestly, the above descriptions refer to conditions in their natural state. It is at once evident that from the very nature and character of the underlying processes that built the coastal plain, above described, the waters of the so-called San Gabriel River, in their natural state, were migratory. Such conditions existed at the time the lands first passed from their wild and natural state to the state ordinarily subject to civilized use. Such uncontrolled waters were a constant menace to landowners, for the processes of aggradation were bound to continue until and unless such waters were controlled.

[4] It is further an historical fact and a matter of common knowledge that the San Gabriel River, until recently, flowed over and across lands privately owned. Under such conditions, it was only natural that landowners undertook to and did in fact in many instances protect their land against vagrant waters and flood damage as well. This action on the part of some owners only increased the hazard as to others, but the common enemy rule under such circumstances clearly applied and no liability accrued. As a result of such individual efforts, however, the waters of the San Gabriel River had the appearance of a channel at various points throughout its general course, but such channel obviously was artificial and at most only temporary.

It was the above-described condition, which is a matter of historical and common knowledge, that the respondent Flood Control District sought to remedy.

Pursuant to such a purpose, a strip of land was purchased or condemned, within which it was intended the waters of the so-called San Gabriel River should be confined and a definite channel thereby established.

[5] Returning now to a consideration of appellants' contentions, it is at once apparent that the argument, in substance to the effect that respondent Flood Control District changed the natural channel of the San Gabriel River, is untenable. The further contention that the so-called *"plan"* was "inherently dangerous and wrong" is equally untenable. The argument, which is clearly fallacious, proceeds from a false premise, and evidently is the result of not only a confusion of terms, but also an unwarranted assumption of facts. Whether by the term "plan" is meant the purpose of the Flood Control District to confine the waters in a single definite channel, or the manner in which such purpose was to be effected, in either case the invalidity of the argument remains, for obviously neither the purpose nor the manner can be successfully assailed as inherently dangerous and wrong. It may be true that the specifications may have been faulty and as a result inadequate dikes or barriers constructed,

but such faults at most merely indicate errors of judgment of employees of the district, and in no sense signify anything inherently dangerous or wrong in the "plan."

[6] Equally without merit is the argument that respondents changed the natural channel of the river. In this connection it is significant that the channel is not alleged to be permanent. Had the facts and the evidence thereof supported such a description, other doctrines clearly would apply. But, the nearest approach to an allegation of permanency in the Janssen case is, "That the natural channel of said river had *from time immemorial* served as a sufficient waterway * * *." And in the Hibbard case, "That several acres of plaintiff's realty consisted, prior to works and alterations erected by defendants, as hereinafter more fully set forth, of a dense stand of large cottonwood, oak, elm, black walnut and willow trees which *from time immemorial* had served to turn the flow of water to the south and at the same time protect plaintiff's realty from being washed away." The expression "from time immemorial" is but the counterpart of the expression "since the memory of man runneth not to the contrary." Such expressions are only the poetic equivalent of "a long time" which, being purely relative, therefore is indefinite. In no sense can such phrases be regarded as allegations of permanency. Nor indeed could it be truthfully alleged that the waters of the San Gabriel River at any time ever flowed in a permanent channel. The geological history of the area, as above described, definitely refutes such a contention. The conclusion is inevitable that, in so far as the asserted cause of action here considered is concerned, it cannot be based on the alleged changing of a channel when the fact is there was no channel to change. The action of the Flood Control District was an effort to locate, establish and maintain a channel, but not to change one.

[7] It should be noted that, under the circumstances alleged in the complaints herein, no duty, legal or moral, devolved upon the state to come to the rescue of landowners. Moreover, although the state may undertake to reduce or remove such menaces, no guaranty of complete success accompanies such an undertaking, and occasional failures of the character here considered create no liability. It may be that unfortunate victims may dispute the justice of such a doctrine, but on the other hand, if it were otherwise there would be slight if any incentive for the state to extend its aid at all.

Plaintiffs, ab initio, had no cause of action. That there is no liability for negligence of employees of the Flood Control District, there can be no question. But a cause of action based on the alleged negligence of the Flood Control District does not necessarily follow. The attempt to differentiate between the employees and the district, as such, and by a circuitous process of reasoning assail a so-called "plan" as negligent, does not affect the conclusion, above noted, that no cause of action exists. Therefore, there can have been no error in granting the motions for nonsuit.

The appeals from the orders granting the motions for nonsuit are dismissed, and the judgments appealed from are affirmed.

DORAN and WHITE, JJ., concurred.

ANDREWS v. POLICE COURT OF CITY OF STOCKTON.*

Civ. 6607.

District Court of Appeal, Third District, California.

March 13, 1942.

Rehearing Denied April 9, 1942.

Hearing Granted May 11, 1942.

Mandamus ⚷62

Mandamus would not issue to compel city police court to strike from and "expunge" from its records complaint and judgment and all records pertaining to a prosecution of petitioner, even if police court was without jurisdiction to hear the case, since there was no duty imposed upon the court to expunge from its records a void judgment. Code Civ.Proc. §§ 473, 1085.

"Expunge" means to destroy or obliterate; it implies not a legal act, but a physical annihilation.

See Words and Phrases, Permanent Edition, for all other definitions of "Expunge".

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* Subsequent opinion 133 P.2d 398.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Mandamus proceeding by John Andrews against the Police Court of the City of Stockton. From a judgment denying petition for writ of mandate, the plaintiff appeals.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

Joseph C. Tope, City Atty., and H. C. Stanley, Asst. City Atty., both of Stockton, for respondent.

TUTTLE, Justice.

This is an appeal from a judgment denying a petition for writ of mandate.

On June 20, 1935, a complaint was filed in the Police Court of the City of Stockton, charging petitioner with the crime of contributing to the delinquency of a minor. Thereafter, petitioner appeared in said court with counsel, and pled guilty to said charge. He now seeks, through mandamus, to compel said court "to strike from and expunge from the records of said Police Court, the said complaint and judgment and all records pertaining to said case," upon the ground that said court had no jurisdiction over the offense.

Section 1085 of the Code of Civil Procedure, referring to mandamus, provides as follows: "It may be issued by any court, except a municipal, justice's or police court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person."

Assuming that the Police Court was without jurisdiction, we can find no statute which makes it the duty of a court to expunge such documents from its records. It is true that void judgments and orders may be vacated under certain circumstances, but "expunging" the actual documents from the record is quite another matter. The latter term means to destroy or obliterate. Webster's New International Dictionary, 2d Ed. It implies not a legal act, but a physical annihilation.

Appellant relies upon the following portion of Section 473 of the Code of Civil Procedure: "The court may, upon motion of the injured party, or its own motion, correct clerical mistakes in its judgment or orders as entered, so as to conform to the judgment or order directed, and may, on motion of either party after notice to the other party, set aside any void judgment or order."

We can find no legal duty imposed upon the court by said section which makes it the clear duty of said court to expunge from its records a void judgment.

The judgment is affirmed.

THOMPSON, Acting P. J., and STEEL, Justice pro tem., concurred.

50 Cal.App.2d 440

In re MURPHY'S ESTATE.

MURPHY v. KENDALL.

Civ. 6695.

District Court of Appeal, Third District, California.

March 12, 1942.

Rehearing Denied April 11, 1942.

Hearing Denied May 8, 1942.

1. Courts 🔑202(5)

The section of Probate Code relating to appealable orders, taken with section of Code of Civil Procedure relating to cases in which appeals may be taken from superior court, determines the right of appeal in probate matters. Probate Code, § 1240; Code Civ. Proc., § 963, subd. 3.

2. Executors and administrators 🔑20(10)

An order refusing to grant letters of administration is appealable. Probate Code, § 1240.

3. Appeal and error 🔑108

Findings of fact are not appealable.

4. Appeal and error 🔑74

An order refusing to vacate a final judgment is not appealable when grounds upon which order is sought existed before the entry of judgment and were therefore available on appeal from the judgment.

5. Appeal and error ⚿113(2)

An appeal does not lie from an order refusing to vacate an order itself not appealable.

6. Appeal and error ⚿792

Where an appeal does not lie, the appellate court has no jurisdiction to entertain the appeal and may dismiss it on its own motion.

7. Appeal and error ⚿907(4)

Where record did not contain all the evidence taken on trial, appellate court must presume that, had complete record been brought before the appellate court, it would appear therefrom that evidence would justify the findings upon which order appealed from was based.

8. Wills ⚿386

Whether the inharmonious relations between testator's wife and testator's daughter by a prior marriage influenced testator in disposing of his property, and, if so, to what extent, was a question for trial court.

9. Appeal and error ⚿1011(1)

The finding of trial court on conflicting evidence is final if reasonably supported.

10. Executors and administrators ⚿20(7)

Evidence warranted refusal to grant letters of administration to testator's daughter by a prior marriage, on ground that testator's will was not obtained by undue influence of testator's wife.

◆

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

In the matter of the estate of S. S. Murphy, deceased, wherein W. S. Kendall, executor, etc., of the estate of Alice K. Murphy, deceased, objected to the petition of Lula Mignon Murphy for letters of administration. From an order refusing the petition of Lula Mignon Murphy for letters of administration, from an order refusing to vacate such order, from findings of fact, and from an order refusing to vacate an order denying sustitution of parties, Lula Mignon Murphy appeals.

Order refusing to grant letters of administration affirmed, and appeals in other respects dismissed.

Lula Mignon Murphy, in pro. per., for appellant.

John R. Cronin, of Stockton, for respondent.

HELD, Justice pro tem.

There is here an appeal from an order refusing appellant's petition for letters of administration, from an order refusing to vacate the order just referred to, from the findings of fact, and from an order refusing to vacate an order denying appellant's application for substitution of parties.

[1, 2] Orders appealable in probate are those designated in section 1240, Probate Code. That section, taken with subdivision 3, section 963, Code Civ.Proc., determines the right of appeal in probate matters. Estate of Olmstead, 216 Cal. 585, 15 P.2d 495; Estate of O'Dea, 15 Cal.2d 637, 104 P.2d 368. The order refusing to grant letters of administration is one of those mentioned in section 1240, Probate Code, and an appeal therefore lies therefrom. None of the other orders from which appellant purports to appeal here are designated in that section.

[3-5] It has been expressly held that there is no appeal from findings of fact. Muchenberger v. City of Santa Monica, 206 Cal. 635, 636, 275 P. 803; Ouzoonian v. Vaughan, 64 Cal.App. 369, 221 P. 958 (on rehearing); Mardesich v. City of Los Angeles, 113 Cal.App. 143, 298 P. 72. Nor is there an appeal from an order refusing to vacate a final judgment, when the grounds upon which the order is sought existed before the entry of judgment, and were therefore available on appeal from the judgment. Nagelmann v. McIntyre, 27 Cal.App.2d 621, 81 P.2d 466; Lawson v. Guild, 215 Cal. 378, 10 P.2d 459. As was said in People v. Palmer, 49 Cal.App.2d 579, 122 P.2d 114: "It also is well established that an order made after judgment is not appealable where the motion or application merely asks the court to repeat or overrule the former ruling on the same facts." Nor, does an appeal lie from an order refusing to vacate an order itself not appealable. Christensen v. Lucerne Holding Co., 134 Cal.App. 215, 25 P.2d 261. The purported appeal arising out of the motion to substitute parties is, therefore, ineffective.

[6] Where an appeal does not lie, the appellate court has no jurisdiction to entertain the same, and may dismiss it on its own motion. Adams v. Christopher, 112 Cal.App. 37, 296 P. 85.

There remains, therefore, to be considered the appeal from the order refusing to grant appellant's petition for letters of administration.

The record here discloses that S. S. Murphy died on February 5, 1936, and left surviving a widow Alice K. Murphy, and appellant, Lula Mignon Murphy, a daughter by a former wife. Alice K. Murphy has since died, and respondent W. S. Kendall was appointed administrator of her estate.

On March 13, 1911, appellant instituted an action against her father, alleging in the complaint that she was a poor person, afflicted with disease, and unable to work to support herself, and that her father was financially able to contribute to her support. Judgment was rendered in that action on March 21, 1912, directing S. S. Murphy to pay to appellant herein the sum of $15 per month from January 5, 1912. In her efforts to realize on this judgment, the daughter instituted several actions prior to the death of her father. A history of the litigation is set forth in the decision of this court in Murphy v. Riecks, 40 Cal.App. 1, 180 P. 15.

Following the death of her father, appellant sought recourse against his estate, in her efforts to recover on the judgment aforesaid. The first action was one instituted on June 24, 1936, against Alice K. Murphy, as administratrix of his estate. It appearing, however, that defendant therein had not been appointed as administratrix, that action was abandoned. Thereupon, appellant, on August 3, 1936, filed a petition praying that Alice K. Murphy be appointed administratrix. She filed a similar petition on January 20, 1938, but the record fails to disclose what disposition was made of either petition. However, on August 10, 1938, appellant filed still another petition, again seeking the appointment of Alice K. Murphy as administratrix. In that proceeding, Alice K. Murphy appeared and declined to accept appointment as administratrix, and filed objections setting forth that S. S. Murphy left no estate, and also that he left a last will and testament, which was then placed on file with the clerk of the court. After a hearing, the court, on September 6, 1938, denied appellant's petition. No appeal was taken from this order. On December 12, 1938, appellant filed a petition seeking her own appointment as administratrix of her father's estate, in which was alleged the denial of the last prior petition, the execution of the will, and that said will was the product of undue influence exerted upon the deceased by Alice K. Murphy. The latter appeared by motion to strike from the files the pleading of appellant last referred to. This motion was granted by the court on April 24, 1939. On May 1, 1939, appellant filed a petition praying the admission of said will to probate, and three days later filed a contest of said will on the ground of undue influence. On June 21, 1939, appellant's petition for probate of the will was denied by the court, without prejudice. The reason for such denial does not appear in the record. However, on June 27, 1939, appellant filed her petition praying that the court vacate the order of June 21, 1939, and, on June 30, 1939, she filed an unverified petition for the issuance of letters of administration to herself; and on July 10, 1939, said petition was amended by the addition of a verification. On the same date, the court vacated its order of June 21, 1939. On October 20, 1939, respondent W. S. Kendall, as executor of the will of Alice K. Murphy, deceased, filed objections to the issuance of letters of administration to appellant. On November 10, 1939, a hearing was had on the petition of appellant and the objection of respondent. After the evidence was taken, the petition was denied by the court on that day. On December 6, 1939, findings were filed, and on December 7, 1939, judgment was entered denying appellant's petition for letters of administration. Prior to the filing of findings and the entry of judgment, the appellant, on November 15, 1939, gave notice of motion, accompanied by supporting papers, to vacate the order of November 10, 1939. After the findings were filed, and the judgment entered, appellant amended the supporting papers, and also added thereto a motion to strike portions of the findings. On December 19, 1939, the court ordered an amendment of the findings, and on December 27, 1939, denied appellant's motion to vacate the order of November 10, 1939.

The petition for letters of administration having been met with an allegation that there was an existing will, the trial court at the time of entering upon the hearing of November 10, 1939, and before the taking of testimony, in accordance with the rule laid down in Re Estate of Edwards, 154 Cal. 91, 97 P. 23, that it is more orderly to postpone the hearing of an application for intestate letters until it be determined whether a known will is or is not valid and admissible to probate, suggested suspension of the proceedings on the petition for letters of administration until a determination as to the validity of the will had been had. As an alternative, the court suggested that if jurisdiction were not involved, and if the petitions on file collectively presented the issue of validity of the will, the matter could, by stipulation of counsel, be heard in the trial then about to begin. Such a stipulation was entered into, and the court proceeded to hear the evidence. Formal proof of the execution of the will was made. Appellant then produced evidence in support of her allegations of undue influence. Respondent also produced evidence on the issue; and, on contradictory evidence, the court found the allegations of undue influence to be untrue, and found, also, that the will was valid in every respect; that it was the last will of deceased, and regularly and duly executed according to law. As a conclusion from these facts, the court determined that the petition of appellant should be denied. The judgment from which an appeal is taken was thereupon entered.

[7] The record upon which the court is now called upon to determine the sufficiency of the evidence to justify the decision of the lower court is brought here by bill of exceptions. This document is authenticated by the certificate of the trial judge, which certificate recites in part that "The foregoing, referred to as a bill of exceptions, contains excerpts from the evidence adduced at the trial." Confronted by the fact, as appears from this certificate, that the record does not contain all the evidence taken on the trial, we must presume that had the complete record been brought before this court, it would appear therefrom that the evidence would justify the findings upon which the order appealed from is based. Foster v. Young, 172 Cal. 317, 156 P. 476.

[8-10] However, we have carefully examined the evidence which is included in the bill of exceptions, and we find therein not the slightest indication that the beneficiary of the will attempted to influence the testator in its execution; indeed, it does not even appear that she had knowledge of the existence of the document prior to the death of her husband. There is some evidence given by appellant that the relations between herself and Mrs. Murphy were not harmonious, but whether this situation influenced the testator in disposing of his property, and if so, to what extent, was a question for the trial court. At the most, there was a conflict of evidence, on which the finding of the trial court is final, if reasonably supported. Homer Laughlin Engineers Corp. v. J. W. Leavitt & Co., 116 Cal.App. 197, 2 P.2d 511.

The appeals from the findings of fact, from the order denying the motion to vacate the order refusing to grant letters of administration to appellant, and from the order denying appellant's motion to vacate the denial of her application for substitution of parties, are each dismissed. The order refusing to grant letters of administration to appellant is affirmed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

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50 Cal.App.2d 492

PEOPLE v. SCRANTON.

Cr. 2218.

District Court of Appeal, First District, Division 2, California.

March 17, 1942.

1. Criminal law 🔑1177

Where defendant who had pleaded guilty to second-degree burglary on application for probation admitted two prior convictions of burglary and of attempt to commit burglary and court entered order granting probation which order was revoked for violation of the probation and thereafter court entered a judgment of conviction, alleged error in granting probation did not prejudice defendant. Pen.Code, § 1203.

2. Criminal law 🔑1023(12)

Where defendant who had pleaded guilty to second-degree burglary in application for probation admitted two prior convictions, and court entered an order granting probation and thereafter revoked the order for violation of the probation and entered a judgment of conviction, and no appeal was taken from the judgment, defendant could not appeal from order denying motion to vacate the judgment since neither order granting probation, nor order revoking probation nor the judgment was void and defendant should have sought his remedy by appeal from the judgment. Pen.Code, § 1203.

3. Criminal law ⚿=1023(12)

Ordinarily a party who has a right to appeal from judgment or order is not allowed to move to set it aside and then appeal from an order denying his motion.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Lester Scranton was convicted of second-degree burglary and appeals from an order refusing to vacate the judgment of conviction.

Affirmed.

Lester Scranton in pro. per.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Defendant made a motion to vacate a judgment of conviction previously entered, under which judgment he had been sentenced to state prison. His motion was denied and he filed a written notice of appeal stating that he appealed "from the order denying defendant's substantial rights." We will assume for the purpose of this discussion that said notice of appeal was sufficient as a notice of appeal from the order denying defendant's motion to vacate the judgment of conviction.

In 1939, defendant entered a plea of guilty to a charge of burglary. The degree was fixed as second degree and defendant applied for probation. While defendant had not been charged with any prior convictions, he admitted on the hearing of his application for probation that in 1927 he had been convicted of the crime of attempt to commit burglary and had served a term therefor in the state prison at San Quentin and that in 1935, he had been convicted of the crime of burglary and had served a term therefor in the state prison at Walla Walla, Washington. The trial court nevertheless entered its order granting probation to defendant for a period of five years, and further ordered, as a condition of probation, that defendant be confined in the county jail for one year. Defendant was so confined in the county jail but after his release therefrom, he violated his probation and a motion was made for the revocation thereof. On April 25, 1941, a hearing was had and motion to revoke probation was granted. A judgment of conviction was entered on the same day sentencing defendant to the state prison. No appeal was taken from said judgment.

[1] Defendant's motion to vacate said judgment was filed on November 5, 1941. It was stated therein that the motion was made upon the ground "That the trial court was without jurisdiction to sentence the defendant to the state prison by revoking a null and void order of probation and using null and void order of probation as basis for a valid judgment." Defendant's claim that the order granting probation was null and void was based upon the fact that he had suffered the above-mentioned prior convictions and was therefore not entitled to probation. We may assume, without deciding, that the trial court erred in granting probation under the circumstances, Penal Code, section 1203, but it is difficult to understand how defendant was prejudiced by such alleged error or how he can now be entitled to any relief based upon the claim that he was erroneously granted favorable action upon his own application for probation when he was not entitled to such favorable action.

[2, 3] We believe, however, that the complete answer to defendant's position on this appeal is that, upon the face of the record, neither the order granting probation, nor the order revoking probation, nor the judgment of conviction was void, and if defendant felt that any prejudicial error had been committed in the proceedings, he should have sought his remedy by an appeal from the judgment of conviction. He did not do so but long after the time for appeal from said judgment had expired, he made his motion to vacate said judgment. "Ordinarily a party who has a right to appeal from a judgment or order is not allowed to move to set it aside and then appeal from an order denying his motion." 8 Cal.Jur. 495, sec. 510; see, also, People v. Zolotoff, 48 Cal.App.2d 360, 119 P.2d 745; People v. Flohr, 30 Cal.App.2d 576, 86 P.2d 862; People v. Simpson, 41 Cal.App.2d 526, 107 P.2d 262; People v. Carkeek, 35 Cal.App.2d 499, 96 P.2d 132. While there are certain exceptional circumstances, as indi-

cated in the cited cases, under which such a motion may be entertained by a trial court and an appeal will lie from an order of denial, we find nothing in the instant case showing such exceptional circumstances.

The order appealed from is affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

GEORGE et al. v. BURDUSIS et al.*

Civ. 6630.

District Court of Appeal, Third District, California.

March 13, 1942.

Rehearing Denied April 11, 1942.

Hearing Granted May 11, 1942.

1. Good will 🔑6(1)

Although sale of good will of a business carried with it expectation on part of buyer of continued public patronage, seller had right to engage in a rival business, in absence of a restrictive agreement. St.1941, p. 702, § 14100.

2. Good will 🔑6(1)

The right of seller of good will of a business to engage in a rival business, in absence of a restrictive agreement, included right to seek trade by any honest method and to deal with old customers who chose to trade with him, but seller would not be permitted to canvass directly the old customers, endeavoring to dissuade them from dealing with the purchaser of the good will and soliciting them to trade with him. St. 1941, p. 702, § 14100.

3. Good will 🔑6(1)

Where bill of sale of linen supply business executed by one of partners to his copartners expressly reserved right of seller to solicit former customers of the firm, the words "former customers" included customers of partnership at date of transfer, as against contention that words included only those who had been customers at one time but were no longer such at date of the transfer, since withdrawal of one of partners wound up the partnership affairs, and anyone who had theretofore patronized it was its former customer. Civ.Code, § 2424.

See Words and Phrases, Permanent Edition, for all other definitions of "Former Customer".

4. Partnership 🔑230

A member of partnership conducting a linen supply business, who sold good will of the business to his copartners pursuant to a bill of sale expressly reserving right of seller to solicit former customers of the firm, was within his rights when he solicited former customers of the firm, and, hence, copartners were not entitled to an injunction restraining seller from soliciting former customers. St.1941, p. 702, § 14100; Civ.Code, § 2424.

5. Injunction 🔑56

Where a member of partnership conducting a linen supply business sold good will of the business to his copartners pursuant to a bill of sale expressly reserving right of seller to solicit former customers of the firm, seller's brother, who had been an employee of the firm before seller's withdrawal therefrom, and thereafter so continued, would be enjoined upon leaving employment of the firm from using information concerning firm's patrons in soliciting patrons for a rival company established by seller, notwithstanding that firm had not directly furnished him with a list of patrons. St.1937, p. 260, § 2860.

6. Injunction 🔑56

If a person establishes a trade or business which depends for its continuance upon keeping secret the names of customers, an agent or employee having been intrusted with such secrets in the course of his employment may not thereafter utilize his secret knowledge against the interests or to the prejudice of such person.

7. Appeal and error 🔑1011(1)

Where there is a substantial conflict in the evidence upon a question of fact, trial court's action will not be disturbed.

8. Injunction 🔑56

Fact that names of customers of a linen supply company solicited by a former employee were to be found in telephone directory and were otherwise available generally to public, did not establish that their identity was not of a confidential nature, or preclude company from right to an injunction enjoining employee from soliciting customers. St.1937, p. 260, § 2860.

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* Subsequent opinion 130 P.2d 399.

9. Torts 🔑21

Where former employee of linen supply company solicited company's customers in behalf of a rival company operated by his brother, but jury found on conflicting evidence that former employee and his brother did not enter into a conspiracy to deprive company of its customers, employee's brother could not be held responsible for acts of employee in soliciting company's customers. St.1937, p. 260, § 2860.

10. Injunction 🔑197

In an action for injunctive relief to prohibit interference by a former employee with confidential business relations affecting individual customers of linen supply company, damages were allowable as incidental to the injunctive relief.

11. Injunction 🔑197

In action for injunctive relief to prohibit interference by a former employee with confidential business relations affecting individual customers of a linen supply company, where undisputed testimony showed that through efforts of former employee plaintiff company lost over 100 customers on a route serving 150, trial court's findings that plaintiff company suffered no financial loss, and hence was not entitled to money damages as incidental to the injunctive relief, were not supported by the evidence.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Peter George and another against Aleck Burdusis and another for an injunction to restrain unfair competition and for damages, wherein the named defendant interposed a cross-complaint. From a judgment denying relief both upon the complaint and the cross-complaint, the plaintiffs alone appeal.

Affirmed in part and reversed in part with directions.

Joseph A. Brown and A. E. Cross, both of San Francisco, for appellants.

Marvin E. Lewis, of San Francisco, for respondents.

HELD, Justice pro tem.

Plaintiffs and defendant, Aleck Burdusis, were at one time co-partners, but are now rivals in business. Defendant, Tom Burdusis was formerly in the employ of plaintiffs, but at the commencement of this action he was an employee of his co-defendant, Aleck Burdusis.

In the complaint herein, plaintiffs charge defendants with unfair competition, and seek injunctive relief, and damages. The defendant, Aleck Burdusis, interposed a cross-complaint, alleging that due to certain activities on the part of plaintiffs, and false representations made by them, he suffered loss of business and consequent damage. The trial court denied plaintiffs' prayer for an injunction and damages, and also denied relief on the cross-complaint. Plaintiffs alone appeal.

The record discloses that for some years prior to November 16, 1934, the plaintiffs and the defendant Aleck Burdusis were co-partners, operating under the trade name of "Stone's Linen Supply Company," and engaged in the business of supplying to meat markets, grocery stores and similar establishments, laundered aprons, gowns and towels, delivery of which was made at the customers' place of business at regular intervals, and over designated routes, by employees of the company. On November 16, 1934, defendant Tom Burdusis, a brother of said co-defendant, was, and for some three years prior thereto had been, one of the employees so engaged. Differences between the members of the co-partnership culminated, on or about November 16, 1934, in a sale by Aleck Burdusis, to plaintiffs, of his interest in the firm. The bill of sale evidencing the transaction included among the property transferred, the good-will of the business, and also the vendor's interest in four route books. Apparently one of these books was assumed to be in the possession of the vendor, for the bill of sale required him "to deliver up the route book in his possession." In the bill of sale was also a provision, as follows:

"The vendor does not agree not to engage in the same or a similar business in San Francisco, Oakland, or elsewhere, nor that he will not solicit former customers of said firm for business."

Following the transfer by Aleck Burdusis to plaintiffs, the latter carried on under the same firm name the enterprise in which Stone's Linen Supply Company had theretofore been engaged. Defendant Aleck Burdusis entered into a similar business under the name of "A B C Linen Supply Company." Defendant Tom Burdusis, however, continued in the employ of plaintiffs until January 18, 1935. On the following day, he accompanied his brother Aleck Burdusis over the route that the former had theretofore served for plaintiffs. They together called upon certain of plaintiffs' customers on that route, and on succeeding days defendant Tom Burdusis alone called on other customers on the route. On the calls so made by defendants, the customers of plaintiffs were solicited to give their business to defendant Aleck Burdusis. Such solicitation resulted in the loss of customers to plaintiffs.

It is obvious that the same principles of law do not apply to both defendants here. The obligations of defendant Aleck Burdusis arise out of his membership in the firm, and the sale of his interest therein to plaintiffs, while the obligations of defendant, Tom Burdusis, arise out of his relationship to plaintiffs as an employee.

[1, 2] The sale of the good-will of the business by defendant, Aleck Burdusis, to the plaintiffs, carried with it the expectation on the part of the latter of continued public patronage. Business & Professions Code, St.1937, p. 1229, § 14100, as added by St.1941, p. 702. In the absence of a restrictive agreement, the seller had the right to engage in a rival business. Diller v. Schindler, 88 Cal.App. 250, 263 P. 277. This included the right to seek trade by any honest method, and to deal with old customers who chose to come and trade with him. He would not be permitted to canvass directly the old customers, endeavoring to dissuade them from dealing with the purchaser of the good-will and soliciting them to trade with him. 24 Am.Jur. 817; Gibbons v. Hansch, 185 Minn. 290, 240 N.W. 901, 82 A.L.R. 1027; 13 Cal.Jur. 53.

[3] Here, the bill of sale, however, provided in effect that the vendor reserved the right to "solicit former customers of said firm for business." To that extent, the implied obligation arising out of the sale of the good-will was modified. Appellants contend that the word "former" as used in the bill of sale, includes only those who had been customers at one time, but were no longer such at the date of the transfer. We cannot agree with this contention. Here, the partnership was dissolved by the withdrawal of defendant Aleck Burdusis therefrom, and while this would not ordinarily effect a termination of the partnership, it did so in this case. Here, the withdrawal brought about not only a dissolution of the partnership, but wound up the partnership affairs, and therefore terminated the relationship. Civil Code, § 2424. The entity having gone out of existence, those who had theretofore patronized it were its "former customers." Any other construction would render meaningless the reservation of the right to solicit. As so construed, the word "former" is used in 24 Am.Jur. 817, note 1, and at page 811, note 12; also by the Supreme Court of California in Langendorf United Bakeries v. Phillips, 5 Cal.2d 150, at page 153, 53 P.2d 363.

In view of the express language of the bill of sale, reserving the right to solicit former customers, it cannot be said that the transfer of the route books was inconsistent with the right reserved.

[4, 5] It is our conclusion that respondent, Aleck Burdusis, was within his rights when he solicited the former customers of Stone's Linen Supply Company on behalf of his rival business. From the conclusion thus arrived at, it does not follow, however, that defendant, Tom Burdusis, had a right to do likewise. He had been an employee of the firm before his brother's withdrawal therefrom, and thereafter so continued. As such employee, and in the course of such employment, and by virtue thereof alone, he gained certain information concerning the patrons of his employer, and this information he used to the latter's prejudice. The information which he so acquired was property of his employer. Section 2860, Labor Code, St.1937, p. 260, provides that aside from compensation due him from the employer, everything which an employee acquires by virtue of his employment belongs to the employer.

The leading case upon the question here involved is Empire Steam Laundry v. Lozier, 165 Cal. 95, 130 P. 1180, 44 L.R.A.,N.S., 1159, Ann.Cas.1914C, 628, where the court held that an agent has no right to use information obtained by him in the course of his employment and for the benefit of his employer, against the interest of the latter. Such use, the court said, was contrary to the good faith of the employment. There, the court quoted with approval from Witkop & Holmes Co. v. Boyce, 61 Misc. 126, 112 N.Y.S. 874, 878, where it was said that equity will restrain acts such as those here committed by defendants, and that this jurisdiction "arises out of a violation of duty having its origin in the relation of employer and employed, and an implied contract that an employé will not divulge confidential knowledge gained in the course of his employment, or use such information to his employer's prejudice."

[6] In 14 Cal.Jur., at page 198, it is said: "If a person establishes a trade or business which depends for its continuance upon keeping secret the names of customers * * * no agent or employee having been intrusted with such secrets in the course of his employment may thereafter utilize his secret knowledge against the interests or to the prejudice of such person. If he does so, he is said to rob his employer."

In Santa Monica Ice & Cold Storage Co. v. Rossier, 42 Cal.App.2d 467, 109 P.2d 382, 384, the case of Empire Steam Laundry v. Lozier, supra, was referred to, and the court said: "The leading case in this state on the subject, Empire Steam Laundry v. Lozier * * * has been followed repeatedly, and no authority to the contrary is cited. The later cases, such as Gloria Ice Cream, etc., Co. v. Cowan, 2 Cal.2d 460, 41 P.2d 340, and Langendorf United Bakeries v. Phillips, 5 Cal.2d 150, 53 P.2d 363, complete an unanimous adherence to the rule."

Other cases, in addition to those contained in the above quotation, which follow the rule laid down in the Empire Steam Laundry case, are: Cornish v. Dickey, 172 Cal. 120, 155 P. 629; New Method Laundry Co. v. MacCann, 174 Cal. 26, 161 P. 990, Ann.Cas.1918C, 1022; Mackechnie Bread Co. v. Huber, 60 Cal.App. 539, 213 P. 285; Pasadena Ice Co. v. Reeder, 206 Cal. 697, 275 P. 944, 276 P. 995; Golden State Milk Products Co. v. Brown, 217 Cal. 570, 20 P.2d 657; Dairy Dale Co. v. Azevedo, 211 Cal. 344, 295 P. 10; Scavengers' Protective Ass'n v. Serv-U-Garbage Co., 218 Cal. 568, 24 P.2d 489.

The factual situation in Gloria Ice Cream & Milk Co. v. Cowan, 2 Cal.2d 460, 41 P.2d 340, is similar to that in the case at bar. The decision there also disposes adversely to respondents of their contention, based on the case of Avocado Sales Co. v. Wyse, 122 Cal.App. 627, 10 P.2d 485, that knowledge of customers obtained under the circumstances shown here does not constitute information of a secret or confidential nature.

Respondents here place much stress upon the finding of the trial court that Tom Burdusis did not receive a list of customers from his employer. We find in none of these cases, as a requisite to relief, that the employee must have received directly from the hands of the employer a list of customers. While in many of the cases that have come before the courts, such a list was furnished the employee, none of these cases have turned upon that circumstance. In Pasadena Ice Co. v. Reeder, supra, the decision rested entirely upon the fact that the information was received by the employee in the course of his employment. In Dairy Dale Co. v. Azevedo, supra, it does not appear that a list of customers was furnished the employee, yet he was restrained. The same was true in Gloria Ice Cream & Milk Co. v. Cowan, supra. The case of Woolley's Laundry, Inc., v. Silva, 304 Mass. 383, 23 N.E.2d 899, 126 A.L.R. 752, cited by respondents, is recognized by the author of the note following it to be at variance with the rule in this state.

[7] Furthermore, the finding that defendant, Tom Burdusis, did not receive any confidential knowledge or information as to the customers of plaintiffs from his employers, is not borne out by the evidence. We are not unmindful of the well established rule that where, upon a question of fact, there is a substantial conflict in the evidence, the action of the trial court will not be disturbed. Clark v. Abrams. 49 Cal.App.2d 497, 121 P.2d 750. Here, however, there is no conflict in the evidence. The defendants themselves testified, and this was not contradicted, that when defendant, Tom Burdusis, was first employed by Stone's Linen Supply Company, his brother, Aleck Burdusis, one of his employers, took him over the route for a period of two weeks and taught him the names of the customers. Some of these customers subsequently were lost, but others were added through the efforts of Tom Burdusis while in the employ of Stone's Linen Supply Company, under which name plaintiffs continued to operate after the withdrawal of Aleck Burdusis from the firm.

[8] It is also the contention of respondents that because the names of the customers solicited by Tom Burdusis were to be found in the telephone directory, and were otherwise available to the general public, their identity is not of a confidential nature. But this contention is disposed of by our Supreme Court in Dairy Dale Co. v. Azevedo, supra, quoting in part from Pasadena Ice Co. v. Reeder, supra, in the following language:

"Obviously it is not merely the knowledge of the identity of the customers, but the friendly contact with them, which is important to the solicitors: '* * * They became personally acquainted with the customers * * * their respective places of residence, their peculiar likes and fancies and other characteristics, a knowledge of which would greatly aid them in securing and retaining the business of said former customers.'"

It is to be noted, too, that the trial court here found that "the business of serving customers is purely personal to the route man, and is obtained and held chiefly as a matter of friendly feeling between the customers and the man on the route."

[9] The finding challenged by appellants, that respondents did not enter into a conspiracy to deprive plaintiffs of their customers, was based by the trial court upon conflicting evidence. We are therefore bound by it. It follows that respondent Aleck Burdusis is not to be held responsible for the acts of Tom Burdusis.

The judgment as to respondent, Tom Burdusis, must be reversed.

[10] Respondents contend, also, that in an action such as this, damages may not be recovered. They cite Olschewski v. Hudson, 87 Cal.App. 282, 262 P. 43, and Adkins v. Model Laundry Co., 92 Cal.App. 575, 268 P. 939, 941. Neither of these cases support their contention. In the former case it was held that section 3336, Civil Code, merely purports to fix the measure of damages in a proper case, but does not give a right of action where none existed otherwise. In the Adkins case, it is expressly stated that the case "was not an equitable action for injunctive relief to prohibit interference with the good will of a business, or confidential business relations affecting individual customers of a particular laundry route, under which circumstances damages are merely incidental to the injunctive relief which is sought." The case here is just such an action as the Adkins case was not. Damages are incidental to the injunctive relief sought. Union Oil Co. v. Reconstruction Oil Co., 20 Cal.App.2d 170, 66 P. 2d 1215.

[11] The findings of the trial court that plaintiffs suffered no damage is not supported by the evidence, in view of the undisputed testimony that through the efforts of respondent, Tom Burdusis, alone, plaintiff lost over one hundred customers, on the route serving one hundred and fifty. It is inconceivable that this loss of business resulted in no financial loss to appellants.

The judgment as to respondent, Aleck Burdusis, is affirmed, and as to respondent, Tom Burdusis, the judgment is reversed, and remanded to the trial court, with directions to issue the injunction against respondent, Tom Burdusis, as prayed for, and to try the issue as to the amount of damages suffered by appellants by reason of the acts of said respondent, Tom Burdusis.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

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50 Cal.App.2d 460

PEOPLE v. TRACY.

Crim. 1790.

District Court of Appeal, Third District, California.

March 13, 1942.

Hearing Denied April 9, 1942.

1. Criminal law 🔑741(1), 742(1)

The weight of evidence and credibility of witnesses are for jury.

2. False pretenses 🔑51

In prosecution for making, uttering, and passing a check with intent to defraud payee of a sum of money, defendant's guilt was for jury. Pen.Code, § 476a.

3. Indictment and information 🔑176

The general rule with respect to proof of time when an offense is committed is that there is no "fatal variance" from the allegation that it was committed on a particular date, to show that it was actually committed on or about or near that date unless the variance results in misleading defendant so as to prevent him from making his defense to the charge or to deprive him of the benefit of a plea of former jeopardy in event of another trial for the same offense.

See Words and Phrases, Permanent Edition, for all other definitions of "Fatal Variance".

4. Indictment and information 🔑176

An information charging that accused uttered and passed a check "on or about

September 4, 1941", with intent to defraud payee was not at "fatal variance" with proof showing that accused actually passed the check on date named or within a day or two thereof. Pen.Code, § 476a.

5. Criminal law ⇐678(1)

In prosecution for making, uttering, and passing a check, "on or about September 4, 1941", with intent to defraud payee, refusal to direct prosecution to elect to designate the exact date upon which it relied in proof of the commission of the offense was not error. Pen.Code, § 476a.

6. Criminal law ⇐829(1)

A requested instruction which was covered by instruction given was properly refused.

7. Criminal law ⇐772(4)

In prosecution for uttering and passing a check "on or about September 4, 1941", with intent to defraud payee, instruction that it was not necessary for prosecution to prove the commission of offense on September 4, 1941, but proof of commission by defendant at any time on or about that date and within three years of filing of information was sufficient, was proper. Pen.Code, § 476a.

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Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

George Tracy was convicted of making, uttering, and passing a check with intent to defraud the payee, and he appeals from an order denying his motion for new trial.

Order denying motion for new trial affirmed.

Gilbert Moody, of Turlock, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

THOMPSON, Acting Presiding Justice.

The defendant was charged and convicted, under Section 476a of the Penal Code, with making, uttering and passing to Alex Kamarenos his check on the Merced Branch of the Bank of America, for the sum of $15, with intent to defraud said payee of that sum of money. The check was dated September 4, 1941. A motion for new trial was denied. On application for probation the judgment was suspended and the defendant was admitted to probation on condition that he serve a term of six months in the Stanislaus County Road Camp. From the order denying the motion for new trial this appeal was perfected.

The defendant resides at Turlock. He was engaged in buying and selling fruit. Alex Kamarenos and Sam Sagres were partners engaged in raising fruit on a farm near Modesto. On August 6, 1941, Mr. Sagres sold the defendant thirty boxes of tomatoes, for which he paid cash. On or about Thursday, September 4th, the defendant again called at the Modesto farm, and purchased from Alex Kamarenos twenty boxes of tomatoes, for which he paid $15 in the form of a check drawn on the Merced Branch of the Bank of America. The check was written by the defendant in the presence of Kamarenos on the bank form in the handwriting of the defendant. The blank checks were printed on a form which read, "Modesto Branch, Bank of America." The word "Modesto" was scratched out, and the name "Merced" was written over that word. That transaction took place at the farm near Modesto early in the morning on or about September 4, 1941. Mr. Kamarenos said in that regard: "He (the defendant) came early in the morning between 6 and 7, maybe 8." His partner, Mr. Sagres, was not there on that occasion. He further testified through an interpreter regarding the defendant's writing of the check:

"Q. Did he ask you who to make the check out to? A. Mr. Kamarenos said to make the check out to Sagres but apparently Mr. Tracy didn't wish to, so he made it out to Mr. Kamarenos' name.

"Q. Did he ask you how to spell your name? A. Yes, he did.

"Q. Did he write the check out in front of you? A. Right in front of him (Mr. Kamarenos) yes, sir.

"Q. Does this appear to be the check (showing)? A. Yes, this is the check.

"Q. How much were those tomatoes? A. They were 75 cents a box, or $15 for the whole lot."

The check was presented for payment to the Merced Branch of the Bank of America on September 11th. Payment was refused on the ground that the defendant had no funds in that bank. The assistant cashier testified that the defendant never had an account in that bank.

To show the defendant's intention to defraud Kamarenos, another small check for $3, which was drawn in favor of H. Oletta, on September 2, 1941, on that same bank, was received in evidence. That check was also refused payment on the same ground. It was in the same handwriting.

The information was then filed against the defendant, charging him with making, uttering and delivering the $15 check to Alex Kamarenos, "on or about" September 4, 1941, with intent to defraud him of that sum of money. The defendant was found guilty as charged.

It is contended the verdict and judgment are not supported by the evidence, and that the order denying defendant's motion for a new trial was therefore erroneously denied. The chief assertion, in that regard, is that the defendant established a complete alibi by proving he was in and about Sonoma from September 2d to the 5th day of that month, and that he therefore could not have uttered, published or passed the check in question at Merced "on or about" September 4th. A reversal of the order denying a new trial is sought on the ground that the court erred in refusing to give to the jury two instructions to the effect that unless the prosecution proved that the check was written and passed on the 2d, 3d, 4th or 5th day of September, the defendant must be acquitted.

[1, 2] There appears to be no reasonable doubt of the identity of the defendant as the man who uttered and passed the $15 check. He was engaged in the business of buying and selling fruit. He had purchased thirty boxes of tomatoes from Mr. Kamarenos' partner at that same farm about two weeks previous to this transaction. Kamarenos testified that the defendant bought the tomatoes from him about that date, and wrote the check in his presence. After the arrest of the defendant, Kamarenos visited the jail and promptly identified him among several other prisoners. Mr. Sherwood Morrill, a handwriting expert from the State Division of Criminal Identification, testified from an examination of the two fictitious checks, as compared with several documents which were acknowledged to have been written by the defendant, that the checks were written by him. He said in that regard: "In my opinion they were written by the same person." It is true that the defendant denied writing or passing the check in question. He denied that he purchased tomatoes from Mr. Kamarenos on September 4th, or at any other time. In fact, he denied ever having seem him before the time when he met him in jail after his arrest. But those denials are contradicted by the evidence which was adduced at the trial. The weight of evidence and the credibility of the witnesses are questions for the determination of the jury. Those issues were decided against the defendant. We have no power to disturb their conclusions in that regard.

The time of the commission of the offense was sufficiently established as on or about September 4, 1941, which is the date the fictitious check bears. A portion of the testimony of Mr. Kamarenos, which was taken at the preliminary examination, was read in evidence at the trial, from which it appears the tomatoes were sold to the defendant "on or about the date this check was dated, September 4th." He was asked that question and replied "yes." He was further asked, "How long after you got the check did you give it to Mr. Honeycutt? * * * A. It was about a week or over, or may be a day less." Mr. Honeycutt accepted the check as part payment for rent which was due from the partners on the ranch where the tomatoes were produced. Honeycutt testified he received the check September 10th. It was actually presented to the bank for payment on September 11th. That evidence corroborates the first statement of Mr. Kamarenos that he received the check from the defendant "on or about" September 4th. He was uncertain regarding the exact date, but the evidence is entirely satisfactory that it was written and delivered to him by the defendant within one or two days of the date which it bears. That evidence is sufficient under the circumstances of this case to conform to the requirement of the law in that regard.

[3] The general rule, with respect to proof of the time when an offense is committed, is that there is no fatal variance from the allegation that it was committed on a particular date, to show that it was actually committed on or about or near that date, unless the variance results in misleading the defendant so as to prevent him from making his defense to the charge or to deprive him of the benefit of a plea of former jeopardy in the event of another trial for the same offense. People v. Becker, 140 Cal.App. 162, 35 P.2d 196; People v. Ralls, 21 Cal.App.2d 674, 70 P.2d 265; People v. Harrington, 92 Cal.App. 245, 254, 267 P. 942; 23 C.J.S., Criminal Law, § 1196a, p. 746. In the text last cited it is said in that regard: "Ordinarily, however,

where time is not an essential and material element of the offense, an instruction as to the time should limit it to a date anterior to the date of the filing of the indictment or information, and within the limits included in the statute of limitations applicable to the offense charged, and should fix the time covered by the statute. Subject to this rule, it is proper to instruct that it is sufficient to prove that the crime was committed at or about the time alleged, or within a given period before the filing of the indictment or information."

In the present case the information charged the defendant with uttering and passing the check in question "on or about September 4, 1941." The evidence is convincing that he actually passed the check on the date named, or within a day or two thereof. If there is a doubt regarding the exact date, the defendant was not misled thereby or deprived of the benefit of his effort to prove an alibi. He introduced evidence tending to show that he was in or near Sonoma, at a distance of about 160 miles from Merced, on September 2d, 3d and 4th. He claimed he did not return to Merced County until September 5th. He was given notice at Sonoma by a traffic officer, September 4th, at 7:30 o'clock p. m., requesting him to have a defective tail-light corrected. It is not suggested how additional evidence upon the subject of his defense of an alibi could have benefited him even if the check were actually delivered within a day or two either before or after the 4th of September. The jury evidently considered all of the evidence which could have been adduced on the subject of an alibi. It was exclusively their province to determine the weight of that evidence and the credibility of the witnesses.

[4] Defendant's proof of the alibi is not conclusive. The fact that he drew the check and delivered it on or about September 4th is very convincingly shown by the evidence. Assuming that he was at Sonoma on the 2d and 3d of September does not preclude the possibility of his having returned to his home on the night of the 3d. Mr. Kamarenos testified that he purchased the tomatoes very early in the morning, "between 6 and 7, maybe 8" o'clock. Mrs. Ponton of Sonoma testified that she thought the defendant called at their home on September 4th "before noon." She fixed no definite time. When she was asked, "You recall what time of day he first came there on Thursday?" she replied, "Well, it was before noon." It thus appears that the defendant might have accepted delivery of the tomatoes at Merced at 6 or 7 o'clock that morning and he would have been able to reach Sonoma before noon. Or it may be true that the defendant actually delivered his check on the morning of September 6th, and that he inadvertently or purposely antedated it as of September 4th. Those were questions for the determination of the jury. In either event there was not a fatal variance from the allegations of the information.

[5] It was not error for the court to refuse to direct the prosecution to elect to designate the exact date upon which it relied in proof of the commission of the offense.

[6, 7] The court did not err in refusing to give to the jury defendant's proposed instructions numbers 9 and 10, which were refused on the ground that they were covered by instruction number 12, which was given to the jury. The rejected instructions directed the jury to acquit the defendant unless they found that the offense was committed "on September 2d, or 3d, or 4th, or 5th of the year 1941," or unless they found the offense was committed "on September 4th, 1941, or in close proximity thereto." The last-mentioned instruction was proper, but it was fully covered by instruction number 12 which was given to the jury in the following language: "It is not necessary for the prosecution to prove the commission of the offense on September 4th, 1941, but proof of its commission by the defendant at any time on or about that date and within three years of the filing of the information is sufficient."

Under the circumstances of this case the foregoing instruction was a correct declaration of the law. Under the authorities previously cited, instruction number 10 was properly rejected. The other rejected instruction was fully covered by the last-mentioned one.

The order denying the motion for new trial is affirmed.

TUTTLE, J., and STEEL, Justice pro tem., concurred.

BUSINESS MANAGEMENT CORPORATION v. DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF LABOR STATISTICS AND LAW ENFORCEMENT, CAL., et al.

Civ. 13500.

District Court of Appeal, Second District, Division 2, California.

March 6, 1942.

Hearing Granted May 4, 1942.

1. Licenses ⚿11(7)

"Place" as used in statute governing licensing of employment agencies, providing that no license shall protect "any place other than that designated in the license", means a place or places actually occupied either continually or at regular periods by a person or corporation or his or its clerks for the purpose of conducting a business, but a place where business is occasionally transacted not at stated periods is not properly termed a "place of business". St.1937, p. 234, § 1593.

> Every step in a long, complicated financial or commercial transaction is a "business" but when used in connection with the phrase "carry on business" a repetition of acts is indicated, the sum of which constitute the "business".
>
> See Words and Phrases, Permanent Edition, for all other definitions of "Carrying on Business", "Place", "Place of Business", and "Business".

2. Licenses ⚿29

A motion picture employment agency maintaining a permanent office in Beverly Hills did not have its "place of business" within the city of Los Angeles so as to be required to pay the higher statutory license fee applicable to cities of such size because its agents were required to visit the various studios and other places in Los Angeles for the purpose of securing employment for their clients where such transactions were merely incidental to the conduct of the agency's business in Beverly Hills. St.1937, p. 230 et seq., § 1550 et seq.; St.1939, p. 2111, § 1588; St.1937, p. 234, § 1593.

◆

Proceeding in mandamus by the Business Management Corporation against the Department of Industrial Relations, Division of Labor Statistics and Law Enforcement of the state of California and others to compel issuance of a license to conduct an employment agency.

Writ granted.

Hanna & Morton and Gang & Kopp, all of Los Angeles, for petitioner.

L. L. Schaumer, of Los Angeles, and Charles Dreyfus and Fred G. Goldsworthy, both of San Francisco, for respondents.

McCOMB, Justice.

This is a proceeding in mandamus to compel respondents to grant petitioner a license to conduct business as a motion picture employment agency in the city of Beverly Hills.

The material facts are:

January 26, 1942, petitioner filed with respondents an application for an agency license to conduct business as a motion picture employment agency in the city of Beverly Hills pursuant to the provisions of the Labor Code of California, division II, part 6, chapter 1, St.1937, p. 230 et seq. The city of Beverly Hills has a population in excess of 25,000 and not exceeding 100,000 people.

In the form of application furnished petitioner by respondents was the query, "Places where agency will operate," which question petitioner answered as follows: "Your applicant maintains a suite of offices which are utilized by applicant in the pursuit of said occupation and the rendition of said services at 9484 Wilshire Boulevard, Beverly Hills, California, and the applicant's business will be conducted and transacted at said offices. The applicant on an average of several times a week will call on behalf of its clients at RKO motion picture studios, Paramount motion picture studios, and other motion picture studios in the City of Los Angeles and at motion picture studios located elsewhere in the County of Los Angeles at such localities as Culver City and upon employers of motion picture artists wherever such employers may be found and interviewed, in places of business other than the premises of applicant, in hotels, restaurants or private homes in any locality in the State of California for the purpose of securing and negotiating employment for clients represented by applicant, and occasionally at such motion picture studios or elsewhere on locations where motion pictures are being produced, for the purpose of counseling or advising with said clients in connection with the rendition of artistic services by them at such places under existing contracts of employment."

In addition to filing with respondents the aforesaid application petitioner delivered to them a check in the sum of $50 in payment of the annual license fee. January 28, 1942, respondents denied petitioner's request for a license on the ground that petitioner, under the foregoing statement as to where it would conduct its business, intended to conduct its business in the city of Los Angeles, which had a population of over 100,000 people, and, therefore, the annual license fee would be $100 pursuant to the provisions of section 1588 of the Labor Code, as amended by St.1939, p. 2111, which reads thus:

"*Fees for licenses and renewals.* Every employment agency shall pay to the Labor Commissioner annually at the time a license is issued or renewed a license fee of:

"(a) One hundred dollars in cities having a population of over one hundred thousand.

"(b) Fifty dollars in cities having a population of over twenty-five thousand and not exceeding one hundred thousand.

"(c) Ten dollars in all other places.

"All figures as to population shall be based on the latest United States Government census."

This is the sole question necessary for us to determine:

If petitioner conducted its business as set forth under the above statement of facts, would its place of business be in the city of Los Angeles?

This question must be answered in the negative. Section 1593 of the Labor Code reads in part thus: "No license shall protect any other than the person to whom it is issued nor any place other than that designated in the license. * * *"

[1] The word "places" used in section 1593 of the Labor Code, supra, means a place or places actually occupied either continually or at regular periods by a person or corporation or his or its clerks for the purpose of conducting a business. If business is transacted at a place occasionally but not at stated periods, it is not properly termed a place of business. (R. V. Smith Supply Co. v. Black, 43 N.M. 177, 88 P.2d 269, 270; Stephenson v. Primrose, 8 Port., Ala., 155, 33 Am.Dec. 281, 287; Arram v. Walters, 1936, 2 All England Law Reports Annotated, 959; Kirkwood v. Gadd, [1910] App.Cas. 422, 431.)

In Arram v. Walters, supra, an action was brought by an agent to recover a commission payable for the securing of employment by an employment agency. It was alleged by way of defense that the contract was unenforceable, since it had been executed at an address other than an address of the employment agency, contrary to the provisions of an act of the London County Council, which act made provision for the granting of employment agency licenses to persons "to carry on an employment agency of the description and in the name and at the address specified in the application." Plaintiff was the assignee of the employment agency which had a regular place of business, for which it was licensed. The facts disclosed that the employment agency had been instrumental in obtaining employment for defendant, a musician, at a theatre. This employment was discussed by the agent and the owner of the theatre at a conference in a restaurant and at various other places, and the contract of employment actually signed at an address other than an address described in the agency license. The court gave judgment in favor of plaintiff, holding that the acts in connection with the contract which occurred at places other than the registered place of business of the agency were merely incidental to the transaction.

In Kirkwood v. Gadd, supra, the court held that the Money-Lenders' Act of 1900, which required that a money-lender "shall carry on the money-lending business * * * at his registered address or addresses," did not mean that every stage and every incident of every part of the money-lending business must be transacted at the registered office. Lord Atkinson in the decision of this case at page 431 of [1910] App.Cas. says:

"In one sense every step, every item, in a long or complicated financial or commercial transaction may be said to be 'business,' but I think it is obvious that in the phrase 'carries on his business' employed in this section, as in the phrase 'carrying on business' employed in the 4th section of the Companies Act of 1862, the words 'carries on' must be held to imply a repetition of acts, the sum of which constitutes the 'business': see Brett L. J., Smith v. Anderson.[1]

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[1] (1880) 15 Ch.D. 247, at pages 277, 278.

"The money-lender's trade is in itself a lawful trade. And it is, I think, no more essential in this than in any trade or business that every act necessary to complete a contract of the class which it is the purpose and object of the trader to enter into and carry out should be performed on the premises of the latter, in order that his trade may be correctly described as being 'carried on' in those premises.

"If one takes by way of example the case of a house decorator, or of an ordinary retail dealer, who delivers at the house of his customers the goods he sells, it could scarcely be seriously contended that the former carried on his business at the houses belonging to his customers, which he decorates, or the latter at the houses of his customers, where he delivers his goods. I fail to see on what principle the words when applied to a money-lender should be used in a sense and meaning so much narrower than that which they bear when applied, in the ordinary use of language, to other traders, unless, indeed, it is to be assumed that it was the paramount object of this statute to prohibit all communication between a money-lender and his customer on business matters by post or telegraph, and oblige the borrower to frequent the registered house or office of the lender and carry out there every detail of each transaction—an assumption for which there is, in my opinion, no warrant to be found in its provisions."

[2] Applying the foregoing rule to the facts in the instant case, it appears that petitioner maintains an office, which is its fixed place of business, in the city of Beverly Hills, but that from the very nature of the business which it conducts and as an incident thereto it is necessary for its agents to visit various moving picture studios, hotels, and restaurants which are located in other cities in the State of California. The transactions which occur at such places are merely incidental to the conduct of petitioner's business. They constitute but isolated acts in connection with the business which petitioner is conducting. Studios, restaurants, and private homes cannot in any proper sense be considered places where petitioner is conducting its business. Many acts connected with the conduct of the business of operating a motion picture employment agency transpire at studios, commissaries, or restaurants adjacent to the various moving picture studios, and conversations with prospective employers often occur over luncheon or dinner tables, which practice corresponds in many respects to luncheons and dinners attended by lawyers, advertising agents, and businessmen generally, and it cannot successfully be contended that the place where such conversations occur constitute the participants' place of business. It is immaterial whether such conversations occur between a motion picture employment agent and a prospective employer, a lawyer and his client, or a businessman and a prospective customer.

Therefore, since from the facts in the instant case it appears that petitioner's only place of business was in Beverly Hills, it was entitled to receive the license which it sought.

For the foregoing reasons, let a peremptory writ issue as prayed.

MOORE, P. J., and W. J. WOOD, J., concurred.

50 Cal.App.2d 445

LINDSEY v. DE VAUX et al.

Civ. 2659.

District Court of Appeal, Fourth District, California.

March 12, 1942.

Rehearing Denied April 9, 1942.

Hearing Denied May 8, 1942.

1. Appeal and error 🔑930(1)

Before appellate tribunal is justified in reversing judgment on ground of insufficiency of evidence, it must appear from record that, accepting full force of evidence adduced, together with every inference favorable to prevailing party, which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such prevailing party from recovering judgment.

2. Appeal and error 🔑930(1)

On appeal, evidence must be construed most strongly against losing party and every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of prevailing party.

3. Appeal and error ⇐930(1), 989

On appeal, prevailing party's evidence must ordinarily be accepted as true and evidence which is contradictory must be disregarded.

4. Theaters and shows ⇐6

In action for drowning of minor in swimming pool, evidence sufficiently established that owners of pool were negligent in violating rule of state health department requiring qualified life guard, having no other duty, to be at pool, and that such negligence was proximate cause of death, to support verdict allowing recovery.

5. Theaters and shows ⇐6

In action for drowning of minor in swimming pool, evidence sufficiently established that owners of pool were negligent in violating rule of state health department requiring qualified life guard, having no other duty, to be at pool, and that such negligence was proximate cause of death, to require denial of owners' motion for directed verdict.

6. Theaters and shows ⇐2

A "qualified life guard", within rule of state health department requiring such life guard to be on duty at public swimming pool, is one who has at least ordinary powers of observation, who is vigilant and attentive to duty, and who realizes that, particularly in swimming pool in which young children are charged admission to swim, he should be watchful for any sign of distress or danger and quick to render assistance.

See Words and Phrases, Permanent Edition, for all other definitions of "Qualified Life Guard".

7. Theaters and shows ⇐2

Parents sending children to public swimming pool to swim have right to assume that there will be a qualified life guard on life guard duty at the pool in accordance with rule of state health department.

8. Appeal and error ⇐996

Upon the trial of a case, the jury is to find not only the facts, but also the inferences from them if any may properly be drawn, and when an inference is supported by the evidence and is not opposed to human experience and reason it cannot be disturbed. Code Civ.Proc. §§ 1957, 1958.

9. Husband and wife ⇐232(3)

In action for drowning of minor in swimming pool allegedly owned and operated by defendants, who were husband and wife, evidence sufficiently established wife's joint interest and participation in operation of pool to support verdict allowing recovery from wife.

10. Appeal and error ⇐1056(1)

In action for drowning of minor in swimming pool, exclusion of notice posted at pool in compliance with requirement of state board of health, and of signs posted at pool to the effect that anyone using diving apparatus or pool did so at his own risk, was not prejudicial to owners of pool, in absence of any evidence that minor had violated any rule.

11. Theaters and shows ⇐6

The mere presence of signs at swimming pool stating that bather used pool at his own risk would not affect duty of owners of pool to have qualified life guard at pool in compliance with rule of state health department, and would not bar recovery for drowning caused by violation of rule.

12. Theaters and shows ⇐6

In action for drowning of minor in swimming pool, allegedly caused by breach of rule of state health department requiring presence of qualified life guard at pool, instruction that it was duty of life guard to use reasonable care and diligence in watching public swimming pool and persons using it so that life guard might in emergency render reasonable assistance to one likely to drown was not erroneous.

13. Trial ⇐296(3)

In action for drowning of minor in swimming pool, allegedly caused by breach of rule of state health department requiring presence of qualified life guard at pool, error, if any, in instruction that it was duty of life guard to use reasonable care and diligence in watching public swimming pool and persons using it so that life guard might in emergency render reasonable assistance to one likely to drown, did not require reversal of judgment allowing recovery, in view of other instructions.

◆

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Action by W. C. Lindsey against D. W. De Vaux and wife for the drowning of plaintiff's son in defendants' swimming pool. From a judgment for plaintiff, defendants appeal.

Affirmed.

W. M. Conley, Philip Conley, Matthew Conley and Conley, Conley & Conley, all of Fresno, for appellants.

Louis J. Coelho and G. L. Aynesworth, both of Fresno, for respondent.

SCHOTTKY, Justice pro tem.

This is an appeal from a judgment based on a verdict in favor of respondent and from the order denying appellants' motion for judgment notwithstanding the verdict.

Respondent sued as the father of a minor son, Joe Lindsey, who was drowned in a swimming pool. The complaint, in substance, alleged that appellants were conducting a public swimming pool where admission was charged; that the State Department of Health rules provided that "One or more qualified lifeguards, having no other duty to perform at the time, shall be on lifeguard duty at each pool for which an admission or special use fee is charged, whenever the pool is open for public use. Lifeguards shall be in good physical condition and possess demonstrated proficiency in lifesaving"; that the appellants had employed a lifeguard but he was required to perform other duties; that on June 14, 1940, respondent's son, Joe Lindsey, was 11 years old and was inexperienced in swimming; that on said day he was admitted to appellants' swimming pool; that "the defendants failed and neglected to supervise, watch, and guard the swimmers in said swimming pool in that the defendants failed and neglected to have a lifeguard on lifeguard duty; and that by reason of defendants' requiring the said lifeguard to perform other duties at the times herein mentioned, and as a direct and proximate result thereof, said Joe Lindsey was negligently permitted to and did drown in said swimming pool."

Appellants' answer denied the allegations charging the negligence on their part and set up a defense of contributory negligence on the part of the deceased boy and also on the part of the respondent as father of the boy, and also set up a defense that the boy was drowned as the proximate result of an unavoidable accident without negligence on the part of anyone.

[1-3] The principal contention of appellants is that "there is no substantial evidence showing negligence or any causal connection between such alleged negligence and the death of the minor." It is a rule too well established to require the citation of authorities that, before an appellate tribunal is justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that, accepting the full force of the evidence adduced, together with every inference favorable to the prevailing party which may be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such prevailing party from recovering a judgment. The evidence must be construed most strongly against the losing party. Every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. The prevailing party's evidence must ordinarily be accepted as true, and evidence which is contradictory must be disregarded.

The pool in question was 100 feet long east and west, and 35 feet in width north and south. As shown by the photographs introduced in evidence, there are no obstacles or obstructions in it. It is enclosed by buildings on the north and south sides, on the east by a high board wall and on the west by a wire fence. A low diving board is on the north half of the east end and a high diving board is on the south half of the east end. The entrance and the refreshment building are at the west end. It is apparent from an examination of the photographs that anyone standing at any point within the enclosure can see the entire pool. Bill Young, the lifeguard, was 16 years of age on the day of the drowning and wore swimming trunks, sandals, and dark glasses, and had zinc oxide on his nose, making it white, and had a string around his neck attached to a whistle. Joe Lindsey, the boy who was drowned, was 11 years of age and according to the testimony of his father and the witness Richard Actis, also aged 11, was not a good swimmer.

Mike Mitchell, also aged 11, testified he was also at the pool when a girl called his attention to Joe Lindsey and told him to go in. The following are excerpts from his testimony:

"A. I saw him, he was floating in the water with his head up toward the water and his feet pointing down toward the bottom.

"Q. And what part of the pool was he in at that time? A. The diving—up towards the diving board end, and on the ladies' dressing room side. * * *

"Q. Just tell us what you did. A. I went in after him.

"Q. And what did you do and what did he do? A. Well, I was trying to get ahold of him and he pushed me down and I thought he was fooling, so I just let it go.

"Q. Now, did you make further effort to get him? A. Yes. After a while another girl told me to go in again, so I went in, and he didn't try to get me, so I just got out again.

"Q. Did you see him any more after that? A. Yes. When they were pumping the water out of him. * * *

"Q. Did you know Joe Lindsey before that day? A. Yes, I knew him at school fairly well. * * *

"Q. And you saw Joe there, of course, at the De Vaux pool? A. I saw him before—before I attempted to get him. I saw him swimming.

"Q. Saw him before. And you saw him down in the water there? A. Yes.

"Q. But this time that you told Mr. Aynesworth about, when you jumped in and then he pushed you down,—you didn't think there was anything the matter with him then, did you? A. No, I didn't * * *.

"Q. And then I think you said, Mike, you don't know how long it was before you went back to him the second time, is that right? A. No, I don't remember. The girl told me to get in again, so I went in * * *.

"Q. Well, you mean some little girl about your age, or do you remember who the girl was? A. No, I never saw her before, but she told me to go in. So I went in again and went along the edge of the pool, and he didn't even try to get me that time * * *.

"Q. And Mike, going back to the first time when you thought Joe was playing with you there in the water and you didn't think there was anything wrong, you didn't yell out or anything like that, did you? A. No, I just went in the water and struggled to get free and then swam to the shore * * *.

"Q. Just a question, Mike. Can you describe how he—how he looked at the time the girl told you to go there? A. Well, he was just like if you could stand up in water, he was standing up, and his hair was just floating around, and I didn't see his face or anything.

"Q. And that is why you went, is because the girl told you to go? A. The girl told me to go, so I went in after him.

"Q. And the second time, I believe, you told Mr. Conley here that you held to the rim, and tried to reach him that way? A. Yes."

Margaret Smittcamp, a student at Fresno State College, testified:

"Q. Now, just tell us about how—when you first saw him. A. Well, Bill Mitchell and I were just going to dive in and swim across, and I saw that—this boy on the bottom of the pool, so I told Bill about it. And we thought at first the boy was just swimming real deep. And finally the boy didn't move, so we looked around and couldn't find a life guard so Bill dove in and brought the boy out.

"Q. And did you help pull the boy out? A. I did, yes.

"Q. And what end of the pool was that? A. On the east end.

"Q. That is, down where the diving boards are? A. Yes.

"Q. And what—did a life guard come later? A. Yes he did.

"Q. How long was it before he came, do you know? A. Oh, it was about three or four minutes later * * *.

"Q. In the meantime did you and Bill try to resuscitate him? A. Bill did, but I did not * * *.

"Q. After the life guard came did he also work to try to resuscitate the boy? A. Yes, he did."

William D. Mitchell, a college student, testified:

"Q. What first called your attention to the presence of the boy in the pool? A. Margaret did.

"Q. And where was the boy when you first saw him? A. He was right in between the two diving boards at the deep end of the pool.

"Q. That is, at the east end of the pool? A. Yes.

"Q. And in what position was he at that time? A. As Margaret said, his hands were outspread. He looked like he was swimming.

"Q. And did you look for a life guard at that time? A. Yes, I did, after we thought something was the matter.

"Q. Yes. And did you see one? A. No, I did not * * *.

"Q. But when you did think there was something wrong, then you dived in? A. No. First I went to look for the life guard.

"Q. And after you got him on the surface what did you do? A. Well, I laid him on his face and stretched his arms out and then gave him artificial respiration as best I could * * *.

"Q. And then when the life guard came did he help try to resuscitate him? A. Yes. I was through. I got up from the boy, and just as I got up why the life guard came."

Oren Seaman, also a college student, a witness called by defendants, testified:

"Q. Did you see Bill Mitchell dive in for the boy? A. No. I saw him first when he was trying to push him up on the bank.

"Q. I see. And what did you then see? What happened then? A. Well, I know Margaret and Bill, both, and Margaret was helping Bill get the boy out of the pool. And I let out a holler, then, for Bill, and I don't know whether Bill heard it or not. And then I ran down to Mr. De Vaux and told him there was a boy being pulled out of the pool, and better call the fire department. * * *

"Q. Now, you say you called for Bill Young. Did you call for him by name, or for the life guard? A. I called, 'Bill.'

"Q. You called Bill. Now, did you see him when you called for him? A. No, I did not. I didn't even wait to look. I ran down to get Mr. De Vaux.

"Q. And which side of the pool did you run on, the north side or the south side? A. The north side. * * *

"Q. Then you went over to Mr. De Vaux and came back, did you? A. Yes, I did.

"Q. And when you came back he was there? A. Yes, that is right. I wasn't gone more than two minutes."

Bill Young, the life guard, testified:

"Q. And how was your attention called to that situation up at the other end? A. Somebody shouted, and I—as I looked up I could see them down at the other end, just as they were pulling the boy out, or just afterwards.

"Q. And what did you do then? A. I ran down there.

"Q. Down there where the boy was? A. Where the boy was, yes. * * *

"Q. Was Bill Mitchell there, the young man who testified? A. I didn't recognize him.

"Q. I see. What did you do when you got down there? A. Well, I started giving him artificial respiration. * * *

"Q. Mr. Young, when you got down to where the boy was, and began to work with artificial respiration, did you notice as to the apparent temperature of his body, as to whether it was warm or cold? A. It just felt like anybody's, who had been in swimming, cool from the water, but the flesh was warm.

"Q. Was there anybody doing resuscitation work when you came down there? A. Not to my knowledge. I didn't see anybody."

The record shows that after Bill Young, the life guard, attempted vainly to resuscitate the boy the pulmotor squad of the fire department arrived and also tried, without effect, and there is no dispute as to the fact that the boy died from drowning.

We have quoted portions of the record most favorable to respondent. There is, of course, other testimony contradicting much of the testimony quoted but, as hereinbefore stated, we are not here concerned with the matter of weighing conflicts in testimony. The question we have to decide is whether, taking all of the evidence into consideration, together with every inference and presumption favorable to respondent which may be deduced therefrom, and disregarding all evidence in conflict therewith, we must conclude that the evidence is insufficient to sustain the verdict of the jury.

[4, 5] We have studied the record carefully. While it must be stated that the evidence on the part of plaintiff is not overwhelming, yet we do not believe it may fairly be said that it is lacking in sufficient probative force to support the verdict. We believe this is one of that class of cases where a trial court would not be justified in granting a motion for a directed verdict, but in which he might have been justified in granting a motion for a new trial. In this case, no motion for a new trial was made, and, unfortunately for appellants, we do not have the same power to weigh the evidence as the trial judge, who is virtually a thirteenth juror, would have upon a motion for a new trial.

[6, 7] The law requires that one or more qualified life guards, having no other

duty to perform at the time, shall be on life guard duty at each pool where admission is charged. It must be assumed that this requirement means what it says and that the State Board of Health used the word "qualified" advisedly. While no exact standard has been specified it may reasonably be assumed that a qualified life guard is one who has at least ordinary powers of observation, who is vigilant and attentive to duty, and who realizes that, particularly in a swimming pool in which young children are charged admission to swim, he should be watchful for any sign of distress or danger and quick to render assistance. Parents sending children to a public swimming pool to swim have a right to assume that there will be a qualified life guard on life guard duty at the pool.

[8] In California, inferences in themselves constitute a recognized class of indirect evidence which a court or jury may not disregard. Sections 1957, 1958, Code Civ.Proc. Furthermore, "Upon the trial of a case, the jury is to find not only the facts but also the inferences from them, if any may properly be drawn. * * * When an inference is supported by the evidence, and is not opposed to human experience and reason, it cannot be disturbed by an appellate court." 10 Cal.Jur. 738.

We believe that the jury in the instant case had a right to infer from the evidence that a life guard 16 years of age who did not observe what two 11-year-old girls and 11-year-old Mike Mitchell observed, namely, that little 11-year-old Joe Lindsey was "floating in the water with his head up toward the water and his feet pointing toward the bottom," and, "that he was standing up and his hair was just floating around"; who did not observe the struggle of Joe Lindsey with Mike Mitchell the first time Mike swam to him; who did not observe Mike go in the second time to go after him; who, although the entire pool was 100 feet long, did not appear at the place where Joe Lindsey was lying until four minutes after he had been pulled out of the water by Bill Mitchell; was not a qualified life guard, was not present at the pool when Joe Lindsey was struggling and in distress, and was not on life guard duty at the pool when Joe Lindsey was drowned. We believe, further, that the jury had a right to infer that a life guard on life guard duty at the pool, being, as he should be, in a position where he could observe to a reasonable extent, swimmers, and particularly children, within the pool, would have observed the unusual position of little Joe Lindsey, which should have been indicated to a qualified life guard, if not to 11-year-old Mike Mitchell, that Joe Lindsey was not in any normal swimming position but was in distress and difficulty. The jury further had a right to infer from the evidence that Bill Young was not present, or on life guard duty or he would have observed these things, and that if he had been present and had observed them, he would have rescued the boy and the drowning would not have occurred. The pool was 100 feet long and 35 feet wide. There is evidence that there were other bathers but there is no evidence to show that the pool itself was crowded with swimmers; in fact, the inference would be to the contrary as all of these young children were up toward the diving board and if there were many adults swimming it is hardly likely that the young children would be at that end of the pool; and there is nothing in the record to prevent the jury from properly inferring that a life guard, being present on life guard duty, could have observed Joe Lindsey's unusual position in the water indicating his danger and distress.

Appellants assert that even assuming that the life guard was not on duty when Joe Lindsey was drowned, respondent has failed to show any causal connection between this alleged negligence and the accident complained of. In our opinion, this contention is fully answered by the following language in the case of Rovegno v. San Jose K. of C. Hall Association, 108 Cal.App. 591, at page 595, 291 P. 848, at page 849, in which case a hearing was denied by the Supreme Court:

> "The most serious question for determination is the question of proximate cause—does the record disclose any evidence of negligence on the part of respondents proximately causing the death of appellant's son? As above stated, the only negligence alleged is the failure of respondents to provide a life guard or other person or persons skilled in life saving. Even had such a guard been present, respondents urge, there is no showing that the boy's life would have been saved. Just what would have happened had a life-guard been present is, of course, not capable of direct proof. It is largely a matter of speculation or of inference. Even so, it has been held that the question is one for the jury and not for the court."

We conclude, therefore, that the evidence is sufficient to sustain the judgment, and that the trial court properly denied appellants' motions for a directed verdict and for judgment notwithstanding the verdict.

Appellants contend that "the uncontradicted testimony shows that while Mr. and Mrs. De Vaux owned the land on which this pool was situated, Mr. De Vaux alone maintained and conducted the pool" and that, therefore, the judgment against Mrs. De Vaux is not justified.

Appellant De Vaux, called by respondent under section 2055 of the Code of Civil Procedure, testified: "Q. That property is owned by you and your wife? A. That is it.

"Q. You, of course, operate a swimming pool upon the property there? A. Oh, yes."

On redirect examination De Vaux testified: "I operate the pool." On re-cross examination he testified: "Q. You do as head of the family, is that it? A. I am the daddy of the family, yes.

"Q. But it is operated on property owned by you and Mrs. De Vaux? A. That is right.

"Q. And standing in your respective names? A. That is right." The evidence showed that appellants both resided upon the premises and were both active in the operation of the pool.

[9] This evidence was ample to justify the jury in inferring that Mrs. De Vaux was jointly interested and participated in the operation of the pool.

Appellants sought to introduce in evidence a notice posted at the pool in compliance with the requirement of the State Board of Health and also sought to introduce in evidence certain signs posted at the pool which were to the effect that anyone using the diving apparatus or pool did so at his own risk. The trial court sustained respondent's objections to the introduction of this evidence.

[10, 11] Assuming, without deciding, that such offered evidence should have been admitted, we are unable to see how its exclusion could have been prejudicial to appellants. There was no evidence that decedent had violated any rule, and the mere presence of signs stating that the bather used the pool at his own risk would not affect the duty of appellants to have a qualified life guard on life-guard duty at the pool.

Appellants' final contention is that the trial court erred in giving the following instruction:

"You are instructed that it is the duty of a life guard to use reasonable care and diligence in watching a public swimming pool and the persons using the same, so that he may, in case of an emergency, render reasonable assistance to one likely to drown."

[12, 13] We have already referred to the requirement of the State Department of Health that one or more qualified life guards should be on life-guard duty at each pool. We do not believe that said instruction goes beyond a fair interpretation of the meaning of said rule of the State Department of Health, or that it does more than to state what is meant by the requirement that a qualified life guard shall be on life-guard duty. If a life guard is not required to do what is set forth in the instruction objected to, it may well be asked why a life guard should be required. We see no error in this instruction. Furthermore, the trial court gave numerous instructions offered by appellants upon the issues of negligence and contributory negligence, and instructed the jury at appellants' request that "if you shall find from the evidence that at the time Joe Lindsey was drowned there was a life guard, having no other duty to perform, on life guard duty at said pool, it is your duty to bring in a verdict in favor of defendants." So, even if it were held that said instruction now objected to were erroneous, it could not be considered a sufficient error to require a reversal of the judgment.

For the reasons hereinbefore set forth, the judgment is affirmed.

BARNARD, P. J., and MARKS, J., concurred.

STRICKLIN v. ROSEMEYER et al.*

Civ. 11807.

District Court of Appeal, First District,
Division 2, California.
March 16, 1942.

1. Negligence 🔑6

The violation of statute or ordinance constitutes negligence as a matter of law.

2. Street railroads 🔑99(1)

Where motorist had partly opened left door of automobile and had put one or both feet on running board and was leaning out for purpose of alighting when he was struck by trolley bus, the motorist was not violating city traffic code providing that it shall be unlawful for any person to be in any "roadway" other than a safety zone or crosswalk.

See Words and Phrases, Permanent Edition, for all other definitions of "Roadway".

3. Appeal and error 🔑216(1)

In action by motorist for injuries sustained when struck by trolley bus as he was about to alight from left front door of automobile into street, where during deliberation jury returned to courtroom seeking instruction regarding whether it was against the law to alight from left side of automobile but court refused to answer the question and gave general instruction on contributory negligence, in the absence of any request for the giving of an instruction at the time when the question was asked, the motorist "waived" right to complain of refusal to instruct the jury upon that subject at that time.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

4. Street railroads 🔑117(24)

It is not "negligence per se", in the absence of a statutory prohibition, to alight from the left side of an automobile into street.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence Per Se".

5. Street railroads 🔑99(1)

Section of city traffic code making it unlawful for any person to be in any roadway other than a safety zone or crosswalk, but providing that the section should not be construed to prevent the necessary use of a roadway by a pedestrian, does not prohibit a motorist from alighting from left door of automobile and walking around the automobile to sidewalk.

6. Street railroads 🔑117(24)

Where motorist, intending to alight from left door of automobile and to walk around automobile to sidewalk, was struck by trolley bus in attempting to alight from left door, motorist was not rendered guilty of "negligence per se" by section of city traffic code making it unlawful for any person to be in any roadway other than a safety zone or crosswalk but providing that the section should not be construed to prevent necessary use of roadway by a pedestrian.

7. Appeal and error 🔑1067
Street railroads 🔑118(11)

In action by motorist for injuries sustained when he was struck by trolley bus as he was about to alight from left door of automobile into street with intention of passing around automobile to sidewalk, where section of city traffic code making it unlawful for any person to be in any roadway other than a safety zone or crosswalk was introduced in evidence, refusing motorist's requested instruction to effect that one has a right to alight into street from left door of automobile provided he exercises ordinary care in doing so was error which was prejudicial.

8. Street railroads 🔑117(24)

Whether motorist who knew that trolley bus was approaching, but who opened left door of automobile just far enough to get his feet on running board and then leaned head and shoulders far enough out to look back for approaching traffic, was guilty of negligence was a question for jury in motorist's action for injuries sustained when struck by trolley bus.

9. Street railroads 🔑118(8)

In action by motorist for injuries sustained when struck by trolley bus, instruction that a trolley coach cannot go upon street except upon that part where trolleys attached to coach can remain in contact with overhead wires supplying electric energy and that it has better right to that space, to which others must yield when necessary, gave a right to defendants and placed a burden on motorist not justified by evidence which showed that on the side of street on which trolley bus had a legal right to operate it was as mobile laterally as any ordinary vehicle.

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* Subsequent opinion 126 P.2d 665.

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Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Personal injury action by Charles D. Stricklin against James C. Rosemeyer and others. From an adverse judgment, plaintiff appeals.

Reversed.

Maurice C. Ryan, of San Francisco, for appellant.

Cyril Appel and Ivores R. Dains, both of San Francisco, for respondents.

DOOLING, Justice pro tem.

Plaintiff received personal injuries as a result of being struck by a trolley bus operated by defendants. From a judgment for defendants entered pursuant to the verdict of a jury plaintiff prosecutes this appeal. The testimony was in sharp conflict as to the manner in which the collision resulting in plaintiff's injuries occurred. Plaintiff had parked his automobile in front of his home on the southerly side of Eighteenth Street in San Francisco between Douglass and Eureka Streets. While he was about to alight from the left door of his automobile into the street the trolley bus which was proceeding easterly on Eighteenth Street struck him and his automobile.

The testimony most favorable to plaintiff was that the operator of the trolley bus was looking down making change for a passenger with the front doors of the trolley bus open and extending beyond the side of the bus and that the open doors first struck the rear of plaintiff's parked automobile and then grazed along its side striking plaintiff. Plaintiff had looked in his rear view mirror and seen no vehicle approaching, had looked out the left window of his automobile and likewise seen no vehicle. He then partly opened the left door, put one or both feet on the running board, leaned his head and shoulders out of the car to look for approaching traffic from the rear, saw the doors of the trolley bus almost instantly strike the rear of his automobile and a moment later was struck himself. It is undisputed that plaintiff had earlier, while making a U-turn at Douglass Street, seen the trolley bus and knew that it was proceeding generally in his direction on Eighteenth Street.

According to the evidence most favorable to defendants the trolley bus was passing plaintiff's parked car with a clearance of at least eighteen inches when plaintiff suddenly threw open the left door of his automobile, which when fully opened extended 22½ inches beyond the side of his automobile, and the front corner post of the trolley bus almost instantly struck the extended door.

The evidence was substantial to support either set of facts, and if plaintiff and his witnesses were believed by the jury a verdict in his favor would have found ample support in the evidence.

Defendants introduced into evidence a portion of section 20 of article III of the Traffic Code of the City and County of San Francisco reading as follows: "It shall be unlawful for any person to be in any roadway other than a safety zone or crosswalk; provided that this provision shall not be construed to prevent the necessary use of a roadway by a pedestrian."

[1] The court correctly instructed the jury that: "It is the law that a violation of a statute or ordinance constitutes negligence as a matter of law."

[2] It is to be observed that plaintiff was not in the roadway at the time when he was struck and it cannot be successfully contended that he was at that time violating any provision of the section of the traffic code which we have quoted. The matter might be considered unimportant but for an incident which occurred after the jurors had retired to deliberate. They returned to the court room seeking further instructions at which time the record shows the following colloquy:

"Juror John M. Nelson: I would like to ask one question: Is it against the law to walk out of the left side of the automobile?

"The Court: Well, I have given you all the instructions on that point that I feel apply to this case. I have given you instructions defining negligence and contributory negligence and I don't want to add anything further to what has been said on that."

Thereupon at the request of another juror the general instructions on contributory negligence were read to the jury and the jury retired. The case was not only close on the evidence but apparently close in the minds of the jurors since the verdict finally returned was shown upon the polling of the jury to have been reached by a vote of 9 to 3.

[3] Appellant cites and relies upon Brooks v. City of Monterey, 106 Cal.App. 649, 290 P. 540, to support his contention that it was error for the court to refuse to answer the question of the juror Nelson. The case is distinguishable in that counsel for plaintiff in the case before us at the time the court refused to answer the question remained silent, made no objection and at that time proposed no form of instruction to be given in answer to the juror's query. In the Brooks case the opinion shows that counsel for the plaintiff requested the court to give an instruction framed by himself and, the court having refused to give any answer to the jury's inquiry because it was after noon on Saturday and he erroneously concluded that he had no right to give additional instructions on a non-judicial day, moved for a continuance to the following Monday. We have been cited to no case where it was held reversible error to refuse a request from a jury for further instructions in which counsel was afforded the opportunity to propose such an instruction and failed to do so. For example in Futoransky v. Nassau Electric R. Co., 169 App.Div. 719, 155 N.Y.S. 734, cited by appellant, counsel in that case at the time of the inquiry requested a proper instruction on the subject of the juror's question which the court refused to give, and the same thing occurred in Stevenson v. New York Contracting Co.-Pennsylvania Terminal, 137 App.Div. 742, 122 N.Y.S. 726, cited in the Futoransky case. In the absence of any request for the giving of an instruction at the time when the question was asked particularly when coupled with the failure to make any objection to the conduct of the court, we are inclined to the view that appellant must be held to have waived his right to complain of the court's refusal to instruct the jury upon that subject at that time.

This conclusion, however, does not dispose of the entire question. Appellant among his instructions originally proposed included the following which the court refused to give: "The plaintiff Charles Stricklin, is not to be charged with negligence merely because he alighted by the northerly door of his automobile. I instruct you that the standard of care required of the plaintiff in this action is ordinary care as will later be defined. It is the care an ordinary person of ordinary prudence would use under all the circumstances of the situation, and if you find that the plaintiff did use ordinary care in alighting from his automobile, I instruct you that the plaintiff had a right to alight therefrom by the northerly door."

[4] Setting aside for a moment the possible effect of the section of the San Francisco Traffic Code above quoted, the proposed instruction was a correct statement of the law. It is not negligence per se in the absence of a statutory prohibition to alight from the left side of an automobile into the street. Lewis v. Memmler, 140 Cal.App. 364, 35 P.2d 406. It follows that, unless the section of the Traffic Code prohibits it, appellant was entitled to have the jury instructed that one has a right to alight into the street from the left door of an automobile providing he exercised ordinary care in doing so.

[5] Turning to the section of the Traffic Code in question it is apparent that it is not a model of legislative craftsmanship. It takes with one hand and gives back to an uncertain degree with the other. The first clause is an absolute prohibition to be in a roadway except in a safety zone or cross-walk. The proviso makes a further exception in the case of "the necessary use of a roadway by a pedestrian." The record in this case fails to show whether the ordinance in other parts gives any definition of the "necessary use of a roadway." In Quinn v. Rosenfeld, 15 Cal.2d 486, 102 P.2d 317, our Supreme Court had under consideration the legal effect of the identical section. It was held in that case that the section did not prohibit a pedestrian crossing the roadway outside of a cross-walk. Further than that the Supreme Court was not called upon to construe the section in that case. In our case the plaintiff admittedly was not intending to cross the roadway but to walk around his car to the sidewalk. But in alighting from his car and until he started to walk around it he would be in no different position than if he had intended to cross the street at right angles to the curb. Under the decision of the Supreme Court in Quinn v. Rosenfeld, supra, plaintiff if otherwise exercising due care would be entitled to alight from his car by the left door and walk across the street at right angles to the curb. He therefore was not prohibited by the Traffic Code from alighting by the left door into the street. Let us suppose that A

alights from the left rear door of a parked automobile intending to cross the street at the same moment that B alights from the left front door of the same automobile intending to walk around the car to the sidewalk. If they are both struck by C's automobile negligently swerving into them before either has taken a step could it be said that A is not and B is guilty of negligence per se?

[6, 7] We pass the serious question of the validity of this section of the Traffic Code suggested, but not decided, in Quinn v. Rosenfeld, supra, as not necessary to the decision of this case. We are satisfied that in attempting to alight from the left door of his automobile plaintiff was not rendered guilty of negligence per se by the provision of the Traffic Code here in question. The section of the Traffic Code having been introduced plaintiff was entitled to a proper instruction as to its legal effect and, in view of the closeness of the case, the doubt in the minds of the jurors shown by the juror Nelson's question, and the closeness of the vote of the jurors in arriving at their verdict, it was prejudicial error to refuse to give the instruction proposed by appellant.

[8] Respondents argue that in any event appellant's conduct in attempting to alight from his car knowing that the trolley bus was approaching was negligence as a matter of law. We cannot hold that opening the door of his automobile just far enough to get his feet on the running board and then leaning his head and shoulders far enough out to look back for approaching traffic (and this was appellant's testimony) is negligence as a matter of law. It would present, at most, a question of fact as to whether in so acting appellant was using ordinary care and prudence. Murphy v. St. Claire Brewing Co., 41 Cal.App.2d 535, 539, 107 P.2d 273.

[9] The court gave the following instruction: "A trolley coach cannot go upon the street or highway except upon that part or portion of the street or highway where the trolleys attached to the coach can remain in contact with the overhead wires supplying the electric energy necessary to operate the coach, and hence it has the better right to that space or part of the highway where it must necessarily be operated, to which others must yield when necessary."

The operator of the trolley bus testified that it could be driven beyond the center of the street. It stopped within three feet of the curb to take on passengers at Douglass Street. It is thus clear that on the side of the street on which it had a legal right to operate it was as mobile laterally as any ordinary vehicle. The instruction is based upon a rule of law applicable to street railway cars which can only operate upon fixed tracks and gives a better right to the space covered by the tracks for that reason. 23 Cal.Jur. p. 866. It can have no application to a vehicle which can be driven at any point from the curb to the middle of the street. The instruction gave a right to defendants and put a burden upon plaintiff which was not justified by the circumstances.

For the reasons given herein the judgment appealed from is reversed.

NOURSE, P. J., and STURTEVANT, J., concurred.

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50 Cal.App.2d 425

DA ARAUJE v. RODRIQUES.

Civ. 11763.

District Court of Appeal, First District, Division 2, California.

March 12, 1942.

1. Execution 🔑**73**
Judgment 🔑**910(1)**

Since the adoption of the Practice Act, period of limitation for suit on judgment is five years, during which period execution issues as a matter of right, with discretionary power in courts to issue execution after lapse of period of limitations. Code Civ.Proc. § 685.

2. Execution 🔑**70**

The purpose of 1933 amendment expressly requiring "due notice to judgment debtor" before court's exercise of discretionary power to issue execution on judgment barred by five-year statute of limitations was to change the previously well-established rule that an order for execution to issue after five years could be made without notice to judgment debtor and to require such notice to be given thereafter in all cases as a "condition precedent" to the making of every such order. Code Civ.Proc. § 685.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

3. Execution ⇨7
Judgment ⇨910(1)

A judgment at end of five years is unenforceable for all purposes except that execution may be issued upon judgment by leave of court obtained in the manner provided by statute, and such an execution is not supported by a judgment otherwise valid and enforceable, but gets its vitality solely by reason of order of court for issuance of execution. Code Civ.Proc. § 685.

4. Execution ⇨73

Under statute giving court discretionary power, after due notice to judgment debtor, to issue execution on judgment barred by five-year statute of limitations, no mere lapse of time, however long, is a bar to an order for issuance of execution. Code Civ.Proc. § 685.

5. Execution ⇨73

The District Court of Appeal would assume that Legislature enacted 1933 amendment requiring due notice to judgment debtor before court could exercise discretionary power to issue execution on judgment barred by five-year statute of limitations, with knowledge that there was no express limit to time within which such execution could be ordered to issue, and that no barred judgment, however old, became so stale that as a matter of law it would not support such an order. Code Civ.Proc. § 685.

6. Execution ⇨70

The Legislature, in enacting 1933 amendment requiring due notice to judgment debtor before court should exercise discretionary power to issue execution on judgment barred by five-year statute of limitations, intended to make the giving of notice jurisdictional to making of order for issuance of execution on barred judgment in the sense that any such order made without notice would be void, and did not merely intend to provide a further procedural step, the failure to take which would render order for execution vulnerable to direct attack on appeal but still leave order immune to collateral attack. Code Civ.Proc. § 685.

7. Justices of the peace ⇨135(2)

In issuing writs of execution, justice of peace acts in purely ministerial capacity, and his act is no different than that of clerk of court of record in issuing such writ.

8. Officers ⇨103

A purely ministerial act is void unless officer performing the act conforms strictly to provisions of statute.

9. Justices of the peace ⇨59

Nothing is presumed in favor of jurisdiction of justice's court.

10. Appeal and error ⇨1091(1)

In absence of proof, District Court of Appeal would assume that justice court's purely ministerial act of issuing writ of execution on judgment barred by five-year statute of limitations was not preceded by or based upon a judicial order granting leave for issuance of writ as required by statute. Code Civ.Proc. §§ 681, 685.

11. Justices of the peace ⇨135(2, 4)

The act of justice of peace in issuing execution on judgment which was barred by five-year statute of limitations was void, and subject to "collateral attack", where due notice of issuance of writ was not given judgment debtor as required by statute. Code Civ.Proc. § 685.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Action to quiet title by Antonia Da Arauje against Frank Rodriques. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Randall O'Neill, George A. Martinelli, and Morettini & O'Neill, all of San Jose, for appellant.

H. A. Gabriel, of San Jose, for respondent.

DOOLING, Justice pro tem.

This is an appeal by the defendant from a judgment for plaintiff in an action to quiet title. On January 10, 1933, defendant in this action recovered judgment by default against the plaintiff in this action in the Justice's Court of Santa Clara Township for $260.13 and costs. A motion was thereafter made to set this default judgment aside. On March 3, 1938, the justice denied this motion and a writ of execution was issued on the same day. Pursuant to this writ the sheriff sold the property here in suit and the defendant herein became the purchaser at the execution sale. It was stipulated that no motion was made, nor any affidavit filed in support of the issuance of said execution as required by section 685 of the Code of Civil Procedure.

It is appellant's position that the act of the justice of the peace in issuing execution over five years after the date of entry of the judgment without the notice, motion and affidavit required by section 685 was not a void act but only voidable and hence not subject to collateral attack. Appellant cites Freeman on Executions, vol. I, 3d Ed., pages 104–107, section 29; 10 R.C.L., pages 1226, 1227, section 14; 21 Am.Jur., page 35, section 45; 23 C.J., page 379, section 143; and Eddy v. Coldwell, 23 Or. 163, 31 P. 475, 37 Am.St.Rep. 672. The rule announced in all of these citations is fully stated in Freeman on Executions, vol. I, page 104 et seq.: "The consequences of issuing an execution after a year and a day are the same as the consequences of a premature issue. The writ is voidable, but not void. The defendant may take proceedings to have it set aside. If he chooses to interpose no objection to the irregularity, others cannot do so for him. Even he cannot attack it collaterally; and a levy and sale made under it are sufficient to transfer his title. The decisions made under the English statute requiring the original execution to issue within a year and a day seem to be equally applicable to cases where executions have issued at too late a day under American statutes. * * * The reasoning on which all these decisions, whether made under English or American statutes, rests, is this: the judgment, notwithstanding the lapse of the year and a day, or other time designated, is, unless actually satisfied, still in force. From the lapse of time, the presumption may be indulged that a satisfaction has taken place, or that some reason exists for the nonissuance of execution. To give the defendant an opportunity of showing cause against the execution, the plaintiff is required to bring him before the court by scire facias or by motion, and thus give him an occasion to show whether the judgment has been satisfied. But as the power to issue execution still exists, its issuance without the scire facias or motion is merely the erroneous exercise of a conceded power, and must, like all other errors, be corrected by some appropriate proceeding * * *".

To test the applicability of this rule to our own statutory situation it is desirable to sketch briefly the legal background against which it was evolved and compare it with our own statutory development.

"A judgment not satisfied or barred by lapse of time, but temporarily inoperative so far as the right to issue execution is concerned, is usually called a dormant judgment. At common law a judgment lost its force as a lien on the judgment debtors realty, and no execution could be issued thereon when it had lain dormant for a year and a day. Upon failure so to sue out execution, plaintiff was driven to his action of debt upon the judgment, or to a scire facias to revive the judgment and obtain fiat for execution under the Statute of Westminster II (13 Edw. I) St. 1c 45. By statute, in the various jurisdictions of this country, there is now a fixed limitation of the period during which the life of a judgment continues, generally considerably greater than the common law 'year and a day.' But these statutes also universally provide that a judgment which has become dormant and lost its lien may be revived and restored to its original force by scire facias, action on the judgment, or special statutory proceeding." 34 C.J. p. 655.

It is to be noted of this statement that the "year and a day" within which execution must be issued in the English practice was not coterminous with the period fixed by the statute of limitations for a suit upon the judgment but shorter than that period and execution could only be authorized to issue by resort to scire facias where the judgment itself was not barred by the statute of limitations.

The following quotation from Browne & Manzanares Co. v. Chavez, 9 N.M. 316, 54 P. 234, aptly summarizes the historical background and points the distinction between a dormant judgment, which could be revived by resort to scire facias for the purpose of obtaining the issuance of execution, and a barred judgment, which under no circumstances could support the issuance of a valid writ.

"At common law the life of a judgment was 20 years, but, if an execution was not issued thereon within a year and a day, the judgment became dormant, and an alias execution could not issue thereon, unless revived by scire facias. The judgment, therefore, although it had been dormant, was not dead, as its life was 20 years. * * * The writ of scire facias was adopted at common law as the proper means of restoring vitality to a dormant judgment, before it was satisfied or barred by limitation. * * * It is clear that at common law the proceeding by scire facias was not a new or distinct action, but simply a writ or process in the original suit, for the sole purpose of securing the right to issue execution upon a dormant judgment, prior to the expiration of its legal life, and it was not intended nor used for the purpose of reviving a judgment whose life had expired and become barred by a statute of limitation."

It will be found upon examination that in most, if not all, of the states of this country which have followed the rule that the issuance of execution upon a dormant judgment without resort to scire facias, or the substituted statutory proceeding by motion, is merely voidable and not void, the same legal situation exists, i. e., the period within which execution issues as a matter of right is shorter than the period of the statute of limitations for suit upon the judgment and it is only, to adopt the phraseology of the Supreme Court of New Mexico above quoted, while the judgment is dormant but not dead that execution may be authorized by such proceedings.

[1] From the time of the adoption of the Practice Act, with the qualifications hereinafter noted, the situation in this state has been the exact converse. The period of limitation for suit upon a judgment has been fixed at five years during which period execution issued as a matter of right, and engrafted upon that has been a discretionary power in the courts to issue execution after the lapse of the period of limitation. Thus instead of providing for the discretionary issuance of the writ upon a dormant judgment after the lapse of some lesser period than that of the statute of limitations, our legislature saw fit to provide for the discretionary issuance of the writ upon a judgment otherwise dead by expiration of the limitation period. In the Practice Act the five-year limitation for suits upon judgments was found in section 209 and the provision for issuance of execution after five years in section 214. St.1851, pp. 83, 85. See Mason v. Cronise, 20 Cal. 211, 218. Section 214 was repealed in 1861. Stats. 1861, p. 116. It was reenacted in 1866 (Stats.1866, p. 704), but made applicable only to cases "other than for the recovery of money"; was so adopted into section 685 of the Code of Civil Procedure and remained in that form until 1895, when the words "other than for the recovery of money" were deleted and the last sentence of the section added. 11 Cal.Jur. pp. 47-49.

The unusual and somewhat anomalous legal situation created by allowing execution to issue on a judgment otherwise barred by the statute of limitations was the subject of comment in Mason v. Cronise, supra, and Doehla v. Phillips, 151 Cal. 488, 494, 91 P. 330, but in each case the court held that despite the apparent inconsistency the legislative intent was clear.

[2] After the amendment of the section in 1895, so as to include within the cases in which execution could be issued after the lapse of five years judgments for the recovery of money, our Supreme Court in Doehla v. Phillips, supra, following Bryan v. Stidger, 17 Cal. 270, and Harrier v. Bassford, 145 Cal. 529, 78 P. 1038, held that the section as it then read authorized the court to make an order for the issuance of execution upon ex parte application without notice to the judgment debtor. This continued to be the law until the amendment of section 685 in 1933 when the section was cast in its present form expressly requiring "due notice to the judgment debtor." The obvious and only purpose of this amendment was to change the previously well-established rule that an order for execution to issue after five years could be made without notice to the judgment debtor, and to require such notice to be given thereafter in all cases as a condition precedent to the making of every such order.

The question that presents itself is whether the legislature by this amendment to section 685 intended to make the giving of the notice jurisdictional to the making of the order for issuance of execution after the lapse of five years in the sense that any such order made without notice would be void, or whether it merely intended to provide a further procedural step the failure to take which would render the order for execution vulnerable to direct attack upon appeal but still leave it immune to collateral attack.

[3-6] In our decision of this question we are entitled to consider the legislative history of section 685 and to contrast it with the corresponding history of the revival of dormant judgments in England and the other jurisdictions of this country. Under the English law and in most of the jurisdictions of this country, as we have pointed out, under no circumstances could execution issue upon a judgment barred by the statute of limitations. The issuance of execution without leave of court after the lapse of a year and a day or other substituted period was therefore supported by a judgment valid and enforceable for all purposes. Under our system the judgment at the end of five years is dead and unenforceable for all purposes except that execution may be issued upon it by leave of court obtained in the manner provided in section 685. Such an execution is not supported by a judgment otherwise valid and enforceable but gets its vitality solely by reason of the order of court for its issuance. The distinction is real and important. It has been consistently held under section 685 that no mere lapse of time, however long, is a bar to an order for the issuance of execution. As examples see Hatch v. Calkins, —— Cal.App.2d ——, 122 P.2d 126, where execution issued after the lapse of 30 years; Palace Hotel Co. v. Crist, 6 Cal.App.2d 690, 45 P.2d 415, after 20 years; and Welk v. Conner, 102 Cal.App. 286, 282 P. 963, after 13 years. When the legislature amended section 685 in 1933 so as to require "due notice to the judgment debtor" in all cases as a condition to the issuance of execution on judgments barred by the statute of limitations we are entitled to believe that it did so with knowledge of the fact that there was no express limit to the time within which such execution could be ordered to issue, and that no barred judgment, however old, became so stale that as a matter of law it would not support such an order. It is reasonable to conclude that in requiring the giving of notice to the judgment debtor in all such cases the legislature intended to enact a jurisdictional requirement. In effect it said: "Hereafter you shall not have execution on a barred judgment unless you first give due notice of your motion for that purpose." The question is purely one of legislative intent. To hold that the requirement of notice is procedural but not jurisdictional would be to emasculate by judicial construction an amendment whose sole purpose is clear, that no judgment barred by limitation should be enforced against a judgment debtor without first giving him an opportunity to be heard.

[7] There is a further factor in this case which equally leads to the conclusion that the issuance of the writ of execution in this case was a void act. It is settled that in issuing writs of execution a justice of the peace acts in a purely ministerial capacity. 6 Cal.Jur. Ten Year Supp., p. 618; Dunn v. Justice's Court, 136 Cal.App. 269, 28 P.2d 690; Santini v. Justice's Court, 218 Cal. 671, 24 P.2d 761; Hamilton v. Tutt, 65 Cal. 57, 2 P. 878; Town of Hayward v. Pimental, 107 Cal. 386, 40 P. 545. His act in that respect is no different than that of the clerk of a court of record in issuing the writ.

[8-11] The record on appeal shows no order of the justice of the peace granting leave for the issuance of execution, which would be a judicial act, but only the issuance of the writ, a purely ministerial act. The only docket entry shown reads simply: "Execution issued." Conceding that, if the justice had purported to make an order for the issuance of execution without the notice to the judgment debtor required by section 685, such action would have been merely an erroneous judicial act but not void (Gray v. Hall, 203 Cal. 306, 265 P. 246), it is the law that a purely ministerial act is void unless the officer performing it conforms strictly to the provisions of the statute. Baird v. Smith, 216 Cal. 408, 14 P.2d 749. Since nothing is presumed in favor of the jurisdiction of a justice's court (Antilla v. Justice's Court, 209 Cal. 621, 624, 290 P. 43), we must assume in the absence of proof that the purely ministerial act of issuing the writ of execution was not preceded by or based upon a judicial order granting leave for its issuance. The case in this respect is no different than if a county clerk purported to issue a writ of execution after five years in violation of the terms of section 681, Code of Civil Procedure, and without leave of court as required by section 685.

For the reasons given the judgment appealed from is affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

50 Cal.App.2d Supp. 859

PEOPLE v. PHILBIN.

Cr. A 1862.

Appellate Department, Superior Court, Los Angeles County, California.

March 9, 1942.

Rehearing Denied March 16, 1942.

1. Gaming ⇨68

Draw poker and low ball poker, played for money, constituted "gambling" but were not unlawful. Pen.Code, § 318.

See Words and Phrases, Permanent Edition, for all other definitions of "Gambling".

2. Criminal law ⇨45

The statute prohibiting prevailing upon a person to visit a room, building, or other place kept for purpose of gambling is unambiguous and requires no interpretation, and hence could not be judicially amended so as to be restricted to gambling prohibited by law. Pen.Code, § 318.

3. Statutes ⇨225

The statutes making specified games illegal, and prohibiting owner or lessor of house from permitting such games to be played, and the statute prohibiting prevailing upon a person to visit gambling place, are not in "pari materia" except remotely, and are not to be read together. Pen.Code, §§ 318, 330, 331.

See Words and Phrases, Permanent Edition, for all other definitions of "Pari Materia".

4. Statutes ⇨225

The statute prohibiting prevailing upon a person to visit gambling place is not to be read together with subsequently enacted and irrelevant statutes dealing with particular gambling games. Pen.Code, §§ 315, 318, 337, 337a.

5. Criminal law ⇨45

The policy back of statute prohibiting prevailing upon a person to visit gambling place is indirect partial protection of the public against an evil. Pen.Code, § 318.

6. Constitutional law ⇨208(1)

The Legislature may recognize degrees of harm and confine its restrictions to classes of cases where the need is deemed to be clear, and, if evil is especially experienced in a particular branch of business, prohibition need not be couched in all-embracing terms.

7. Criminal law ⇨45

In prosecution for prevailing upon a person to visit gambling place, that defendant was operating gambling club under license from city did not better his position.

8. Municipal corporations ⇨592(4)

The city of Gardena could not legalize prevailing upon a person to visit gambling place, which the general law forbids. Pen. Code, § 318.

9. Criminal law ⇨45

In prosecution for prevailing upon a person to visit gambling place, complaint was not insufficient because not alleging location of the building that was kept for gambling. Pen.Code, § 318.

10. Criminal law ⇨45

The gist of the offense of prevailing upon a person to visit gambling place is the giving of the invitation.

11. Criminal law ⇨1186(4)

Where prosecution for prevailing upon a person to visit gambling place was submitted on stipulated evidence, defendant suffered no possible prejudice from failure of complaint to allege location of the building that was kept for gambling, and there would be no basis for reversal. Const. art. 6, § 4½.

◆

Appeal from Police Court of City of Glendale, Los Angeles County; F. H. Lowe, Judge.

Clarence Philbin was convicted of prevailing upon another to visit a room and building kept for gambling, and he appeals.

Affirmed.

Dailey S. Stafford, of Los Angeles, for appellant.

John F. Dockweiler, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

BISHOP, Acting Presiding Judge.

It was charged against the defendant, in the Police Court of the City of Glendale, that he did "unlawfully, through invitation and device, prevail upon N. F. Walton to visit a room and building kept for the purpose of gambling, and in which gambling was conducted and carried on." We are of the opinion that the judgment of conviction, from which the defendant appeals, should be affirmed, although the evidence reveals that the gambling for which the building was kept was not itself unlawful.

Section 318, Penal Code, is the statute upon which the charge was based. Incidentally, all sections referred to hereafter are Penal Code sections. Section 318 reads as follows: "Whoever, through invitation or device, prevails upon any person to visit any room, building, or other places kept for the purpose of gambling or prostitution, is guilty of a misdemeanor, and, upon conviction thereof, shall be confined in the county jail not exceeding six months, or fined not exceeding five hundred dollars, or be punished by both such fine and imprisonment."

[1] The trial was had upon a written stipulation of evidence. In the city of Gardena a social club was being operated. (Its dues were a dollar a year, payable at the end of the year "only if the member is entirely satisfactory.") The Club was housed in a building leased for its use and was kept for the purpose of enabling its members to play draw poker and low ball poker for money. The stipulation describes how these games are played; we need note only that the games undoubtedly constituted gambling, but a variety of gambling not made unlawful either by the statutes of the state (Ex parte Meyer, 1895, 5 Cal.Unrep. 64, 40 P. 953; Monterey Club v. Superior Court, 1941, 48 Cal.App.2d 131, 119 P.2d 349) or by any local ordinance.

The defendant, the stipulation further sets forth, mailed a letter addressed to N. P. Walton and received by him in Glendale, in which the defendant, signing as secretary for the Club, set forth its location and its advantages, and solicited his membership. "That by reason of said letter he (N. P. Walton) decided to, and did, visit the Gardena Club;" "that he would not have visited said Club had he not received the letter." Upon his visit to the Club he found some sixty-six players engaged in playing either draw or low ball poker for money.

[2] From the evidence, then, and without dispute, it appears that the defendant prevailed upon N. P. Walton to visit a building kept for the purpose of gambling. Clearly, the defendant has violated the provisions of section 318 as written; his only escape is to have us add to the section after the word "gambling" the further words, not now there, "where such gambling is prohibited by law." The provisions of the section are clear and unambiguous; they require no interpretation; if any amendment is to be made it should be by the legislature for "the court is without the power to do" it. In re Goddard, 1937, 24 Cal.App.2d 132, 141, 74 P.2d 818, 824.

In support of his contention that "gambling" as written in section 318 should be limited to gambling which has been made unlawful, appellant states: "According to a well approved rule of construction sections 315, 318, 330, 331, 337, and 337a, insofar as they relate to the same subject, should be construed together." An application of the principle of statutory construction referred to proves to be of no assistance to appellant. Section 315, in so far as of interest, reads: "Every person who keeps a house of ill-fame in this state, resorted to for the purposes of prostitution * * * is guilty of a misdemeanor * * *." In a measure, sections 315 and 318 do deal with the same subject matter, that is, houses kept for prostitution. In one section, the keeping of the house is made a misdemeanor, in the other, prevailing upon a person to visit the house is the act outlawed. The only significance of this to the problem we are considering is that since by no state law (of which we are aware) is it made a public offense to act as a prostitute, section 315 prohibits the keeping of a house for a purpose itself not unlawful, and section 318 makes it a crime to prevail upon one to visit a house where that which goes on has not been made a crime.

[3] No contrary interpretation of the provisions of section 318 is warranted by virtue of sections 330 and 331. The first section declares certain gambling games (some seven were originally listed) to be illegal. No attempt is made to define "gambling" and by no stretch of interpretation can it be said that the section endeavors to list all gambling games. Section 331 prohibits an owner or lessor of a house from permitting any of the games mentioned in section 330 to be played in his house. Neither section refers to a house kept either for the purpose of gambling generally or even for the more limited purpose of carrying on the games listed in section 330. It would seem, then, that sections 330, 331 and 318 are not in pari materia except remotely, and that by read-

ing them together no additional light is thrown on section 318.

[4] Section 337 cannot be said to relate even remotely to the same subject as does section 318. By this section any public official is made guilty of a felony who endeavors to save a violator of section 330 from his just deserts, or who votes for or issues a license or permit purporting to authorize the playing of a game banned by section 330. Section 337a deals with various phases of pool-selling and book-making, and adds that an owner of a house may not even once permit its use for any purpose prohibited by the section. We find no guide to the meaning of section 318 in this section. Furthermore, it should be noted that both these sections were added to the Penal Code after the adoption of section 318 (Stats. 1880, p. 40). What the legislature meant by the clear terms it used in section 318 is not to be found, we are of the opinion, in these irrelevant sections, adopted subsequently.

In support of his statement that these several sections should be read together, appellant cites In re Chase, 1931, 119 Cal. App. 432, 6 P.2d 577, 578. In this case it was contended that the complaint, charging a violation of section 318 and under which the defendant had been convicted, failed to state a public offense because the place kept for the purpose of gambling was outside of the state. The court concluded that the complaint sufficiently, although with uncertainty, stated that the place referred to was within the state, and remanded the petitioner to custody. It follows that what the court had to say about a state of affairs not before it, that is, a complaint referring to a gambling place outside the state, is obiter dictum. Moreover, the question discussed (but not decided) was another question than that now under review. The court did, it is true, refer to a group of sections which "in so far as they relate to the same subject, should be construed together." But doubtless the court did not mean its reference to sections "315–318" to be inclusive, for section 317, since repealed plainly had nothing to do with the question under discussion. But we note that section 317, which was in the code when section 318 was added, in providing that "Every person who * * * publishes any notice or advertisement of any medicine or means * * * for the prevention of conception * * * is guilty of a felony," furnishes another illustration of the legislative practice of making it a public offense to invite the doing of something itself nowhere declared to be unlawful.

The result is not necessarily illogical; it certainly is not so absurd that it warrants judicial legislation. The legislature may well have recognized both the evil of gambling and the instinct to gamble which seems inherent in mankind. The public policy against that form of gambling known as a lottery is so well settled that it is expressed in the state constitution. Art. IV, sec. 26. In some of its other forms, gambling was prohibited by the legislature by its enactment of section 330, Penal Code, in 1872, based on an earlier statute, Stats.1857, p. 267. Section 330 was amended in 1891 to add to the list of those outlawed other games theretofore lawful. From time to time other forms of gambling may be declared unlawful, and again the ban be withdrawn.

[5, 6] Gambling not prohibited by the constitution, nor at any moment declared by the legislature to be illegal, may, nevertheless, be subject to indirect attack by the legislature. For reasons commending themselves to the legislature, the playing of stud-horse poker is expressly made a misdemeanor, section 330, while draw poker is not prohibited. Draw poker for money is nevertheless gambling, and while it may now lawfully be engaged in, equally lawfully the legislature could attack such evil as it sees in it by providing that no one should be prevailed upon to play it. The policy back of section 318, that of an indirect, partial, protection of the public against an evil, is one that the legislature may make. In our opinion, section 318 clearly expresses such a policy. "It [the legislature] is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may 'proceed cautiously, step by step,' and 'if an evil is specially experienced in a particular branch of business' it is not necessary that the prohibition 'should be couched in all-embracing terms.'" Miller v. Wilson, 1915, 236 U.S. 373, 384, 35 S.Ct. 342, 344, 59 L.Ed. 628, 632, L.R.A.1915F, 829.

[7, 8] Appellant's further contention that he was operating his club under a

license from the City of Gardena, even if true, does not better his position. The city, one of the sixth class, could not, if it tried to do so, legalize that which the general law forbids. People v. Settles, 1938, 29 Cal.App.2d, Supp., 781, 78 P.2d 274. Moreover, the most that could be said for the effect of the license would be to authorize the keeping of the Club for the purpose of gambling; it does not purport to relieve one from the restrictions of section 318.

[9-11] Appellant made a motion in arrest of judgment and now argues that the complaint was insufficient because it did not allege the location of the building that was kept for gambling. The denial of the motion was not error. "The gist of the offense * * * is the giving of the invitation." People v. Chase, 1931, 117 Cal.App.,Supp., 775, 780, 1 P.2d 60, 62. See, also, People v. De Martini, 1914, 25 Cal.App. 9, 142 P. 898; People v. Pierce, 1939, 14 Cal.2d 639, 642, 96 P.2d 784. Moreover, if the complaint were subject to criticism in this particular, it would be no basis for a reversal in a case submitted, as this was, on stipulated evidence revealing that no possible prejudice was suffered by the defendant. Const. Art. VI, sec. 4½.

The judgment of conviction is affirmed.

FOX, J., and VICKERS, Judge pro tem., concur.

20 Cal.2d 42

PEOPLE v. BRIGGS.

Cr. 4387.

Supreme Court of California.

March 23, 1942.

1. Criminal law ⚿1037(1)

Ordinarily, unless timely objection is made, an objection of misconduct will not be considered by an appellate court.

2. Criminal law ⚿1037(1)

Where evidence left no doubt as to accused's guilt of first degree murder, alleged misconduct of district attorney in stating to jury in argument that accused's testimony that deceased had assisted his estranged wife in procuring an abortion was uncorroborated and that prosecution could not call accused's wife as a witness instead of saying that wife could not be compelled to testify against her husband, to which remarks no timely objection was made, did not constitute prejudicial error. Pen.Code, § 1322.

3. Criminal law ⚿1166½(12)

Where defense counsel in argument to jury stated that district attorney could have called accused's wife as a witness subject to accused's right to prevent her from testifying against him and that he did not think the defense would have exercised such privilege, trial court's statement that wife may not testify against her husband without his consent, and that it has been held misconduct for district attorney by calling wife as witness to place accused in a situation where he had to either accept wife's testimony or make objections, did not prejudice accused's rights. Pen.Code, § 1322.

4. Criminal law ⚿361(1)

In prosecution for murder, court properly refused to permit accused on redirect examination to explain those inconsistent statements allegedly made to police officers which accused directly or equivocally denied having made, where he was permitted to explain other statements.

5. Homicide ⚿253(1)

Evidence warranted conviction for murder in the first degree.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Maurice Louis Briggs was convicted of the crime of murder in the first degree, and from the judgment and an order denying a new trial, an appeal is automatically taken under Penal Code, § 1239.

Judgment and order affirmed.

James O. Warner, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson and Frank Richards, Deputy Attys., Gen., for respondent.

EDMONDS, Justice.

Maurice Briggs has been convicted of the crime of murder in the first degree and sentenced to death. Upon his appeal from the judgment and from the order denying his motion for a new trial, he admits that he shot and killed Nat Rosenberg, but he complains of rulings of the judge upon evidence and asserted misconduct of the district attorney during argument to the jury which, he asserts, amount to prejudicial error.

The information included charges of two prior convictions of a felony. After he admitted these convictions and pleaded not guilty, and also not guilty by reason of insanity, a jury found him guilty without including in its verdict any recommendation concerning the punishment to be imposed for the crime. A trial upon the issue of insanity followed and resulted in a verdict by the same jury finding that the appellant was sane at the time the homicide was committed.

The fatal shooting occurred at the place of business of Cotton Products Corporation, where the appellant was previously employed. Rosenberg, who was also known as Nat Ross, was night foreman of the plant. A short time before, Briggs had married a fellow employee. They lived together only two months, when they separated, and she returned to her employment. On the night of the homicide, she was at work in the processing room.

Four witnesses to the crime testified at the trial. The appellant was seen at the entrance to the building three times during the course of the evening and finally, shortly after ten o'clock, he told one of the employees to call Rosenberg as he wished to see him. Rosenberg left his work and walked towards the door. When he was within about ten feet of it, Briggs reached outside, grasped a rifle, and shot him. Rosenberg fell backwards on the floor. Briggs then strode inside the room and, pointing the gun at him, fired another shot from a distance of about two feet. No word had been spoken by either man.

About thirty minutes later, two policemen arrested Briggs as he stood on a street corner two blocks away. One of them testified that in response to his question, "Well, how do you feel about it now?" the appellant replied: "Sorry I cannot do it again." Later that night, Briggs was questioned by other officers. According to the transcript of his statement at that time they asked him when he first planned to kill Rosenberg. "About three weeks ago," said Briggs, "I was figuring on working him over. I don't know whether I was figuring on killing him but I probably would have if I was able to with my hand, and I thought maybe I couldn't do a good enough job that way." "Had you definitely made up your mind that you would kill him?" they then asked. "Yes," answered Briggs.

At his trial, the appellant took the stand and admitted that he shot Rosenberg. It was before noon, he said, when he purchased the rifle, but he arranged to leave the gun at the store until five o'clock. From another store he bought five shells. In the late afternoon, he called for his gun, carried it down to the plant of the Cotton Products Corporation and hid it back of an adjoining apartment building. He then placed himself at a vantage point from which he could observe the entrance to the factory.

He had bought the gun, he testified, because a few evenings before, he had seen his wife leave the factory with Rosenberg in the latter's automobile. And he said that on the morning of the day of the homicide, his wife told him she had submitted to an abortion after Rosenberg had aided her in securing the services of a physician and in financing the operation. Briggs also told the jury that he had planned to commit suicide and wished to see his estranged wife before doing so.

Concerning his conversation with the officers, he denied some of the statements which they said he made to them. He explained that, when they questioned him, he had wanted to die as he had nothing to live for. "I said everything at the time I could that was damaging to me, whether it was so or not."

Although the appellant told the jury that he did not intend to kill Rosenberg at any time, testimony offered by the prosecution shows that he had made threats to do so. Twelve days before the shooting, Briggs, considerably intoxicated, went to the plant and inquired for Rosenberg. A witness testified that the appellant told her at that time he was going to kill Rosenberg; that he hated him "for firing him from his job." She said he carried a pocket knife with which he had cut his hand severely, and that he was profane in his remarks concerning Rosenberg. She said she talked with Briggs for about five minutes, urging him to leave the plant, but that he finally insisted on entering the work rooms and was subsequently arrested.

The appellant bases his charge of prejudicial error upon several grounds. The first of these concerns the district attorney's argument to the jury. During these remarks, the prosecutor commented upon the fact that the appellant's testimony is uncorroborated and he did not call his wife as a witness. Another statement of the district attorney of which he complains is that the People could not call the appellant's wife as a witness. Also, the appellant contends, the trial judge erroneously stated the law relating to the testimony of a wife. Concerning his own testimony, the appellant asserts that the court, upon redirect examination, refused to allow him to state the whole of several conversations with the arresting officers. Finally, he says, the court improperly restricted the argument to the jury made in his behalf and the evidence of premeditation is insufficient to support a verdict of murder in the first degree.

The record shows that in his argument of the case, the district attorney declared that the appellant's testimony concerning the assistance given his wife in procuring an abortion is entirely without corroboration. He also told the jury that, aside from the appellant's testimony, there is no evidence to prove either the pregnancy of Mrs. Briggs or an abortion upon her. In other comment upon the appellant's testimony, the prosecutor said: "He has related to you conversations which he said he had with Mr. Ross and with Mrs. Briggs. There is no corroboration of that testimony. I certainly couldn't call Mr. Ross as a witness to testify that those conversations were not had; because this defendant has by his act prevented that. Neither could I call his wife."

[1, 2] The appellant made no objection to these remarks, nor did he request the trial judge to admonish the jury concerning them. Ordinarily, without timely objection, an objection of misconduct will not be considered by an appellate court. And the most that may be said in reasonable criticism of the prosecutor's statement is that it is incomplete. Obviously, he meant that he could not compel the appellant's wife to testify against her husband. Sec. 1322, Pen.Code. Considering all of the evidence shown in the record, there is no doubt of the appellant's guilt nor any basis for concluding that the remarks complained of contributed materially to the verdict. Certainly it does not amount to prejudicial error.

The ruling of the trial judge comes within the same category. During the argument of appellant's counsel, he told the jury: "* * * The prosecution would like to have you speculate as to the wife; they say they could not call the wife. The District Attorney, with the Judge, know that calling the wife is a question of privilege; the defendant could exercise the privilege if she were called by the prosecution, but I don't think we would have exercised the privilege." At this point, the trial judge said: "There is a rule of law which provides that the wife cannot testify against the husband without his consent. But it also has been held misconduct for the District Attorney to call the wife to the witness stand and force the defendant into a situation where he has to either accept the testimony of the wife or make objections."

[3] Perhaps the case referred to was People v. Terramorse, 30 Cal.App. 267, 157 P. 1134, where the court declared that a defendant's declination to permit his wife to be a witness on behalf of the prosecution must not be used against him. More recently, it has been said that it is unfair for a district attorney to ask a defendant, in the presence of the jury, whether she would object to having her husband called as a witness for the prosecution. Under such circumstances, the court ruled, the spouse should be offered as a witness, subject to the objections of the defendant. People v. Moore, 111 Cal.App. 632, 295 P. 1039. Although the comment of the trial judge was not entirely accurate, it is obvious that he was stating to the jury the limitation upon the right of the district attorney to present the testimony of the wife. Considering all of the circumstances under which the remark was made, it did not prejudice the appellant's rights.

[4] The appellant contends that the trial court erred when it limited his redirect examination. His claim is that he should have been allowed to explain the inconsistent statements said to have been made by him in his conversations with the officers. In ruling upon his testimony, the court did not permit him to explain the statements he directly or equivocally denied having made, but it permitted him to explain the others. These rulings were correct.

The final contention relied upon by the appellant is that the evidence of premeditation is insufficient to support a verdict of first degree murder. In reviewing his testimony, he points out that in order to see his wife before committing suicide it was necessary for him to obtain the permission of Rosenberg, who was the night foreman, and that he did in fact ask one of the employees at the plant to see his wife. He maintains that his acts were those of a man so overcome by his broken marriage and his consequent disappointments that upon seeing the man who, he believed, had caused his difficulties, he shot without premeditation or plan. But the record also includes his statement to the police officers that after making up his mind to shoot Rosenberg, he had to wait ten days to get money to buy the rifle.

[5] The jury heard all of this testimony and also the appellant's statements in positive denial of some of the answers which the officers said he gave in response to their questions. Several witnesses related not only the circumstances of the shooting but also other facts tending to show premeditation. By its verdict the jury impliedly found that the appellant acted with the malice which is an element of the crime of murder in the first degree, and the evidence is amply sufficient to support that verdict and to justify the sentence which has been imposed.

The judgment and the order denying a new trial are, and each of them is, affirmed.

GIBSON, C. J., and SHENK, CURTIS, HOUSER, CARTER, and TRAYNOR, JJ., concur.

20 Cal.2d 52

COLLINS v. BRIDGE INV. CO.

S. F. 16543.

Supreme Court of California.

March 24, 1942.

Rehearing Denied April 20, 1942.

1. Appeal and error 🔑15

In action to quiet title, based on two causes of action, where judgment disposed of both causes of action, there could be but one appeal on the record which was required to be from the final judgment and the correctness of all intermediate orders and rulings were reviewable on the appeal from the final judgment. Civ.Code Proc. § 956; § 963, subd. 1.

2. Appeal and error 🔑839(1)

In action to quiet title, plaintiff by objecting only to that portion of final judgment decreeing disposition of demurrer to first cause of action, and by failing to object to that portion of judgment which determined issues raised by the second cause of action and the defendant's answer, conceded the finality of the judgment for the defendant on the second cause of action.

3. Appeal and error 🔑927(2)

In action to quiet title, where plaintiff appealing from judgment disposing of first cause of action failed to include in judgment roll portion of judgment disposing of second cause of action and defendant's answer, it was required to be assumed that the trial court correctly exercised its jurisdiction in refusing to give effect to plaintiff's purported dismissal of the second cause of action on theory that the answer of the defendant sought affirmative relief and was on file at the time the dismissal was sought by the plaintiff. Code Civ.Proc. § 581, subd. 1.

4. Dismissal and nonsuit 🔑19(1)

Where defendant seeks affirmative relief in a quiet title action, plaintiff is not entitled to dismiss the action as of right. Code Civ.Proc. § 581, subd. 1.

5. Dismissal and nonsuit 🔑19(1)

In view of rule that plaintiff is not entitled to dismiss quiet title action as of right where defendant seeks affirmative relief, where complaint in quiet title action contained two causes of action, and defendant filed answer seeking affirmative relief, distinction could not be made between actions and causes of action so as to entitle plaintiff to dismiss the second cause of action, especially where the first cause of action was merely a restatement of the second cause of action and the same probative facts were relied on by the plaintiff to establish her title pursuant to either. Code Civ.Proc. § 581, subd. 1.

6. Appeal and error 🔑907(3)

In action to quiet title where complaint contained two causes of action, in absence of transcript of evidence, it was required to be assumed that the facts attempted to be stated in the first cause of action and evidence in support thereof upon which plaintiff based her claim of title were before the court on the trial of the issues presented by the second cause of action and that they, together with the evidence produced by defendant, were sufficient to support judgment thereon in favor of defendant, and where the first cause of action was merely a restatement of the second cause of action, and plaintiff appealed only from judgment as to the first cause of action, judgment could not be reversed.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action to quiet title to real property by Clarice McC. Collins against Bridge Investment Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

Elliot W. Seymour, of San Francisco, for respondent.

SHENK, Justice.

The plaintiff has appealed from a judgment quieting the defendant's title to certain described real property. The appeal was taken on the judgment roll alone. The amended complaint contained two causes of action. In the first cause of action the plaintiff alleged ownership of the real property, and the execution of a note and a trust deed in favor of the defendant; that he had defaulted in the payments required by the provisions of the trust deed note but that he had obtained a moratorium decree under the Mortgage and Trust Deed Moratorium Act of 1937 (Stats. of 1937, p. 460) forbidding a sale of the property until after July 1, 1939; that on August 31, 1938, the court entered an order terminating the extension under the moratorium act and permitting a sale of the property; that at such sale the property was sold to the defendant, the beneficiary under the trust deed. The plaintiff further alleged that the order terminating the extension was void and that the sale was therefore in violation of the extension. Thus by the first cause of action the plaintiff attempted to base his claim of title on the asserted invalidity of the order terminating the decree granting to the plaintiff an extension under said act.

The second cause of action contained the usual allegations in a quiet title action, and referred to the same described property.

The defendant interposed a demurrer to the first cause of action on both general and special grounds, and a general demurrer to the second cause of action. On November 16, 1939, the court ordered the demurrer to the first cause of action sustained with leave to amend, and the demurrer to the second cause of action overruled with leave to the defendant to answer. The plaintiff declined to amend the first cause of action.

From the transcript presented by the plaintiff it appears that on January 15, 1940, the plaintiff filed a purported "dismissal of action as to the second count of amended complaint" and that on February 7, 1940, a "judgment on demurrer" was entered decreeing that the defendant "have judgment against the plaintiff as to the first cause of action set forth in the first amended complaint." The plaintiff's notice of appeal, dated February 29, 1940, is "from the final judgment rendered and entered in favor of the defendant in said action, and from the whole of said judgment." The foregoing comprises the entire transcript. It is disclosed without any question, however, that the trial court refused to recognize or permit the attempted dismissal of the second cause of action and proceeded to trial on the issues presented by that cause of action and by the denials in the defendant's answer and further allegations of fact whereby it sought affirmatively to have the title to said property quieted in the corporation; also that a final judgment was entered for the defendant on proof tendered in support of its affirmative allegations, quieting the title of the defendant to the real property described in the plaintiff's complaint. It is further indicated that the "judgment on demurrer" was so styled by the plaintiff, and that the paragraph copied into the transcript as the "judgment on demurrer" was in fact one of the paragraphs contained in the final judgment from which the plaintiff noticed an appeal.

As justification for the omissions from the judgment roll the plaintiff asserts that the trial court erroneously refused to give effect to her "dismissal" of the second cause of action and in proceeding to trial thereon, and that inasmuch as she questioned only that ruling and the ruling on the demurrer to the first cause of action, she elected to bring before this court on the appeal only that portion of the judgment roll showing the "dismissal" and the disposition by the court of said demurrer.

[1-6] There can be but one appeal on the record here involved which must be from the final judgment in the action, and the correctness of all intermediate orders and rulings are reviewable on the appeal from the final judgment. Secs. 956, 963(1), Code of Civil Procedure; Estate of Smith, 98 Cal. 636, 33 P. 744; Guaranty Trust & Savings Bank v. City of Los Angeles, 186 Cal. 110, 199 P. 35. By her failure to include in the judgment roll the entire final judgment, that is, by objecting only to that portion of the final judgment decreeing the disposition of the demurrer to the first cause of action and by failing to object to that portion of the judgment which determined the issues raised by the second cause of action and the defendant's answer, the plaintiff must necessarily be deemed to concede the finality of the judgment for the defendant on the second cause of action and the defendant's answer. In the absence of the record of that judgment it must be assumed that the trial court correctly exercised its jurisdiction in refusing to give effect to the plaintiff's purported dismissal; that is, that the answer of the defendant seeking affirmative relief was on file at the time the "dismissal" was sought by the plaintiff. Where the defendant seeks affirmative relief in a quiet title action, the plaintiff is not entitled to dismiss the action as of right, Sec. 581(1), Code of Civil Procedure; Islais & Salinas Water Co. v. Allen, 132 Cal. 432, 64 P. 713. The distinction sought by the plaintiff may not be made between actions and causes of action so as to except the latter from the applicability of that section. This is so especially where, as in the present case, the first cause of action was merely a re-

statement of the second cause of action and the same probative facts were relied on by the plaintiff to establish her title pursuant to either. The plaintiff concedes that fact, and that "judgment for the defendant on the first count would make necessary a judgment for the defendant on the second count." Obviously a judgment for the defendant on the second count would also necessitate a judgment for the defendant on the first count. The conceded fact is a further sufficient answer to the contentions of the plaintiff. In the absence of a transcript of the evidence taken at the trial it must be assumed that the facts attempted to be stated in the first cause of action and the evidence in support thereof, upon which the plaintiff based her claim of title, were before the court on the trial of the issues presented by the second cause of action and that they, together with the evidence produced by the defendant, were sufficient to support the judgment thereon in favor of the defendant. The plaintiff has therefore failed to disclose any tenable reason for a reversal of the judgment.

The judgment is affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.

20 Cal.2d 12

KIM v. CHINN et al.

S. F. 16697.

Supreme Court of California.
March 19, 1942.

1. Appeal and error 🔑479(1)

The Supreme Court will in its discretion under proper circumstances stay execution on a money judgment while an appeal from a judgment is pending in the Supreme Court where the sureties on the undertaking to stay execution filed in lower court fail to justify and require the filing of a proper undertaking in the Supreme Court and that result is accomplished by a writ of supersedeas. Code Civ.Proc. § 948.

2. Appeal and error 🔑479(2)

Whether circumstances justify the issuance of writ of supersedeas on appeal from a money judgment lies in the sound discretion of the court.

3. Appeal and error 🔑479(2)

Where it appears that petitioner seeking writ of supersedeas on appeal from a money judgment has in good faith attempted to comply with the law, and the respondent will not suffer injury, liberality should characterize exercise of court's discretion to the end that the status quo may be maintained and the fruits of the appeal preserved.

4. Appeal and error 🔑479(1)

Where defendant's counsel in trial court refused to proceed with appeal, proposed new counsel became disabled and attorney, acting gratuitously and temporarily, mistakenly believed that filing of second undertaking was all that was required upon failure of one of sureties on original undertaking to qualify so that there was a failure of one of the sureties on new undertaking to justify within the statutory time, the Supreme Court would grant defendant's application for writ of supersedeas to stay execution on money judgment appealed from, where sufficient undertaking with qualified sureties had been filed in Supreme Court since the plaintiff would not be prejudiced. Code Civ.Proc. § 948.

In Bank.

Action by Edwin Kim against O. S. Chinn and others. From the judgment, defendants appeal. On application of O. S. Chinn for writ of supersedeas.

Writ granted.

Prior opinion, see 117 P.2d 368.

A. B. Bianchi, of San Francisco, for appellants.

Manwell & Manwell, of Marysville, and John L. McCarthy, of Watsonville, for respondent.

CARTER, Justice.

Defendant Chinn, petitioner herein, has applied for a writ of supersedeas to stay the execution of a judgment against him pending an appeal therefrom. The judgment was entered in the Superior Court of Santa Cruz County on April 18, 1941, for the sum of $8,500 and costs. A motion for a new trial was denied on June 12, 1941. Defendant filed a notice of appeal on July 10, 1941.

In all of the above-mentioned proceedings petitioner was represented by his counsel of record, Mr. Stanford G. Smith, who then advised petitioner that he desired to withdraw from the case and refused to take any further proceedings thereafter. He signed a substitution of attorneys between July 21 and July 26, 1941.

On July 26, 1941, petitioner by and through Mr. Hudson, an attorney at law, caused to be filed in the Superior Court in said action, an undertaking in the sum of $17,600 to stay execution on the judgment pending appeal; the sureties were personal. Petitioner was ill at the time but went to San Francisco to obtain an attorney to be substituted in the place of Mr. Smith, and in the latter part of July, 1941, made a tentative arrangement with Mr. Bianchi, an attorney in San Francisco, to "prosecute the case on appeal when, as and if the record on appeal was perfected"; Mr. Bianchi signed the substitution of attorneys on September 15, 1941, and sent it to Mr. Smith. It was filed on September 19, 1941. Petitioner became so ill on August 14, 1941, that he was, and at all times since has been, confined in a sanatorium. On August 15, 1941, Mr. Bianchi was injured, necessitating his absence from his office until September 10, 1941. Plaintiff excepted to the sufficiency of the sureties on the undertaking on August 18, 1941, notice thereof being mailed to Mr. Bianchi's office and to Mr. Smith. Mr. Bianchi, not having signed the substitution of attorneys, and he being ill, his office took steps by which petitioner's wife received the notice. She delivered it to Mr. Hudson for attention, who filed notice that the sureties would justify on August 29, 1941, at which time one of the sureties, Silliman, failed to justify and Mr. Hudson informed petitioner's wife that she would have to secure a new surety. Plaintiff asserts that the court stated at that time, in the hearing of petitioner's wife, that only eight days remained in which to obtain proper sureties. A new undertaking was filed in the trial court on September 2, 1941. Neither petitioner nor his wife were ever advised by anyone or knew until September 10, 1941, that it was necessary under the law to have other sureties in court to justify within the time limit in the event of the failure of the sureties to which exception was taken to qualify. Mr. Hudson acted gratuitously and as an accommodation in the matter of the undertaking, and believed that the filing of the second undertaking was all that was required upon the failure of one of the sureties on the first undertaking to qualify, and did not know of any objection upon plaintiff's part to the sureties on the second undertaking until plaintiff's exception thereto on September 10, 1941, at which time it was too late for the sureties to justify. Sec. 948, Code of Civil Procedure. Plaintiff threatens to obtain execution of the judgment, and defendant alleges that plaintiff is insolvent.

Plaintiff in his answer to the petition asserts that it was through his indulgence that the defendant was allowed until July 28, 1941, to file an undertaking (it was filed on July 26th); that he was not notified that the undertaking had been filed until he received a copy thereof on August 18, 1941, from Mr. Bianchi; that the second undertaking was signed by the new surety Chan, in place of Silliman, on August 30, 1941, and filed on September 2, 1941; notice thereof being given on September 5, 1941; and that the record on appeal has not yet been prepared.

[1-3] It is conceded that there was a failure of one of the sureties to justify within the time required by section 948 of the Code of Civil Procedure. However, this court will in its discretion under proper circumstances stay the execution on a money judgment while an appeal therefrom is pending in this court where the sureties on the undertaking to stay execution filed in the lower court fail to justify, and require the filing of a proper undertaking in this court; that result is accomplished by a writ of supersedeas. Tompkins v. Montgomery, 116 Cal. 120, 47 P. 1006; Williams v. Borgwardt, 115 Cal. 617, 47 P. 594; Rosenfeld v. Miller, 216 Cal. 560, 15 P.2d 161; Messenkop v. Duffield, 211 Cal. 222, 294 P. 715. Whether the circumstances justify the issuance of the writ lies in the sound discretion of the court, and where it appears that petitioner has in good faith attempted to comply with the law and the respondent will not suffer injury, liberality should characterize the exercise of that discretion to the end that the status quo may be maintained and the fruits of the appeal preserved. See Dairy Holding Co. v. Pacific Coast D. Co., 19 Cal.App.2d 252, 64 P.2d 1111; Poncino v. Sierra Nevada, etc., Co., 100 Cal.App., 85, 279 P. 1035; Nonpareil Mfg. Co. v. McCartney, 143 Cal. 1, 76 P. 653; Hill v. Finnigan, 54 Cal. 493;

Segarini v. Bargagliotti, 193 Cal. 538, 226 P. 2; Rosenfeld v. Miller, supra; Messenkop v. Duffield, supra; Foster v. Fernandes, 200 Cal. 274, 252 P. 726; Ellinwood v. McCoy, 133 Cal.App. 597, 24 P.2d 549.

[4] From the above-stated circumstances we are convinced that the writ should properly issue in this case. It appears that defendant acted in good faith in endeavoring to file an undertaking with satisfactory sureties. The difficulties in which he found himself were due to his illness, the refusal of his counsel in the trial court to proceed with the appeal, the confusion resulting from an effort to obtain new counsel, the disability of Mr. Bianchi, the proposed new counsel, and the mistake on Mr. Hudson's part with respect to the proper procedure to follow when one of the sureties failed to justify, he acting gratuitously and temporarily. It does not appear that the plaintiff will be in any way injured or prejudiced by the stay of execution pending the appeal since a sufficient undertaking with qualified sureties has been filed in this court.

Defendant relies upon such cases as Williams v. Borgwardt, supra; Reliance Acceptance Corp. v. Lundblade, 96 Cal.App. 371, 274 P. 360, and Willis v. Paul, 116 Cal. App. 733, 3 P.2d 339, but suffice it to say that each case must be determined on its particular facts, and we are satisfied that the facts here are as persuasive if not more persuasive for the issuance of the writ than the cases cited by us, supra.

Therefore, it is ordered that the writ of supersedeas issue as prayed for, and execution on said judgment be stayed. Defendant has heretofore filed in this court pursuant to the order to show cause made by this court on November 25, 1941, an undertaking approved by, and the sureties on which justified before the Superior Court of Santa Cruz County in the sum of $17,600, conditioned on the payment of the judgment and costs in the event of an affirmance thereof on appeal or a dismissal of the appeal, and said undertaking shall stand as the undertaking on appeal as required by law and as a compliance with the condition to the issuance of said writ.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, HOUSER, and TRAYNOR, JJ., concurred.

19 Cal.2d 815

CONSOLIDATED MILK PRODUCERS FOR SAN FRANCISCO v. PARKER, Director of Agriculture.

S. F. 16589.

Supreme Court of California.

March 12, 1942.

1. United States ⚷3

When the state of California ceded exclusive jurisdiction over the Presidio, a military reservation, to the United States by statute reserving only right to execute civil and criminal processes therein, such area became a federal territory removed from state's jurisdiction. St.1897, p. 51.

2. United States ⚷3

The State Director of Agriculture has no jurisdiction to establish minimum prices of milk sold on territory, such as military reservation, over which the United States has exclusive jurisdiction. Agricultural Code, §§ 735–738.

◆

In Bank.

Proceeding by the Consolidated Milk Producers for San Francisco, a corporation, for a writ of mandamus ordering William B. Parker, as Director of Agriculture, to hold a hearing on petitioner's complaint against certain distributors of fluid milk, bring an action to enjoin their violations of a milk marketing and stabilization plan, revoke or suspend their licenses for such violations, lodge a criminal complaint against them, bring an action to recover a stated sum for each violation, or take such other action against them as may be required by law.

Alternative writ discharged, and petition for peremptory writ denied.

Bartley C. Crum and Philip S. Ehrlich, both of San Francisco, for petitioner.

Earl Warren, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for respondent.

Frank J. Hennessy, U. S. Atty., and William E. Licking, Asst. U. S. Atty., both of San Francisco, as amici curiae, on behalf of respondent.

TRAYNOR, Justice.

Three distributors of fluid milk licensed to do business in the San Francisco marketing area have contracted to sell fluid milk, at prices below those set by the Director of Agriculture, to military agencies of the United States in the Presidio. The Consolidated Milk Producers, an association of milk producers for the San Francisco area, requested the Director of Agriculture to take action to prevent these sales. They also filed a verified complaint with the director alleging that the sales violated the stabilization and marketing plan for San Francisco and requested that a hearing be held to determine whether the licenses of the offending distributors should be revoked. The director refused to take action on the ground that he had no jurisdiction to fix the minimum price at which fluid milk might be sold within the Presidio. The Producers then petitioned this court for a writ of mandamus ordering the Director of Agriculture either to hold a hearing upon the complaint against the distributors, or to bring an action to enjoin their violations of the marketing and stabilization plan, or to revoke or suspend their licenses for such violations, or to lodge a criminal complaint against them in accordance with the provisions of section 737.7 of the Agricultural Code, or to bring an action in accordance with the terms of the code to recover $500 for each violation, or to take such other action as may be required by law. The United States Attorney has filed a brief as amicus curiae on behalf of the United States in opposition to the petition for mandamus.

The parties agree that petitioner has sought the appropriate remedy in mandamus (Bodinson Mfg. Co. v. California Employment Commission, 17 Cal.2d 321, 109 P.2d 935), and that the milk control act is valid in its general application to producers and distributors in California. Nebbia v. New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469; Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 620, 637, 91 P.2d 577; Ray v. Parker, 15 Cal.2d 275, 281, 101 P.2d 665.

[1] California ceded exclusive jurisdiction over the Presidio to the United States by the Act of March 2, 1897 (Cal.Stats. 1897, page 51) reserving only the right to execute civil and criminal processes therein. See United States v. Bateman, 9 Cir., 34 F. 86, 13 Sawy. 212; United States v. Watkins, D.C., 22 F.2d 437. The area thus became a federal territory removed from the jurisdiction of the state. Standard Oil Co. of California v. California, 291 U.S. 242, 54 S.Ct. 381, 78 L.Ed. 775; see 24 Cal.L.Rev. 573; Rottschaefer, Constitutional Law, secs. 71-73.

Paragraph XII of the petition alleges that the invitation for bids was issued within the Presidio by the United States Quartermaster Supply Officer; Paragraph XIII alleges that the bids were filed in the ceded territory; and Paragraphs XV and XIX allege that the bids were accepted by the Quartermaster Supply Officer at Fort Mason. There is no allegation that the agreements were made outside the territory within an area over which the State has jurisdiction, or that the sales in question were made or are to be made outside of the territory before the delivery of the milk therein. Cf. Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752. In fact, the offer to sell was made and accepted in the Presidio, and the contract, in the words of the petitioner, "became a contract on ceded territory." Closing Memorandum of Petitioner, page 29. The alleged violations relate solely to the sale of milk in the Presidio at less than the minimum prices established for the San Francisco marketing area and not to the performance of any acts in violation of law outside the Presidio. Under the law in effect at the time of the alleged violations there was no provision prohibiting the unfair trade practices now described in section 736.3(a) (6) of the Agricultural Code. The power of the State to regulate activities within its jurisdiction that may affect activities within the Presidio (Cf. Pacific Coast Dairy Inc. v. Dept. of Agriculture, Cal.Sup., 123 P.2d 442, this day decided) is therefore not involved in this case.

[2] The sole question involved in this proceeding is whether the Director of Agriculture has jurisdiction to establish minimum prices for milk sold on territory over which the United States has exclusive jurisdiction. The case of Standard Oil Co. of California v. California, supra [291 U.S. 242, 54 S.Ct. 382, 78 L.Ed. 775], makes it clear that he lacks such jurisdiction. The court there declared: "In three recent cases—Arlington Hotel Co. v. Fant, 278 U.S. 439, 49 Sup.Ct. 227, 73 L.Ed. 447, United States v. Unzeuta, 281 U.S. 138, 50 S.Ct. 284, 74 L.Ed. 761, and Surplus Trading Co. v. Cook, 281 U.S. 647, 50 S.Ct. 455, 74 L.Ed. 1091—we have pointed out the consequences of cession by a state to the United States of jurisdiction over

lands held by the latter for military purposes. Considering these opinions, it seems plain that by the act of 1897 California surrendered every possible claim of right to exercise legislative authority within the Presidio. * * * Accordingly, her Legislature could not lay a tax upon transactions begun and concluded therein. * * * A state cannot legislate effectively concerning matters beyond her jurisdiction and within territory subject only to control by the United States." See also, Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502.

The alternative writ of mandamus is discharged and the petition for a peremptory writ is denied.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, HOUSER, and CARTER, JJ., concurred.

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19 Cal.2d 818

PACIFIC COAST DAIRY, Inc., v. DEPARTMENT OF AGRICULTURE et al.

S. F. 16694.

Supreme Court of California

March 12, 1942.

1. Food ⇨1

The provisions of Agricultural Code that any stabilization and marketing plan shall prohibit milk distributors from paying lesser price to any producer for fluid milk or cream, distributed to any person, including government agency, on property within geographical limits of marketing area, for less than minimum prices established by Director of Agriculture for such area, and purchase or receipt of such milk or cream from producers within such area for less than such prices, regardless of whether it is subsequently sold or distributed within or without such area or state's jurisdiction, are valid. Agricultural Code, § 736.3(a) (7, 8).

2. Constitutional law ⇨298(1)
Food ⇨1

The state has power to prohibit milk distributors from purchasing or delivering in any marketing area any fluid milk or cream to be sold at any place within boundaries of such area, whether part thereof or not, at less than minimum prices effective therein, as against contention that state's control over activities within its jurisdiction does not authorize it to impose penalties for transactions on territory outside its jurisdiction, such as army reservation, because such penalties violate "due process clause" of Fourteenth Amendment. Agricultural Code, § 736.3(a) (6); U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

3. States ⇨4

A state may validly regulate activities, persons, and property within its jurisdiction, though extraterritorial repercussions ensue, whenever such regulation is vital to welfare of its inhabitants, as propriety of regulation is determined by its focus on internal problems, not by range of its influence.

4. States ⇨4

A state may exercise its power over things within its jurisdiction, with knowledge that it will thereby influence things beyond its jurisdiction and that such influence may be far-reaching, so long as external consequences remain incidental to solution of internal problems.

5. Commerce ⇨16

Shipments of milk from California to United States military reservation therein are within definition of "interstate commerce" in Federal Agricultural Marketing Agreement Act as commerce between any state, territory, or possession and any place outside thereof. Agricultural Marketing Agreement Act 1937, § 10(j), 7 U.S.C.A. § 610 (j).

See Words and Phrases, Permanent Edition, for all other definitions of "Interstate Commerce".

6. Commerce ⇨3

The constitutional power of Congress to regulate interstate commerce, reinforced by its authority over territories, forts, magazines, arsenals, dock yards, and other needful buildings, enables it to regulate commerce between states and such federal areas as military reservations. U.S.C.A.Const. art. 1, § 8, cl. 17.

7. Commerce ⇨8(10)

The State Milk Control Act, being focussed on a state problem, does not run counter to commerce clause of federal constitution, despite its repercussions on Interstate commerce, as it does not conflict with provisions or objectives of congressional legislation. Agricultural Code, §§ 735–738; Agricultural Marketing Agreement Act 1937, § 1 et seq., 7 U.S.C.A. § 601 et seq.

8. States ⟹4

Where conflict between state and federal legislation is apparent, state legislation must yield.

9. Health ⟹20

Public health is a vital concern of state, and its maintenance at proper levels should not wait on federal regulation.

10. States ⟹4

The State Milk Control Act, as applied to milk sold on United States military reservation, is not invalid as unduly burdening operation of essential federal agency or inconsistent with federal statutes requiring purchase of army supplies through competitive bidding, as it does not discriminate against United States army, nor substantially hinder its efficient operation, and regulates, not the army, but milk distributors as independent contractors with federal government. Agricultural Code, §§ 735–738; 10 U.S.C.A. §§ 1200, 1201; 41 U.S.C.A. § 5.

11. States ⟹4

Independent contractors with federal government, such as milk distributors contracting with such government for sale of milk on military reservations, are subject to state's control, and any consequent burden on federal government is speculative and remote. Agricultural Code, §§ 735–738.

In Bank.

Proceeding by the Pacific Coast Dairy, Incorporated, for a writ of mandamus ordering the State Department of Agriculture and William B. Parker, Director of Agriculture, to dismiss proceedings for revocation of petitioner's license as a milk distributor.

Alternative writ discharged, and petition for peremptory writ denied.

Vincent W. Hallinan and Carey Van Fleet, both of San Francisco, for petitioner.

Frank J. Hennessy, U. S. Atty., and William E. Licking, Asst. U. S. Atty., both of San Francisco, amici curiae, on behalf of petitioner.

Earl Warren, Atty. Gen., and W. T. Sweigert and W. R. Augustine, Deputy Attys. Gen., for respondent.

TRAYNOR, Justice.

In 1935 the California legislature passed an act regulating the marketing and distribution of fluid milk and fluid cream. Cal.Agricultural Code, div. 4, ch. 10, secs. 735–738, St.1935, p. 922, as amended. The act declares that it is the policy of the state to promote the intelligent production and orderly marketing of such essential commodities as milk; that an adequate supply of wholesome milk is vital to the public health; that the production, transportation, processing, storage, distribution, and sale of milk and cream therefore constitute an industry affected with a public interest; and that unfair and destructive trade practices in the production, marketing, and distribution of milk and cream have menaced the public health by undermining sanitary regulations, which cannot of themselves guard against serious deterioration in the supply of milk. Agric.Code, sec. 735. It sets forth as one of its objectives the elimination of "speculation, waste, improper marketing, unfair and destructive trade practices, and improper accounting for milk purchased from producers. * * *"

The act as amended (Cal.Stats.1937, Chs. 3, 413, 710; Stats.1941, ch. 1214) empowers the Director of Agriculture to set up defined marketing areas within the State, to prescribe minimum prices for fluid milk and fluid cream to be paid by distributors to producers in accordance with stabilization and marketing plans for such areas (secs. 735.4(b) (4) (5) and 736.3(b) (c)), to prescribe minimum wholesale and retail prices of fluid milk and fluid cream within each area (Agric.Code, secs. 736.11, 736.12), to license milk distributors within each area, to revoke or suspend licenses for violation of any stabilization and marketing plan, and to bring actions to enjoin such violations. Agric.Code, sec. 737.7.

The petitioner seeks a writ of mandamus ordering the Director of Agriculture to dismiss proceedings undertaken pursuant to section 737.11 of the Agricultural Code with the object of revoking petitioner's license. In these proceedings it is alleged that petitioner violated section 736.3(a) (6) of the code and of the Stabilization and Marketing Plan for the Santa Clara Marketing Area by purchasing, processing, bottling, transporting, and delivering in the Santa Clara Marketing Area fluid milk that it sold to the Federal Government for less than the minimum wholesale prices prescribed for that area. The sale occurred on Moffett Field, territory within the geographic boundaries of the Santa Clara Marketing Area, but subject to the exclusive jurisdiction of the federal government.

Since the demand for fluid milk fluctuates from day to day and cannot be anticipated exactly, the producers must supply enough milk to meet all reasonable needs; then any surplus, or "stand by," is converted into milk products and sold by the distributors at lower prices, with corresponding lower receipts for the producers. The possibility of a surplus has been a constant threat to the stability of prices paid to the producers, given the reluctance of distributors to pay the full price for milk that becomes in part converted into milk products. A stabilization plan counteracts this downward pull by establishing minimum prices for fluid milk. At the end of a given period, the distributor settles his accounts with the producer by paying him a "blended price" representing the price for fluid milk bought less the difference between that price and the price for the milk converted into milk products. Even then the producer does not know what the blended price will be until the expiration of the period for settling accounts. The minimum price of fluid milk, however, represents a fixed element in the blended price that affords him at least some protection against speculation at his expense in the distribution of milk. If the distributor were under no compulsion to pay a minimum price he would seek to shift to the producer the risk of speculation in a fluctuating market by paying him the lowest possible price, not only for fluid milk sold to consumers but for milk converted into milk products, and there would soon be adverse effects on standards of production.

[1] The same adverse effects would result if the minimum price established by a stabilization plan were not uniformly enforced. The act itself anticipates that possibility by specifying that there may be no departures from the minimum price even when the milk is sold to the federal government on territory within the exclusive jurisdiction of that government. Section 736.3(a) provides that any stabilization and marketing plan shall prohibit distributors and retail stores from engaging in such unfair practices as:

"(7) The payment of a lesser price by a distributor to any producer for fluid milk or fluid cream which is distributed to any person, including agencies of the Federal, State or local government, located upon property within the geographical limits of any marketing area for less than the minimum prices established by the director to be paid by distributors to producers for fluid milk or fluid cream for said marketing area.

"(8) The purchasing or receiving of any fluid milk or fluid cream by distributors from producers within a marketing area wherein a stabilization and marketing plan is in effect for less than the minimum prices established in such plan, regardless of whether such milk or cream is subsequently sold or distributed within or without such marketing area, or within or without the jurisdiction of the State of California."

The validity of such provisions is clear. Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752; Alabama v. King & Boozer, 62 S.Ct. 43, 86 L.Ed. 3; James v. Dravo Contracting Co., 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155, 114 A.L.R. 318.

In its original form in 1935 the milk control act prescribed minimum prices to the producers only. To prescribe such prices without also prescribing minimum resale prices is ineffectual, however, since the distributors cannot pay the producers the prescribed prices unless they have some guarantee of corresponding returns. Minimum resale prices, moreover, must govern all transactions, particularly those of the producer who is his own distributor and who is otherwise apt to sell to consumers at prices below those at which regular distributors are required to operate. In the light of these considerations, Article 2A was added in 1937 to provide for minimum wholesale and retail prices. Section 736.11 provides that in all marketing areas where a stabilization and marketing plan is in effect the Director of Agriculture shall prescribe minimum wholesale prices at which milk shall be sold by distributors to retail stores, and minimum retail prices at which fluid milk shall be sold by distributors and retail stores to consumers. Section 736.12 provides that in determining minimum prices for any marketing area the director shall make an investigation relative to that area of such factors as the quantities of fluid milk distributed and normally required by consumers, the price to distributors and their handling costs, and the available capacity for processing and distributing. Section 736.13 prohibits sale by distributors at less than the prescribed prices.

[2] The most real danger to the prescribed minimum lies in sales by distributors at lower prices on areas within the exclusive jurisdiction of the federal government, where transactions cannot be regulated by the State. Prescribed minimum prices fail of their purpose if they lie in the shadow of cut prices. The route of the milk from the producer to the consumer is a continuous one even when it crosses the imaginary line that demarcates federal jurisdiction, and the evil effects of substandard prices in the federal area course backward to play their part in undermining the intelligent production and orderly marketing that the State has declared essential to the public health. The State has therefore undertaken to regulate the milk industry within the bounds of its jurisdiction in such a manner as to obviate the elusive evils that it could not directly attack. Section 736.3(a) (6) of the Agricultural Code provides that any stabilization and marketing plan shall prohibit distributors and retail stores from engaging in such unfair practices as, "(6) The purchasing, processing, bottling, transporting, delivering or otherwise handling in any marketing area of any fluid milk or fluid cream which is to be or is sold or otherwise disposed of by such distributor at any place in the geographical area within the outer, outside and external boundaries or limits of such marketing area, whether such place is a part of the marketing area or not, at less than the minimum wholesale and minimum retail prices effective in such marketing area."

The Stabilization and Marketing Plan for the Santa Clara Marketing Area contains the provisions outlined by this section. These regulations are directed at the milk before it can enter the stronghold of an area within the State's boundaries but outside its jurisdiction on terms that would menace the entire milk supply. The alleged violation in the present case is the purchasing, processing, bottling, transporting, delivering, and other handling of milk within the Santa Clara Marketing Area for prospective sale at a point outside the jurisdiction of the State at prices less than the minimum prescribed for that marketing area. Petitioner contends that the State's control over activities within its jurisdiction affords it no authority to impose penalties because of transactions on Moffett Field. This contention proceeds from the theory that such penalties violate the due process clause of the 14th Amendment to the Constitution of the United States, denying to a State the power to restrict or control activities, persons, and property beyond its jurisdiction. Standard Oil Co. of California v. California, 291 U.S. 242, 54 S.Ct. 381, 78 L.Ed. 775; Allgeyer v. Louisiana, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832; St. Louis Cotton Compress Co. v. Arkansas, 260 U.S. 346, 43 S.Ct. 125, 67 L.Ed. 297; Compania General de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 48 S.Ct. 100, 72 L.Ed. 177; Home Ins. Co. v. Dick, 281 U.S. 397, 50 S.Ct. 338, 74 L.Ed. 926, 74 A.L.R. 701. This contention, however, confuses the State's control over activities, persons, and property within its jurisdiction and the repercussions of that control in areas outside thereof. The question is not whether the State can prescribe the minimum prices at which milk may be sold on the territory within the exclusive jurisdiction of the United States. (Cf. Consolidated Milk Producers v. Parker, Cal.Sup., 123 P.2d 440, this day decided), but whether it has power to regulate acts within its jurisdiction even though they are followed in direct line of succession by a transaction outside its jurisdiction.

[3] It is established that a State may validly regulate activities, persons, and property within its jurisdiction, even though extra-territorial repercussions ensue, whenever such regulation is vital to the welfare of its inhabitants. The propriety of the regulation is determined by its focus upon an internal problem and not by the range of its influence. Thus, in Mirkovitch v. Milnor, D.C., 34 F.Supp. 409, the court held that the State could exercise its police power over boats within State waters in a manner that was bound to affect their activities beyond State borders. Threatened with the depletion of its fish supply by the practices of certain fishermen, California provided in the Fish and Game Code, St.1933, p. 395, that no person shall use a boat in this State or its waters that delivers to any point outside the State fish caught from the boat in the waters of the Pacific Ocean within the State or on the high seas or elsewhere without authorization of the Fish and Game Commission. The court pointed out that the code provision related solely to the operation within State waters of fishing vessels deliver-

ing their catch outside the State, and emphasized that the provision was designed not to regulate fishing operations beyond the State's jurisdiction but to protect the State's fisheries from depletion. The realization that the plaintiff might be unable to carry on fishing operations beyond the State's jurisdiction without entering and operating his boat within State waters did not deter the court from declaring that the statute was a valid exercise of the State's police power over acts within its jurisdiction.

In Osborn v. Ozlin, 310 U.S. 53, 60 S.Ct. 758, 761, 84 L.Ed. 1074, the United States Supreme Court upheld a Virginia statute requiring that insurance policies for persons or property in Virginia written by companies authorized to do business in Virginia be countersigned by a local agent receiving a certain percentage of the commission, even though insurer and insured are both outside of Virginia when the contract of insurance is negotiated. The close relation between the insurance contracts and the insured persons or property, together with the State's interest in protecting such persons and property, justified the regulation despite its extra-territorial effect. The court stated: "But the question is not whether what Virginia has done will restrict appellants' freedom of action outside Virginia by subjecting the exercise of such freedom to financial burdens. The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids. * * * Virginia has not sought to prohibit the making of contracts beyond her borders. She merely claims that her interest in the risks which these contracts are designed to prevent warrants the kind of control she has here imposed. This legislation is not to be judged by abstracting an isolated contract written in New York from the organic whole of the insurance business, the effect of that business on Virginia, and Virginia's regulation of it." Pages 62, 63 of 310 U.S., page 761 of 60 S.Ct. 84 L.Ed. 1074. See, also, Holmes v. Springfield Fire & Marine Insur. Co., 311 U.S. 606, 61 S.Ct. 19, 85 L.Ed. 384; Springfield Fire & Marine Ins. Co. v. Holmes, D.C., 32 F.Supp. 964; National Union Fire Ins. Co. v. Wanberg, 260 U.S. 71, 43 S.Ct. 32, 67 L.Ed. 136, and Palmetto Fire Ins. Co. v. Conn., 272 U.S. 295, 47 S.Ct. 88, 71 L.Ed. 243; Brandeis' dissent in New York Life Ins. Co. v. Dodge, 246 U.S. 357, 377, 38 S.Ct. 337, 62 L.Ed. 772, Ann.Cas.1918E, 593; cf. Fidelity & Deposit Co. v. Tafoya, 270 U.S. 426, 46 S.Ct. 331, 70 L.Ed. 664.

Again in the application of State workmen's compensation laws, it is established that where the injury occurs in one state and the contract of employment is entered into in another, the statute of the state with the greater interest in the welfare of the injured workman controls. Alaska Packers Assn. v. Industrial Acc. Comm. of California, 294 U.S. 532, 55 S.Ct. 518, 79 L.Ed. 1044; Pacific Employers Ins. Co. v. Industrial Acc. Comm. of California, 10 Cal.2d 567, 75 P.2d 1058. In the Alaska Packers case the California Workmen's Compensation Act was held applicable to an injury sustained in Alaska by a workman who resided in California and entered into the contract of employment here. The court noted California's interest in the welfare of the injured workman, stating: "Obviously, the power of a state to effect legal consequences is not limited to occurrences within the state if it has control over the status which gives rise to those consequences." Page 541 of 294 U.S., page 521 of 55 S.Ct., 79 L.Ed. 1044. See, also, Wisconsin Tax Comm. v. J. C. Penney Co., 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267, 130 A.L.R. 1229; Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412, 57 S.Ct. 772, 81 L.Ed. 1193, 112 A.L.R. 293; Nelson v. Sears Roebuck & Co., 312 U.S. 359, 61 Sup.Ct. 586, 85 L.Ed. 888, 132 A.L.R. 475.

[4] The foregoing cases establish that a State may exercise its power over things within its jurisdiction in the knowledge that it will thereby influence things beyond its jurisdiction, and that its influence may be far reaching, so long as the external consequences remain incidental to the solution of internal problems. Their application to the present case is clear. In accomplishing the objectives of the State Milk Control Act the State is concerned, not with the destination and sale of the milk but with the effect of the price of the milk upon the conditions of production. A price below the fixed minimum for milk produced in the State endangers those established standards for the milk industry that safeguard the public health, and leads successively to a breakdown of the law, price cutting, diminishing returns to the producers, inferior standards of milk pro-

duction and finally injurious effects on the public health. The State has regulated the purchasing, processing, bottling, transporting and handling of fluid milk within its jurisdiction with the object, not of controlling transactions beyond its jurisdiction, but of stabilizing within its jurisdiction the production of a commodity vital to the public health.

[5] The State Milk Control Act, however clear its validity under the due process clause, must be scrutinized further in the light of the commerce clause and the Federal Agricultural Marketing Agreement Act of 1937, 50 U.S.Stats. 246, 7 U.S.C.A. § 601 et seq., held constitutional in United States v. Rock Royal Co-op., 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446. The federal act authorizes the Secretary of Agriculture to enter into marketing agreements fixing minimum prices to be paid producers for milk that is "in the current of interstate or foreign commerce" or that "directly burdens, obstructs, or affects, interstate or foreign commerce." (Sec. 8c (1), (2), (5), (7), (8), and (18), 7 U.S.C.A. § 608c.) It defines interstate or foreign commerce as "commerce between any State, Territory, or possssion, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this chapter * * * a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within the State and the shipment outside the State of the products so processed. * * * As used herein, the word 'State' includes Territory, the District of Columbia, possessions of the United States, and foreign nations." Sec. 10(j), 7 U.S.C.A. § 610(j). The extensiveness of this definition leaves no doubt that Congress intended to cover the broadest possible field that might come within its powers to regulate interstate commerce and to govern territories.

The shipments of milk from California to such areas as Moffett Field, where the transit ends, fall within this definition of interstate commerce, for Moffett Field can be classified as either a territory or possession of the United States outside the jurisdiction of California, even though within the State's boundaries.

[6] The contention is nevertheless advanced that transactions between such federal areas as Moffett Field and the rest of the State do not come within the power of Congress to regulate interstate commerce, because such areas do not fall within the categories of States, foreign nations, or Indian tribes set forth in the commerce clause. The judicial interpretation of the commerce clause, however, has greatly amplified the meaning of interstate commerce. Thus, commerce between States and territories has long been recognized as interstate commerce. Hanley v. Kansas City So. Ry. Co., 187 U.S. 617, 23 S.Ct. 214, 47 L.Ed. 333; Inter-Island Steam Navigation Co. v. Hawaii, 9 Cir., 96 Fed.2d 412, aff'd 305 U.S. 306, 59 S.Ct. 202, 83 L.Ed. 189. Commerce between States and the District of Columbia is similarly recognized as interstate commerce. Stoutenburgh v. Hennick, 129 U.S. 141, 9 S.Ct. 256, 32 L.Ed. 637; Galloway v. Bell, 56 App.D.C. 172, 11 Fed.2d 558. Such areas as Moffett Field are in the same category as the District of Columbia, for the same power of Congress extends over them both. U.S.Const., Art. I, sec. 8, cl. 17; Surplus Trading Co. v. Cook, 281 U.S. 647, 50 S.Ct. 455, 74 L.Ed. 1091; Fort Leavenworth R. R. Co. v. Lowe, 114 U.S. 525, 5 S.Ct. 995, 29 L.Ed. 264. In the light of the foregoing cases it is clear that the power of Congress to regulate interstate commerce, reinforced by its authority over territories and "forts, magazines, arsenals, dock-yards, and other needful buildings" [281 U.S. 647, 50 S.Ct. 456, 74 L.Ed. 1091] enables it to regulate commerce between States and such areas as Moffett Field. Compare People v. Standard Oil Co., 218 Cal. 123, 22 P.2d 2; Grayburg Oil Co. v. State, Tex.Civ.App., 286 S.W. 489; Grayburg Oil Co. v. State, Tex. Com.App., 3 S.W.2d 427, and McKesson & Robbins v. Collins, 18 Cal.App.2d 648, 64 P.2d 469, which did not involve any federal statute regulating such commerce.

[7] The milk industry in California is dominantly a local one. Only a small percentage of the milk produced goes beyond

the jurisdiction of the State, but whatever the destination of the milk, the State is vitally concerned with the stabilization of the industry, and particularly with standards of production, in the State as a whole. The federal territory within the State is so fragmented that there may be several federal islands within a single marketing area. If they are citadels of immunity from State jurisdiction, they are also exceptional segments in areas that are otherwise subject to that jurisdiction. They stand out like colored pins on the map of California, and range from military reservations to soldiers' homes, from court houses to penitentiaries, from post offices to Indian reservations, from national parks to regional dams. See cases cited in 38 Columbia L.Rev. 128, at 130. The commerce between them and the rest of the State is of the greatest interest to the State regardless of the circumstance that it may be regulated by the federal government. Focussed as it is upon a State problem, the State act, despite its repercussions upon interstate commerce, does not run counter to the commerce clause so long as it does not conflict with the provisions or objectives of Congressional legislation. Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752; Duckworth v. Arkansas, 62 S.Ct. 311, 86 L.Ed. 294; California v. Thompson, 313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219; South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734. See 27 Cal.L.Rev. 615.

[8] The objectives of the federal act in fixing the minimum price payable by the distributor to the producer are the same as those of the California act, namely, to insure to the producer a reasonable return on his products (secs. 1 and 2), and to the consumer a "sufficient quantity of pure and wholesome milk." Sec. 8(c) (18). There is no federal marketing agreement or order with respect to the milk industry, however, now in effect in this State. Where a conflict is apparent the State legislation must yield. United States v. Wrightwood Dairy Co., 62 S.Ct. 523, 86 L.Ed. 726; Cloverleaf Butter Co. v. Patterson, 62 S.Ct. 491, 86 L.Ed. 754. There is a question, however, whether any conflict exists when a federal administrative officer is empowered to prescribe regulations in a field already regulated by a State but does not actually do so. The United States Supreme Court has held in some cases that a conflict of authority is inherent in such a situation by interpreting the failure of the federal officer to make any regulation as in effect a ruling that neither federal nor State regulation is necessary. Oregon-Washington R. & N. Co. v. Washington, 270 U.S. 87, 46 S.Ct. 279, 70 L.Ed. 482; Napier v. Atlantic Coast Line Ry. Co., 272 U.S. 605, 47 S.Ct. 207, 71 L.Ed. 432. There is a growing tendency on the part of the court, however, to emphasize the evils arising from the absence of any regulation, and to hold therefore that the existence of an unexercised superior federal authority does not rule out State regulation vital to the public welfare. This realistic view germinated in cases upholding State regulation of certain public utility practices that the Interstate Commerce Commission did not regulate although it had authority to do so. Northwestern Bell Telephone Co. v. Nebraska State Ry. Commission, 297 U.S. 471, 56 S.Ct. 536, 80 L.Ed. 810; Missouri Pacific Ry. Co. v. Larabee Flour Mills Co., 211 U.S. 612, 29 S.Ct. 214, 53 L.Ed. 352. The court has balanced, not the State regulation against the unexercised federal authority, but the importance of the State's objectives against the effects of its regulation on interstate commerce. It has rejected the theory that the failure of a federal administrative agency to exercise its authority necessarily amounts to a declaration against all regulation. Indeed, in H. P. Welsh Co. v. New Hampshire, 306 U.S. 79, 59 S.Ct. 438, 83 L.Ed. 500, it demonstrated its concern with keeping the State regulation alive in the absence of immediate conflict with federal regulation. It upheld in that case the application of a state act regulating the hours of drivers of motor carriers to a driver transporting an interstate shipment, even though the Interstate Commerce Commission had overlapping authority and had issued regulations that would conflict with the state act when they became effective two years later. The court took the view that the safety of the people should not wait upon federal administrative action. See, also, Kelly v. Washington, 302 U.S. 1, 58 S.Ct. 87, 82 L.Ed. 3; South Carolina State Highway Dept. v. Barnwell Bros., supra; Eichholz v. Public Serv. Commission, 306 U.S. 268, 59 S.Ct. 532, 83 L.Ed. 641; Maurer v. Hamilton, 309 U.S. 598, 60 S.Ct. 726, 84 L.Ed. 969, 135 A.L.R. 1347; Mintz v. Baldwin, 289 U.S. 346, 53 S.Ct. 611, 77 L.Ed. 1245.

[9] Public health, like public safety, is a vital concern of the State, and its maintenance at proper levels should likewise not wait upon federal regulation. Toward that maintenance the California Milk Control Act contributes largely, but it might well be disrupted if those engaged in interstate commerce escaped the State regulation while they were untouched by corresponding federal regulation. The absence of federal regulation may well be a recognition not only of the propriety but of the effectiveness of State regulation in the stabilization of a dominantly local industry, rather than a ruling that there should be no regulation.

[10, 11] There remains the question whether the Milk Control Act can validly affect milk sold to instrumentalities of the United States. In a brief filed as amicus curiae on behalf of the United States, the United States Attorney contends that the application of the State act to such milk would unduly burden the operation of an essential federal agency, and that it is inconsistent with the federal statutes requiring that army supplies be secured through competitive bidding. 41 U.S.C.A. § 5; 10 U.S.C.A. §§ 1200, 1201. Federal agencies, however, cannot entirely escape the effects of State legislation. The California Milk Control Act does not discriminate against the United States army nor substantially hinder its efficient operation. The army is not precluded from obtaining milk, nor required to pay more for such milk than other consumers in the same area. The act regulates not the army but the distributors who are independent contractors with the federal government. It is settled that such contractors are subject to State control, and that any consequent burden on the federal government is speculative and remote. Milk Control Board v. Gosselin's Dairy, Inc., 301 Mass. 174, 16 N.E.2d 641; Paterson Milk & Cream Co., Inc., v. Milk Control Board, 118 N.J.L. 383, 192 A. 838; Alabama v. King & Boozer, 314 U.S. 1, 62 S.Ct. 43, 86 L.Ed. 3; James v. Dravo Contracting Co., 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155, 114 A.L.R. 318; Atkinson v. State Tax Comm. of Oregon, 303 U.S. 20, 58 S.Ct. 419, 82 L.Ed. 621; State Tax Comm. v. Van Cott, 306 U.S. 511, 59 S.Ct. 605, 83 L.Ed. 950; Helvering v. Gerhardt, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427; Trinityfarm Const. Co. v. Grosjean, 291 U.S. 466, 54 S.Ct. 469, 78 L.Ed. 918; see 27 Cal.L.Rev. 327. The very federal statutes requiring competitive bidding except cases "where it is impracticable to secure competition" (10 U.S.C. § 1201, 10 U.S.C.A. § 1201), and Regulation 5-240(g) of the United States Army provides that it is impracticable to secure such competition: "(3) When the price is fixed by Federal, State, municipal, or other competent authority." Penn Dairies, Inc. v. Milk Control Commission, March 25, 1941, Court of Common Pleas of Lancaster County, Pennsylvania; Commonwealth v. Rohrer, Pa., 37 D. & C. 410.

The alternative writ of mandamus is discharged and the petition for a peremptory writ is denied.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, HOUSER, and CARTER, JJ., concurred.

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20 Cal.2d 1

MALONEY v. MASSACHUSETTS BONDING & INS. CO.

S. F. 16657.

Supreme Court of California.

March 19, 1942.

1. Guardian and ward 🔑182(3)

The discharge or removal of guardian within statute requiring action against surety on guardian's bond to be commenced within three years from discharge or removal of guardian, can be accomplished only by court order. Probate Code, § 1487.

2. Judgment 🔑496

In action on guardian's bonds, wherein 1935 decree of probate court restoring ward to competency was subject of collateral inquiry, the usual presumptions relative to regularity of probate court proceedings in guardianship matter would be indulged in support of such decree, and whatever was upon the record would be presumed to be rightfully there, and it would be conclusively presumed if necessary to support the decree that an earlier decree restoring ward to competency was vacated and that the circumstances justified such action.

3. Judgment ⚷560

A determination as to whether or not a prior adjudication is "res judicata", or is valid or void, is conclusive on such issue in subsequent litigation.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

4. Guardian and ward ⚷180

An order, which has become final, fixing default of guardian, is binding on surety.

5. Judgment ⚷203

Generally, in case of successive and conflicting judgments in different proceedings between the same parties upon the same issues, the last judgment is conclusive.

6. Insane persons ⚷45

A 1932 decree restoring ward to competency, terminating guardianship, setting aside order appointing guardian, revoking letters of guardianship and directing guardian to surrender estate to ward and file an account, did not start running of statute requiring action against surety on guardian's bond to be commenced within three years from discharge or removal of guardian, where in 1935, the probate court considered the question of whether the 1932 decree was void for lack of prescribed statutory notice and entered order which restored ward to competency and which was within probate court's jurisdiction to make only if decree was void, and a 1937 order entered in accounting phase of the guardianship proceeding found that ward was restored to competency by 1935 order. Probate Code, §§ 1200, 1206, 1207, 1471.

7. Insane persons ⚷45

Under rule that discharge or removal of guardian within statute requiring action against surety on guardian's bond to be commenced within three years from discharge or removal of guardian can be accomplished by court order, 1935 order restoring ward to competency did not affect a "discharge or removal of guardian" within such statute, where guardian was dead at time of entry of order. Probate Code, §§ 1471, 1555.

See Words and Phrases, Permanent Edition, for all other definitions of "Discharge or Removal of Guardian".

8. Guardian and ward ⚷182(3)

The statute requiring action against surety on guardian's bond to be commenced within three years from discharge or removal of guardian, is not applicable where there is no effective court order of discharge or removal before death of guardian, or ward attains majority, in view of rule that discharge or removal of guardian within statute can be accomplished only by court order. Probate Code, § 1471.

9. Insane persons ⚷45

The direction in 1935 order restoring ward to competency, that guardianship should terminate upon accounting and discharge of guardian, did not cause order to provide for "discharge or removal of guardian" within statute requiring action against surety on guardian's bond to be commenced within three years from court order discharging or removing guardian. Probate Code, § 1471.

10. Guardian and ward ⚷182(3)
Limitation of actions ⚷24(2)

Where guardian was not removed or discharged by court order prior to guardian's death, action on guardian's bonds was not governed by statute requiring actions against surety on guardian's bond to be commenced within three years from discharge or removal of guardian, but was governed by general four-year statute of limitations, which began to run from date of decree finding the guardian in default and establishing cause of action against surety. Probate Code, § 1487; Code Civ.Proc. § 337, subd. 1.

11. Guardian and ward ⚷182(3)

In action on guardian's bonds, defense of "laches" was not available to surety in absence of showing that surety was in the least disadvantaged by reason of any delay in the settlement of the guardian's account.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches".

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In Bank.

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Action by Bernard F. Maloney against the Massachusetts Bonding & Insurance Company, to recover upon two bonds given by the plaintiff's former guardian. Judgment for the defendant, and the plaintiff appeals.

Reversed.

Prior opinion, 114 P.2d 417.

Hubbard & Hubbard, of San Francisco, for appellant.

William P. Caubu, of San Francisco, for respondent.

CURTIS, Justice.

Plaintiff Bernard F. Maloney, previously an incompetent person, brought this action against defendant Massachusetts Bonding and Insurance Company to recover the sum of $4,500, the full extent of its liability upon two surety bonds filed by plaintiff's former guardian, whose default in accounting had been determined by the probate court to be in excess of that amount. In the contest in the trial court defendant prevailed upon the ground that the action was barred by the three-year statute of limitations fixed by the provisions of section 1487 of the Probate Code, which reads as follows: "No action may be maintained against the sureties on a bond given by a guardian unless commenced within three years from the *discharge or removal of the guardian;* but if at the time of such discharge the person entitled to bring the action is under any legal disability to sue, the action may be commenced at any time within three years after the disability is removed." [Emphasis added.]

The pertinent facts and dates as recited in the trial court's findings may be stated briefly as follows: In 1929 in an appropriate guardianship proceeding instituted in the Superior Court in and for the City and County of San Francisco plaintiff was adjudged incompetent and committed to the Agnew State Hospital, and his wife, Nellie M. Maloney, was appointed guardian of his person and estate. Some six months following his discharge as a patient from the state hospital and "on October 20th, 1932, after notice given in accordance with the order of this Court, an order was made by this Court providing that said Bernard F. Maloney be restored to competency, that the guardianship cease, that the order appointing guardian be set aside, that Letters of Guardianship be revoked, and that the guardian file an account of her administration." On July 27, 1935, the guardian died without filing an accounting. Subsequently, and on December 27, 1935, a second order was made and entered "restoring Bernard F. Maloney to competency, adjudging him sane and capable of managing his person and estate, and directing an accounting by the guardian." On June 22, 1937, by an order sustaining the plaintiff's objections to the supplemental account filed by the executor of the guardian's estate, the former guardian was adjudged in default in the payment of the sum of $8,477.33. The present action was commenced on August 23, 1939. Upon these facts the court further found "That more than three (3) years have elapsed since the date of restoration to competency of said Bernard F. Maloney and the date of the filing of this action," and it concluded therefrom that the defense predicated upon the special limitation prescribed for actions upon guardians' bonds by section 1487 of the Probate Code should be sustained. Judgment was entered accordingly for defendant, and plaintiff prosecutes this appeal.

The sole question presented for determination in this case is whether the action is barred by the lapse of time. The trial court did not indicate which of the two above-mentioned orders restoring plaintiff to competency—that of October 20, 1932, or that of December 27, 1935, almost seven and four years, respectively, prior to the filing of the present suit—it considered effective to set in motion the special statute of limitations prescribed by said section 1487. On the trial the defense relied primarily upon the date of the first order, while on this appeal respondent urges in support of the judgment the controlling effect of the date of the second order. It is appellant's position that neither of these decrees militates against his right to recover upon the surety bonds involved in this litigation, but that the order of June 22, 1937, which fixed the amount of shortage in the guardian's account, started the running of the applicable general four-year statute of limitations governing claims based upon written instruments, and therefore the commencement of this action on August 23, 1939, was within the time permitted.

[1] It is definitely settled in this state that the "discharge or removal of the guardian," as the expression is used in section 1487 of the Probate Code, can be accomplished only by *court order.* Cook v. Ceas, 143 Cal. 221, 228–230, 77 P. 65; Keck v. Keck, 16 Cal.App.2d 521, 524, 61 P.2d 79. In the light of this established principle must be considered the force and effect of the above-mentioned orders made in the guardianship proceeding preliminary to the institution of the present action. First in chronological sequence is the decree of October 20, 1932, restoring the ward to capacity, terminating the guardianship, set-

ting aside the order appointing the guardian, revoking the letters of guardianship, and directing that the guardian surrender to the former ward all of the estate and file an account within twenty days. Conceding that in the absence of other circumstances the explicit language in which this order is couched would constitute a "discharge or removal of the guardian," so as to start running the three-year statute of limitations therein provided, appellant urges that this decree must be declared null and void because there was no personal service of the citation upon the guardian five days before trial on the issue of capacity, as required by sections 1206, 1207 and 1471 of the Probate Code. In this connection appellant refers to the judgment roll in the guardianship proceeding, which shows that notice was given only in compliance with section 1200 of the Probate Code—by posting and mailing a copy to the guardian. However, it is not necessary here to pass upon appellant's contention that the insufficiency of the notice rendered the order in question void, for the record demonstrates to a certainty that the decree of 1932 is not binding in this case.

[2] Second of these pertinent orders in point of time is the 1935 decree of restoration, which, after reference to the 1932 order, recites that "a question has been raised by a title company as to the sufficiency of the notice upon which said Order (of 1932) restoring to capacity was made," and which then proceeds to restore Bernard F. Maloney to capacity as of December 27, 1935. This decree, which has long since become final, incontrovertibly establishes that in 1935 the probate court considered the question of whether the 1932 decree was void because of lack of the prescribed statutory notice and thereupon resolved to enter an order which it had jurisdiction to make only if the former order was void. The record does not disclose any jurisdictional defect with respect to this later adjudication, negativing the validity of the 1932 decree, and accordingly upon this collateral inquiry the usual presumptions relative to the regularity of the probate court proceedings in the guardianship matter must be indulged in support of the 1935 decree of restoration. 15 Cal.Jur. 64, sec. 149. In such situation whatever is upon the record is presumed to be rightfully there. Thus, it is conclusively presumed, if necessary, to support the later of two judgments shown by the roll, that the earlier was vacated and that the circumstances justified such action. Colton Land & Water Co. v. Swartz, 99 Cal. 278, 33 P. 878.

[3] The general rule upon this subject is stated in 2 Freeman on Judgments, 5th Ed., page 1498, sec. 709, as follows: "A determination as to whether or not a prior adjudication is res judicata, or is valid or void, is conclusive on this issue in subsequent litigation." Recent application of this settled principle in this state appears in Geibel v. State Bar, 14 Cal.2d 144, 148, 93 P.2d 97, 99, wherein it is said: "A determination as to the validity of a former adjudication is res judicata in a subsequent proceeding attacking it."

[4-6] Corroborative of this conclusion with respect to the operative effect of the 1935 decree of restoration is the third of the above-mentioned orders, that of June 22, 1937, sustaining the ward's objections to the guardian's supplemental account. That order, which also has long since become final, fixed the default of the guardian and is binding on the surety. Smith v. Fidelity & Deposit Co., 130 Cal.App. 45, 19 P.2d 1018. Bearing significantly upon the point at issue is that order's review of the prior incompetency phase of the guardianship proceeding, wherein it recites that letters of guardianship were issued to the named guardian in October, 1929, and that "Said incompetent was restored to competency by said Court on December 27th, 1935." Here again the probate court in an independent ruling has adjudicated the date of restoration to capacity. Thus, the 1932 decree purporting to have restored the ward to competency and to have discharged the guardian is disputed by two subsequent orders. The 1935 order purports to restore him to competency as of that date, and the 1937 order entered in the accounting phase of the guardianship proceeding finds that he was restored in 1935. In treating these conflicting orders entered in distinct and separate branches of the guardianship matter as equivalent in import to inconsistent judgments rendered in different actions between the same parties in respect to the same subject matter, the following well-settled rule, by analogy, is applicable to the present case: "Generally, in case of successive and conflicting judgments in different proceedings between the same parties upon the same issues the last one is conclusive." 15 Cal.Jur. 57, sec. 143; see, also, 15 Cal.Jur. 104, sec. 171, and cases there cited. Accordingly, the 1932 decree of restoration must be disregarded in the instant action.

The next point for consideration is whether the decree of December 27, 1935, effected a "discharge or removal of the guardian" within the meaning of section 1487 of the Probate Code. That order, after adjudging that "Bernard F. Maloney * * * be and he is hereby restored to capacity" and that he "is sane and capable of managing and taking care of himself and his property," directed that "the guardianship * * * cease and terminate upon the proper and legal accounting and discharge of the guardian and the administration of the estate of the guardian." However, it is significant to note that the court on this last-mentioned date made no order for the removal or discharge of the guardian, since it would have been a futile act to so decree in view of her death some six months earlier, which event terminated the previously existing fiduciary relationship. In such circumstances the rules established by the leading authorities upon this subject in this state, Cook v. Ceas, supra, and Keck v. Keck, supra, preclude the adoption of the date of this decree for the commencement of the statutory period of limitations specified in section 1487. An examination of these decisions will demonstrate the basis of determination of the point here in issue.

In Cook v. Ceas, supra, an action upon a guardian's bond instituted more than three years after the ward had attained her majority, the court stated at pages 230, 231 of 143 Cal., at page 68 of 77 P.:

"* * * we conclude that an action against the sureties of a guardian is not, *by the terms of section 1805* [of the Code of Civil Procedure; now section 1487 of the Probate Code] barred until three years after a final order of court removing or discharging the guardian. By the terms of the statute, therefore, this action was not barred, for it does not appear, and it is not claimed, that the guardian of plaintiff ever was discharged or removed by any order of court. The respondent [the surety] contends, however, that the coming of age of the plaintiff operated a discharge of the guardian, and set the statute in motion * * *.

"It is certainly true that when a ward arrives at the age of majority the authority of the guardian comes to an end. * * * But although his authority is at an end when his ward comes of age, it cannot be said that in any ordinary or usual or statutory sense of the terms he has been *removed or discharged*, so that the statute does not in terms apply to such a case, and, in order to bring the respondent within its protection, its terms must be enlarged by construction. In other jurisdictions this seems to have been done. In the state of Montana it was held, construing a statute identical in terms with our own, that the death of the ward operated a discharge of the guardian, and set the statute in motion. Berkin v. Marsh [18 Mont. 152], 44 P. 528, 56 Am.St.Rep. 565. In Massachusetts no action can be maintained against the sureties on a guardian's bond unless it be commenced within four years 'from the time when the guardian shall be discharged.' Chief Justice Shaw, in construing this statute, said: 'The court are of opinion that by the term "discharged" in this statute is intended any mode by which the guardianship is effectually determined and brought to a close either by the removal, resignation, or death of the guardian, the marriage of a female, the arrival of a minor ward at the age of twenty-one, or otherwise.' Loring v. Alline, 9 Cush. 68. This construction of the statute, in substance identical with our own, has been followed in other cases in Massachusetts, and reaffirmed as late as McKim v. Mann, 141 Mass. 507, 6 N.E. 740. A similar construction has been placed upon similar statutes in Michigan and Wisconsin, and perhaps other states. On the other hand, the Supreme Court of Texas has in several cases refused to extend the operation of a similar statute beyond its literal terms, adhering firmly to the doctrine stated in Marlow v. Lacy, 68 Tex. 154, 2 S.W. 52, to the effect that the statute does not begin to run in favor of the sureties until the guardian has been removed or discharged by order of court in one of the cases provided for in their Code of Procedure. The weight of authority, it must be conceded, is on the side of respondent, but we are disinclined to follow the construction adopted in Massachusetts, Michigan, Wisconsin, etc., for a reason not adverted to in some of the decisions, and not allowed sufficient weight, as we think, in those cases where it has been adverted to.

"A statute of limitations ought not to be enlarged in its operation by judicial construction when it is so framed as to work injustice either by itself or in conjunction with other provisions of law. In this state we have one rule which prohibits an action on the bond of a guardian's surety until there is a final order settling the guardian's account, and another rule barring the action in three years after the removal or discharge of the guardian. So far as its express terms require, the rule must no doubt be enforced, even where without the fault of the ward a final settlement of the account has not been obtained within three years after the removal or discharge; but neither justice nor sound policy requires that a law capable of working so inequitably should be enlarged by construction so as to embrace a class of cases not comprehended in its terms. And this conclusion does not leave the sureties on guardian's bonds without an ample measure of protection against stale claims. They have all the advantage of the general statute of limitations and of the doctrine of Barnes v. Glide, 117 Cal. 1, 48 P. 804, 59 Am.St.Rep. 153, which will hold wards to the rule of reasonable diligence in procuring settlement of their guardian's accounts. * * *"

It is apparent from this somewhat lengthy quotation that the court, after a full consideration of the arguments pro and con relative to the majority rule on the subject, expressly refused to follow the weight of authority and cited as supported by the better reasoning the line of decision requiring that the "discharge or removal of the guardian" be by *court order.*

In Keck v. Keck, supra, the legal principles of Cook v. Ceas, supra, were expressly reaffirmed, but upon the particular facts presented, the court held the action against the surety barred by the special three-year statute of limitations prescribed by the code section. As stated in the Keck opinion, at page 523 of 16 Cal.App.2d, 61 P.2d 79, the plaintiff in 1924 was declared incompetent and his wife was appointed his guardian. In 1926 the plaintiff in an appropriate proceeding was restored to mental competency, and in the decree rendered therein it was "ordered, adjudged and decreed that the guardianship of the person and estate of Arthur W. Keck, as an incompetent is hereby terminated." In January, 1927, an order was made in the guardianship proceeding again purporting to terminate the guardianship, and it was then specifically decreed that the order appointing the guardian "be, and said order is hereby revoked." This order further provided that an accounting be had and that the court's jurisdiction over the guardian be retained until the accounts were settled. In March, 1930, there was a final settlement, showing a shortage, and the suit against the surety was instituted in December, 1930. With reference to the effect of the two early adjudications and as basis for the rejection of the plaintiff's contention that the statute of limitations did not commence to run until March, 1930, when the guardian's accounts were settled and the liability fixed, the court stated at pages 523, 524 of 16 Cal.2d, at page 80 of 61 P.2d: "Thus it affirmatively appears that the action was commenced more than four years after the rendition of the decree of April 19, 1926, *terminating the guardianship proceedings,* and more than three years after the entry of the decree of January 18, 1927, in the guardianship proceedings *revoking the powers of the guardian.* Manifestly these decrees, and especially the latter, operated as a removal of the guardian, and set in motion the statute of limitations prescribed in said section 1805 [of the Code of Civil Procedure; now section 1487 of the Probate Code]. The trial court properly held, therefore, that the action against the sureties was barred by the provisions of said Code section." [Emphasis added.]

Thereupon the Keck opinion cited as controlling authority the case of Cook v. Ceas for the construction there placed on said section 1805 regarding the necessity of a court order to effect the "discharge or removal of the guardian" within the meaning of the code provision. Then following its reference to the particular findings contained in the decree of January 18, 1927, relative to the plaintiff's restoration to capacity, as furnishing ample demonstration of the probate court's determination as of that date that it was no longer proper that plaintiff should be under guardianship, the court significantly concluded its treatment of this point with the following statement, at page 525 of 16 Cal.2d at page 80 of 61 P.2d: "Clearly, therefore, in view of those findings it cannot be successfully maintained, as plaintiff argues, that the court's decree based thereon, *revoking the guardianship,* did not operate as a removal of the guardian within the meaning of section 1805 of the Code of Civil Procedure." [Emphasis added.]

[7-9] Thus, both Cook v. Ceas, supra, and Keck v. Keck, supra, establish as the rule in this state that before section 1487 of the Probate Code can come into operation there must be a court order discharging or removing the guardian. In the Keck case the two decrees of restoration to capacity satisfied the requirement of the code provision as settled by judicial construction, in that the 1926 order expressly terminated the guardianship and the 1927 order expressly revoked the powers of the guardian. Measured by these considerations, the

Keck case is distinguishable from the present situation. Here the decree of October 20, 1932, contained an order discharging the guardian, but for the reasons above mentioned that decree is without force in this case. The only remaining order bearing on this point is that of December 27, 1935, whose sole purpose was to establish the competency of Bernard F. Maloney as of that date. It did not discharge or remove the guardian, nor can it be said that this adjudication automatically had such effect, for the powers of the guardian had long since terminated by operation of law by reason of her death. Prob.Code, sec. 1555. Since under the rule of Cook v. Ceas, supra, section 1487 has no application to the termination of the guardian's powers other than by court order, it reasonably follows that this section can have no application where there is no effective court order of discharge or removal *before* the guardian dies or the ward attains majority. The contingency which would bring that section into operation here has not occurred and never can occur.

Nor in this connection did the incorporation in the decree of December 27, 1935, of the single reference to the guardianship, to wit, that it shall cease and terminate upon the guardian's rendering a proper and legal accounting, add anything of value thereto. Such language was characterized in Keck v. Keck, supra, 16 Cal.2d at page 525, 61 P.2d 79, as meaningless, because without such provision the probate court would retain jurisdiction over the guardian for the purpose of settling the accounts. Probate Code, sec. 1555. But holding such a provision to be without legal effect is not the same as holding that it can be distorted into an order discharging the guardian. In the Keck case the decree discharged the guardian and then retained jurisdiction over her "until the final settlement of her accounts." In such circumstances the court correctly held that the order discharging the guardian was not limited by the clause retaining jurisdiction over her. But that situation must be differentiated from the instant case, wherein the comparable decree of restoration to capacity as of December 27, 1935, contained no clause discharging or removing the guardian, or terminating the guardianship. As above noted, if the language in question were deleted from the order here under consideration, there would be no reference therein to the guardianship at all. It is plain, therefore, that such clause is not sufficient to bring this case within the operation of section 1487 of the Probate Code. This conclusion is in conformity with the salutary principle to which the court adhered in Cook v. Ceas, supra, to the effect that the harsh provisions of this special statute of limitations, capable of producing inequitable results by permitting an action against the surety to be barred before the cause of action accrues upon the final settlement of the guardian's account showing the balance due the ward, should not be given wider application than the express terms of the enactment require.

[10, 11] It is manifest, therefore, from the above observations that the third and last of the orders to be considered here, that of June 22, 1937, finding the guardian in default and establishing the cause of action against the surety, is the operative decree in so far as the period of limitations is concerned. Under such circumstances, as was suggested in both Cook v. Ceas, supra, and Keck v. Keck, supra, the general four-year statute governing the time within which to bring an action upon an instrument in writing would apply. Code Civ. Proc. sec. 337, subd. 1. Accordingly, the present action was commenced well within the statutory period. Moreover, in this connection it is pertinent to note that there is no showing in the record that the surety has been in the least disadvantaged by reason of any delay in the settlement of the guardian's account, so that the defense of laches is of no avail in this case.

The judgment is reversed.

GIBSON, C. J., and SHENK, EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.

19 Cal.2d 870

CONNELL v. BOWES et al.

S. F. 16664.

Supreme Court of California.

March 19, 1942.

1. Jury ⚿13(14)

Where complaint, either originally or as the result of amendment, states two complete rights of action, one legal and one equitable, a jury trial may be obtained upon the issues raised by the legal cause.

2. Appeal and error ⚿110

Where complaint stated a cause of action of an equitable nature and defendant by cross-complaint asked for damages defendant was entitled to have legal issues raised by cross-complaint submitted to a jury, and hence appeal from order granting a new trial on the ground of insufficiency of the evidence to sustain judgment entered in favor of plaintiff was not subject to dismissal under statute permitting an appeal from such order only where a jury trial is a matter of right. Code Civ.Proc. § 963, subd. 2.

3. Trial ⚿3

Where a cause presents both legal and equitable issues, the proper trial procedure is to first submit the equitable issues to court for determination and then if any legal issues remain, a jury may be called.

◆

In Bank.

Action by James P. Connell against E. L. Bowes and others for specific performance of an option to sell capital stock of a corporation, for an accounting and for an injunction, wherein defendants filed a cross-complaint for damages, bringing in further parties as cross-defendants. From an order granting a new trial on the ground of insufficiency of the evidence to sustain the judgment entered in favor of plaintiff, plaintiff and cross-defendants appeal and defendants move to dismiss the appeal.

Motion denied.

See, also, 122 P.2d 71.

James R. Agee and Harold C. Holmes, Jr., both of Oakland, for appellant.

Bradford Melvin, Charles A. Christin, T. J. Keegan, and Walter Christie, all of San Francisco, and J. Paul St. Sure, of Oakland, for respondents.

GIBSON, Chief Justice.

In this action plaintiff filed an amended complaint asking for specific performance of an option to sell capital stock of a corporation, for an accounting, and for an injunction. Defendants filed an answer and a cross-complaint for damages, bringing in further parties as cross-defendants. Judgment was entered for the plaintiff, but the lower court subsequently granted a new trial on the ground of insufficiency of the evidence to sustain the judgment. Plaintiff and cross-defendants appealed from the order granting a new trial, and defendants made this motion to dismiss the appeal on the ground that the order was nonappealable under section 963, subdivision 2, of the Code of Civil Procedure, which permits an appeal from an order granting a new trial only where a jury trial is a matter of right.

An inspection of the record discloses that the amended complaint purports to state a cause of action of an equitable nature, in which jury trial is not a matter of right. The cross-complaint, on the other hand, asked for damages, and although equitable relief in the form of cancellation of the option might also be allowed thereunder, the pleading purports to state a cause of action of a legal nature in which, if pursued independently, a jury trial would be a matter of right. Whether any cause of action is stated by the pleadings need not be determined upon this motion, and the sole question, therefore, is whether the interposition by defendant in an equity action of a cross-complaint of a legal nature will entitle either party to a jury trial of the legal issues raised by the cross-complaint, thus authorizing an appeal from the order granting a new trial.

[1, 2] Defendants, in contending that the cause is essentially equitable in nature, that it is not changed in character by the filing of the cross-complaint, and that, therefore, there is no right to a jury trial, rely principally upon the case of Bettencourt v. Bank of Italy Nat. Trust & Sav. Ass'n, 216 Cal. 174, 13 P.2d 659, which states that where the gist of the action is equitable, the plaintiffs' prayer for damages is merely incidental to the relief sought and there is no right to a jury trial. It is now established in this state, however, that if a complaint states two complete rights of action, one legal and one equitable, a jury trial may be obtained upon the issues raised by the legal cause. See Pacific Western Oil

Co. v. Bern Oil Co., 13 Cal.2d 60, 66–69, 87 P.2d 1045, which expressly overrules the Bettencourt case, in so far as the same is in conflict with views expressed therein. Also, in Farnsworth v. Hunter, 11 Cal.2d 27, 31, 32, 77 P.2d 840, this court said that upon amendment of an equitable action so as to include a cause for damages the right to a jury trial on the latter issue could then have been asserted. The earlier California decisions upon the point are conflicting. Both lines of authority are cited in Union Oil Co. v. Reconstruction Oil Co., 20 Cal. App.2d 170, at page 190, 66 P.2d 1215, which followed Bettencourt v. Bank of Italy Nat. Trust & Sav. Ass'n, supra, and which was also disapproved in the Pacific Union Oil Company case.

Even more pertinent to the present question, however, is the opinion of this court in Thomson v. Thomson, 7 Cal.2d 671, 62 P.2d 358, 117 A.L.R. 1. This was an action to quiet title to real property under Code of Civil Procedure, section 738, and it was determined that, under the circumstances, the complaint presented issues which were purely equitable. A cross-complaint was filed stating a cause of action in ejectment and presenting purely legal issues. In summarizing the rules of law involved, this Court said at page 681 of 7 Cal.2d, at page 362 of 62 P.2d: "If plaintiff is in possession, and the defendant by answer or cross-complaint seeks to eject the plaintiff and recover possession, the action involves both equitable and legal issues. The issues arising out of plaintiff's cause of action are equitable, and those resulting from defendant's answer and cross-complaint are legal. In such an action the plaintiff is entitled to have the equitable issues tried by the court without a jury, and the defendant is entitled to have the legal issues submitted to a jury." The logic of the opinion in that case is persuasive, notwithstanding the fact that the court upheld a denial of a jury trial on the ground that the lower court properly first passed upon the equitable issues, and determined that plaintiff was the owner of the property involved, thus leaving nothing for a jury to try.

[3] Most of the courts in other jurisdictions have taken a contrary view and have held that the filing of a legal counterclaim or cross-complaint in an equity action does not entitle either party to demand a jury trial, but the decisions to some extent depend upon local statutory and constitutional provisions and are not necessarily applicable here. Also, many of these cases were decided upon the theory that once equity has assumed jurisdiction, it may retain it for all purposes. The practical problem presented by this rule is solved by the trial procedure outlined by Justice Henshaw in Angus v. Craven, 132 Cal. 691, 699, 64 P. 1091, approved by the Thomson case, whereby the equitable issues are tried first and then, if any legal issues remain, a jury may be called. See also note 25 Cal. L.Rev. 565, 572; James, Trial by Jury and the New Federal Rules of Procedure (1936), 45 Yale L. Jour., 1022, 1033–1034. Moreover, it does not seem desirable to force a party to give up his right to a jury trial as an alternative to utilizing the advantages of modern code procedure designed to permit settlement of various issues in a single action. See (1937) 85 U. of Pa.L.Rev. 738; James, Trial by Jury and the New Federal Rules of Procedure (1936), 45 Yale L. Jour. 1022, 1036.

The motion is denied.

SHENK, CURTIS, EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.

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19 Cal.2d 831

LAISNE v. STATE BOARD OF OPTOMETRY et al.

L. A. 17578.

Supreme Court of California.

March 16, 1942.

Rehearing Denied April 15, 1942.

1. Courts 🔑125

State-wide judicial power can be exercised by no other body than the Supreme Court, the District Courts of Appeal, and the Superior Courts except as the result of constitutional amendment. Const.Cal. art. 6, § 1.

2. Constitutional law 🔑50

Where one department or agency of the government exercises the complete power that has been expressly limited to another, such action violates the implied mandate of the constitution dividing the powers of state government into the legislative, executive, and judicial departments. Const.Cal. art. 3, § 1.

3. Constitutional law ⚷101

The right of a licensed optometrist to practice optometry was a "vested property right" in the constitutional sense.

See Words and Phrases, Permanent Edition, for all other definitions of "Vested Property Right".

4. Constitutional law ⚷275(1)

Notice and the right to appear and answer charges made against optometrist in a proceeding before the State Board of Optometry for the revocation of his license accorded to optometrist all the rights of procedural "due process of law." St.1937, p. 1294, §§ 3090, 3091.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

5. Constitutional law ⚷79

A vested property right cannot be finally destroyed by a nonjudicial body if the action of that body is questioned in a court of law in a mandate proceeding. Const.Cal. art. 6, § 1.

6. Constitutional law ⚷80(2)
Physicians and surgeons ⚷11(3)

Where one whose license to practice optometry has been revoked by the State Board of Optometry for violation of statute fails to question the order of revocation in a court of law, the failure is an admission of violation and the ruling of board will stand, but if the order is questioned in a court of law, the party must be given a trial de novo on the issues involved under the constitutional provisions relating to the separation of powers and enumerating courts which may exercise state-wide judicial power. St. 1937, p. 1294, §§ 3090, 3091; Const.Cal. art. 3, § 1; art. 6, § 1.

7. Constitutional law ⚷318

Conferring binding fact finding power on purely administrative boards and the failure of courts in reviewing boards' actions to exercise an independent judgment on the facts as well as on the law, would violate the "due process of law" provisions of the state and federal constitutions.

8. Constitutional law ⚷318

Where a body other than one of the courts enumerated in the constitution makes findings of fact, determines on those findings that the provisions of a statute have been violated, and issues an order or renders a judgment which has the effect of depriving a person of a valuable property right, such action is the full exercise of "judicial power" and it denies the aggrieved party the "due process of law" guaranteed to him by the state and federal constitutions unless the action may be questioned in a court of law. Const.Cal. art. 3, § 1; art. 6, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Power".

9. Physicians and surgeons ⚷11(3)

The legislature by not providing for a court hearing after determination by the State Board of Optometry revoking a license did not intend that the board's action should be final, or that a court should be confined to a consideration of the evidence introduced at the hearing before the board in view of legislature's proposal to the voters of a constitutional amendment purporting to give the legislature the right to confer power on administrative officers, boards, or commissions to make decisions. St.1937, p. 1294, §§ 3090, 3091; Const.Cal. art. 3, § 1; art. 6, § 1; and art. 4, § 1b; see St.1941, p. 3549.

10. Mandamus ⚷173

In mandamus proceeding to set aside an order of the State Board of Optometry revoking petitioner's license to practice optometry on ground that evidence before board showed that petitioner had violated certain provisions of the Business and Professions Code, the Superior Court erroneously denied petitioner the right to introduce any new and material evidence, and compelled him to submit his case solely on the record and proceedings before the board. St.1937, p. 1294, §§ 3090, 3091; Const.Cal. art. 3, § 1; art. 6, § 1.

GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting.

In Bank.

Appeal from the Superior Court, Fresno County; Ernest Klette, Judge.

Proceeding by E. W. Laisne against the California State Board of Optometry and others for a writ of mandate to set aside an order of the board revoking petitioner's certificate of registration to practice optometry in the State of California. From a judgment denying the relief sought and discharging the alternative writ and the temporary restraining order previously issued against the board, petitioner appeals.

Reversed.

Prior opinion, 101 P.2d 787, petition for rehearing denied, 102 P.2d 538.

Rehearing denied; GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting.

H. A. Savage and Lawrence W. Young, both of Fresno, for appellant.

A. B. Bianchi, of San Francisco, amicus curiae, on behalf of appellant.

Earl Warren, Atty. Gen., and Lionel Brown, Thomas I. Coakley, J. Albert Hutchinson, and Chas. W. Johnson, Deputy Attys. Gen., for respondents.

Morse Craig, H. E. Lindersmith, and Morris Lavine, all of Los Angeles, amici curiae, on behalf of respondents.

CURTIS, Justice.

A proceeding for a writ of mandate was instituted in the Superior Court of Fresno County to set aside an order of the California State Board of Optometry revoking appellant's certificate of registration to practice optometry in the state of California. After a hearing the superior court rendered its judgment denying the relief sought and discharging the alternative writ of mandate and the temporary restraining order previously issued against the board. It is from this judgment that an appeal is brought to this court.

The board of optometry made an order revoking appellant's license after a hearing as provided by sections 3090, 3091 of the Business and Professions Code, St.1937, p. 1294. The complaint before the board alleged violation by appellant of sections 3098 and 3125 of the same code and the board determined on the evidence introduced that appellant had violated the provisions of said sections.

After the filing of the petition for writ of mandate in the superior court, the respondent board made a motion to strike certain portions thereof and the motion was granted in part. Included in the portions stricken was that part of the prayer which read "* * * and that this court have a hearing and trial de novo." The only evidence considered by the superior court was the record of the proceedings had before the board, and on this evidence the court concluded that the appellant had violated sections 3098 and 3125.

On the authority of the cases of Drummey v. State Board of Funeral Directors & Embalmers, 13 Cal.2d 75, 87 P.2d 848, and McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205, appellant insists that he had the right to require the trial court in the mandamus proceeding to conduct what would be in substance and effect a trial de novo, in the course of which the parties would not be limited to the record made before the board. We have assumed from the record and for the purpose of this decision that the trial court denied appellant the right to introduce any new and material evidence and compelled him to submit his case solely upon the record and proceedings before the board of optometry. The validity of the judgment appealed from therefore hinges upon the action of the trial court denying the appellant the right to introduce such evidence. If the order of the trial court in this respect was proper, then the judgment should be affirmed. On the other hand, if the trial court was in error in denying appellant such right, the judgment should be reversed.

The specific ruling in the Drummey case was that on a proceeding in mandate in a superior court questioning the validity of an order by an administrative board revoking or suspending a license to practice a profession, the court had the power to exercise an independent judgment on all of the material facts relative to the issue of whether the petitioner had violated the particular sections of the act governing that particular profession. In the exercise of such independent judgment it was held that the court must consider all material evidence and was not confined to the record of the proceedings before the board. If the court were so confined, it would not be exercising an independent judgment on all the facts material to the issue. It was further held that such independent judgment on the facts by a court was necessary because the entire judicial power of the state is vested in certain enumerated courts by Article III, section 1, and article VI, section 1, of the Constitution of this state, and also because the person whose license had been revoked or suspended by the action of the board would otherwise be deprived of a property right without due process of law as guaranteed by both the federal and state Constitutions.

[1] The necessity for the exercise of an independent judgment on the facts and the receipt of any material evidence regardless of the record of the proceedings before the board is apparent from the fol-

lowing facts. The powers of the government of the state are divided into three separate departments—the legislative, executive and judicial. Article III, section 1, of the state Constitution. State-wide judicial power may be exercised by only three *enumerated* courts, viz., the supreme court, the district courts of appeal, and the superior courts. Article VI, section 1 of the state Constitution. No other body can exercise state-wide judicial power except as the result of constitutional amendment. Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 P. 24; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P. 491, Ann.Cas.1917E, 390. If, therefore, some agency with state-wide jurisdiction, other than one of the enumerated courts, without sanction by constitutional amendment, exercises or attempts to exercise judicial power, such action is in direct violation of the articles of the state Constitution cited above.

[2-4] It is true that there can be no complete separation of powers of government in an ever changing social order. It is equally true that each department for its own existence must in some degree exercise some of the functions of the others. That there can be no rigid line over which one department cannot traverse has been recognized since the first test of the doctrine of separation of powers. There still remains, however, this unalterable fact: When one department or an agency thereof exercises the complete power that has been by the Constitution expressly limited to another, then such action violates the implied mandate of the Constitution. If, in the instant case, the superior court in the mandate proceedings were limited to the evidence presented before the board, or if the findings of fact by the board were conclusive on the court, then the board would be exercising the complete judicial power reserved to the enumerated courts. The appellant's right to practice optometry was a vested property right. Hewitt v. State Board of Medical Examiners, 148 Cal. 590, 84 P. 39, 3 L.R.A.,N.S., 896, 113 Am.St.Rep. 315, 7 Ann.Cas. 750; Suckow v. Alderson, 182 Cal. 247, 187 P. 965. In the proceeding against him by the board all the rights of "procedural" due process were accorded him, viz., notice, right to appear and answer the charges made against him. Witnesses were subpoenaed and evidence was taken. A reporter was present and a record made of the whole proceedings. At the conclusion of the hearing an order was made revoking appellant's license to practice. This then would be an exercise of the complete judicial power that was contemplated by the framers of the Constitution, and appellant would be deprived of his constitutional right unless he had a right to go into a court of law and question the validity of that order by the introduction of any material evidence to prove that he did not commit the acts alleged.

This problem is not a new one and on numerous occasions the courts of this state have been called upon to prevent the complete extinction of the doctrine of separation of powers. In the early case of Pryor v. Downey, 50 Cal. 388, at page 403, 19 Am.Rep. 656, in declaring a statute unconstitutional which attempted to validate a judgment of a court void for want of jurisdiction, the court stated: "The Legislature of California cannot exercise any judicial function, and no person in this State can be deprived of life, liberty or property without due process of law." And again at page 406 of 50 Cal., 19 Am.Rep. 656: "If we assume the act to have validated the Forster sale * * * then the lands which up to the date of the act * * * belonged to the heirs of Nathaniel M. Pryor, from that date became the property of other persons, and this transfer was accomplished by the legislative act alone. And even if we could indulge the fiction that the parties to be deprived of their estates had notice of the intended act, and a hearing and opportunity to produce witnesses, or to show cause why the act should not be passed, *this would have been a species of trial, and the exercise of judicial power by the Legislature.*" [Emphasis added.] And again at page 408 of 50 Cal., 19 Am.Rep. 656: "* * * A judgment must be the result 'of due inquiry, sufficient to satisfy the discretion and convince the judgment of the officer of the law, *in whom the authority and jurisdiction to decide the questions involved have been duly vested.*' (Denny v. Mattoon, 2 Allen, Mass. [361], 380 [79 Am.Dec. 784].)" [Emphasis added.] Chief Justice Beatty in a concurring opinion in Glide v. Superior Court, 147 Cal. 21 at page 30, 81 P. 225, at page 229, makes the following pertinent observation: "Vested rights of property and contract rights are placed by the Constitution under the protection of the courts, where alone the questions of law and fact upon which they depend can be finally decided." In Chinn v. Superior Court, 156 Cal. 478, 105 P. 580, a statute provided for the formation of an irrigation district, with the right of appeal to the superior court. The superior court refused to act on the ground that the statute was unconstitutional as in violation of article VI, section 1. Mandate was brought to force the superior court to act. The writ was denied and the act held unconstitutional, the court stating at page 480 of 156 Cal., at page 581 of 105 P.: "It is a well-recognized principle that where the judicial power of courts, either original or appellate, is fixed by constitutional provisions, the Legislature cannot either limit or extend that jurisdiction." Again, in the case of Griffin v. City of Los Angeles, 134 Cal.App. 763, at page 771, 26 P.2d 655, at page 659, it is stated: "The jurisdiction of superior courts is conferred by the Constitution, and cannot be taken away by any act of the Legislature. City of Tulare v. Hevren, 126 Cal. 226, 58 P. 530."

The language found in that group of cases involving questions which arose after the passage of the Workmen's Compensation, Insurance, and Safety Act of 1913, St.1913, p. 279, conclusively determines the issue under discussion here. In annulling an award made by the Industrial Accident Commission because the injury did not arise "in the course of" the employment, the court in the case of Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 P. 24, 26, had occasion to refer to the constitutional provision giving the legislature the power to create the Industrial Accident Commission and also to article VI, section 1. On page 322 of 171 Cal., on page 26 of 153 P. is found the following statement: "The constitutional provision is that the Legislature may 'create and enforce a liability on the part of all employers to compensate their employés for any injury incurred by the said employés in the course of their employment.' It proceeds to declare that the legislature may establish an Industrial Accident Board and empower it to settle disputes concerning the liability which the Legislature may create under the authority so given. Article 20, § 21. *This action by such board would be an exercise of judicial power. For that purpose it is, in legal effect, a court.* Section 1 of article 6 vests the judicial power of the state 'in the Senate, sitting as a court of impeachment, in a Supreme Court, district courts of appeal, superior courts,' and such inferior local courts as the Legislature may establish. *Under this provision the Legislature would be without authority to give judicial power to any general state board or tribunal.* Except for local purposes, the section disposes of the whole judicial power of the state, and vests all of it in the courts expressly named therein, leaving none at the disposal of the Legislature. Authority to the Legislature to create another state tribunal and vest it with judicial power over this new class of cases must be sought for elsewhere in the Constitution. It is found only in the aforesaid section 21 of article 20. It follows that this section measures and limits the legislative power in that respect. * * *" [Emphasis added.]

The case of Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P. 491, 493, Ann.Cas.1917E, 390, is also of particular interest because of statements of the reasons why the action of the Industrial Accident Commission is an exercise of judicial power as stated in the Pacific Coast case, supra. The court points out that the commission has power to administer oaths, issue subpoenas, take testimony and punish for contempt. Notice is served on the adverse party and he is given opportunity to answer. After hearing by the commission, it makes and files its findings of facts and its award. The findings are "conclusive and final." The court states at pages 412, 413 of 172 Cal., at page 493 of 156 P., Ann.Cas.1917E, 390:

"The commission, in exercising these powers, is performing precisely the same functions that are performed by any court in passing upon questions brought before it. * * * The industrial accident commission is given the power to make binding orders or judgments. * * *

"In the absence of a special enabling provision of the Constitution, judicial power could not be vested in the industrial accident commission. Section 1 of article 6 of the Constitution provides that [quoting the provision]. *It is clear that the industrial accident commission is not one of the courts thus designated. It is equally clear that the grant contained in the section of the Constitution just cited, unless modified by other constitutional provisions, is exclusive.*" [Emphasis added.]

The court concludes, however, that section 21 of article XX sufficiently modifies section 1 of article VI to permit the Industrial Accident Commission to act as a court.

The language quoted from the above cited cases may be directly applied to the instant situation. The only factual distinction is that in the Industrial Accident Commission hearings the rights of two individuals were involved, whereas in the board hearing in the instant case the state or an agency thereof is acting against one individual. However, in both situations there exists the issue of the deprivation of a property right and the vested interest remains the same whether one private individual is aligned against another or one against the state. Because the state institutes the action it does not follow that the person against whom the action is brought may be finally deprived of a personal or property right by a body other than a court.

The cases involving the powers of the Water Commission are equally applicable to the instant situation. These cases are referred to in the Drummey case, supra, and also in the case of Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119, which held that certiorari would not lie to review the rulings of administrative boards. The concurring opinion of Chief Justice Shaw in Tulare Water Co. v. State Water Commission, 187 Cal. 533, 202 P. 874, is particularly relied on and is of sufficient materiality to be directly quoted here. At page 542 of 187 Cal., at page 878 of 202 P. the Chief Justice states:

"If the Water Commission is acting judicially, it is doing so because it is determining the rights and titles of individuals to private real property, and in that capacity it would be acting as a court as fully as a court of general jurisdiction would be acting when it adjudicates the title to real property. [Citing cases.]

"The effect of section 1, art. 6, aforesaid, is to vest in the courts therein mentioned the entire judicial power of the state. It is not within the power of the Legislature to vest in any other body any general judicial power to establish and declare the right and title to private property. The Water Commission is not one of the superior courts of the state and could not be made such court or be given the powers thereof, and it is not an inferior court with jurisdiction limited to incorporated cities, or towns, townships, counties, or cities and counties. On the contrary, its jurisdiction is state-wide. Consequently it is not a court which comes within the purview of said section 1 and it is not within the power of the Legislature to give that commission such judicial power. Western [Metal Supply] Co. v. Pillsbury, 172 Cal. 413, 156 P. 491, Ann. Cas.1917E, 390; Pacific [Coast Casualty] Co. v. Pillsbury, 171 Cal. 322, 153 P. 24."

This concurring opinion in the Tulare Water Co. case was expressly approved in Mojave River Irrigation District v. Superior Court, 202 Cal. 717, 262 P. 724. In that case a petition for prohibition was brought to prevent the superior court from reviewing an order of the Department of Public Works (Water Division) as provided by section 1b of the Water Commission Act. The writ was granted on the ground that the review provided could neither be on certiorari or appeal. It was further determined that the action in the superior court could not be regarded as an original proceeding because the evidence that could be introduced was limited as was the judgment that could be rendered.

Both of the preceding cases were subsequently approved in the case of Yuba River Power Co. v. Nevada Irr. Dist., 207 Cal. 521, 279 P. 128. In that case the plaintiff had applications for appropriation pending and brought suit to quiet title to determine adverse claims to the water so sought as between itself and an upper claimant. In reversing a judgment based upon an order sustaining a demurrer by the trial court, this court stated at page 525 of 207 Cal., at page 129 of 279 P.: "The court in said cause (Tulare Water Co. v. State Water Commission, supra) further clearly intimated that neither the question of priority between claimants nor the existence or nonexistence of unappropriated waters in a stream were questions to be finally determined by the water commission. The effect of this holding was sought to be obviated by the enactment of a new section, known as 1b (St.1923, p. 162), providing for a hearing by the superior court upon applications for permits to appropriate water. This court, in Mojave River Irrigation District v. Superior Court, 202 Cal. 717, 262 P. 724, declared said enactment invalid and sustained the pronounce-ments of the court in Tulare Water Co. v. State Water Commission, supra, to the effect that no judicial power had been or could be lawfully conferred upon the state water commission or its successor. This doctrine is also set forth in Department of Public Works v. Superior Court, 197 Cal. 215, 239 P. 1076."

[5] The above group of cases cannot be distinguished from the situation in the instant case. Just as a vested property right was there involved so here a vested property right is in existence. Such right cannot be finally destroyed by a non-judicial body if the action of that body is questioned in a court of law in a mandate proceeding.

The cases interpreting the State Bar Act, St.1927, p. 38, strengthen our conviction that if finality were given to the action of an administrative agency, such would be an unconstitutional exercise of judicial power. In the case of In re Shattuck, 208 Cal. 6, 279 P. 998, the constitutionality of the State Bar Act as it read in 1927 was attacked as giving judicial power to the Board of Bar Governors. The act nominally gave the Board of Bar Governors power to disbar or suspend. Section 26 of the State Bar Act provided that "Any person so disbarred or suspended may, within sixty days after the filing of said certified copy of said decision, petition said supreme court to review said decision." The court in commenting on this section stated at pages 8, 9 of 208 Cal., at page 998 of 279 P.: "The term 'review,' as used in this and in certain other portions of the act, we do not understand to bear the limited significance attributed to the 'writ of review or certiorari,' as the same is defined and the functions thereof stated in section 1067 et seq. of the Code of Civil Procedure. To give it such limited meaning would result, not only in narrowing the powers of this court to the single issue of jurisdiction in the board to make such order, but would also be to consider said board as being invested with judicial functions, which, under the inhibition of section 1 of article 3 of the state Constitution, the legislative department of the state government has no power to repose in such a board. The review of the evidence, findings, and conclusions of the Board of Bar Governors which this term contemplates consists, and should consist, in a re-examination by this court of the entire record of the proceedings before said board as these are required to be kept and in due course transmitted to this court under the provisions of section 26 of the State Bar Act." That the findings of the Board of Bar Governors, although based on conflicting evidence, are not binding on this court; that the court can and sometimes has refused to sustain the findings of the board; and that the court can and does pass upon the weight of the evidence by a review of the whole record is now well established, and it has been so stated in numerous cases. In re Stafford, 208 Cal. 738, 284 P. 670; Fish v. State Bar, 214 Cal. 215, 4 P.2d 937; Clark v. State Bar, 214 Cal. 281, 4 P.2d 944; Bentson v. State Bar, 216 Cal. 58, 13 P.2d 512. It should be noted here that in disciplinary proceedings this court has confined itself to the record of the proceedings before the Board of Bar Governors. This may be said to be due to the fact that the board is an administrative arm of this court, Fish v. State Bar, supra, and has no effect on our conclusion that in situations such as the instant one a court may consider any new material evidence.

Such cases as Suckow v. Alderson, 182 Cal. 247, 187 P. 965; Brecheen v. Riley, 187 Cal. 121, 200 P. 1042; Cuffield v. Board of Dental Examiners, 12 Cal.App.2d 446, 55 P.2d 522; Fuller v. Board of Medical Examiners, 14 Cal.App.2d 734, 59 P.2d 171, and many earlier cases decided by the various district courts of appeal do not affect the views previously expressed. Those cases were considered on review by certiorari and were decided before the case of Standard Oil Co. v. State Board of Equalization, supra, become final. [The Fuller case was decided one day after the decision of the Standard Oil Co. case, but no petition for a hearing was made in that case to this court.] The Standard Oil Co. case decided that certiorari was not and constitutionally could not be the proper method of review. That case quotes at length from the case of Van Camp S. F. Co. v. Fish & Game Commission, 75 Cal.App. 764, at page 767, 243 P. 702, at page 704, wherein it was stated: "Except for local purposes the section [State Const., art. VI, sec. 1] disposes of the whole judicial power of the state and vests all of it in the courts expressly named therein, leaving none at the disposal of the Legislature." The Standard Oil Co. case was followed by the case of Whitten v. California State Board of Optometry, 8 Cal.2d 444, at page 445, 65 P.2d 1296, 115 A.L.R. 1, in which it was expressly held that "in the absence of a constitutional grant of judicial power a state board cannot exercise judicial functions and the Legislature is powerless to confer such power upon it." That case practically overrules the long list of cases relied upon by respondents, such as Suckow v. Alderson, supra, and kindred cases. The Drummey case, supra, holding that a court must exercise its independent judgment on the facts, logically followed the Whitten case.

In the case of Ray v. Parker, 15 Cal.2d 275, 101 P.2d 665, the constitutionality of the Milk Stabilization Act, St.1935, p. 922, as amended, as a whole was under attack, as it had been in the earlier case of Jersey Maid Milk Products Co. v. Brock, 13 Cal. 2d 620, 91 P.2d 577. The court held that, with the exception of the section giving the Director of Agriculture the power to fix damages under certain conditions, the act was a constitutional exercise of the police power of the state. Because of section 737.11 of the act, which gives the director the power to revoke or suspend a milk license "after due hearing upon a verified complaint signed and filed with the director by any interested person," it is argued that this case is thoroughly consistent with the respondents' contention as hereinbefore set out. Neither the facts nor the law of the Ray case warrant this conclusion.

In the present case the board of optometry had made an order revoking the license of appellant. Appellant then instituted an action in the superior court contesting the validity of that order. The question on appeal before this court is the type or extent of "review" that should have been granted appellant in the superior court in determining the question of whether he had committed certain acts in violation of the provisions of the Optometry Act which would justify the revocation of his license. No order of revocation of any person's license had been made by the Director of Agriculture in either the Ray case or the Jersey Maid case. Section 735.6 of the Milk Act provides that any order of the director "may be reviewed by any court of competent jurisdiction." It would be only after an order of revocation of a license by the director and the contesting of that order by the aggrieved party in a superior court that the question of the scope of the "review" would become the same as that involved in the present case. On the authority of the Drummey case the only type of review that would afford appellant his full constitutional rights would be a complete trial de novo as outlined in the decision in that case. 13 Cal.2d 75, 87 P.2d 848. It was there said at page 85 of 13 Cal.2d, at page 854 of 87 P.2d: "The findings of the board come before the court with a strong presumption of their correctness, and the burden rests on the complaining party to convince the court that the board's decision is contrary to the weight of the evidence." Undoubtedly, the court in this reference to the "evidence" contemplated not only the record of the proceedings before the board, but such additional evidence as either party desired to introduce before the trial court. It should be noted that the Ray case, supra, cites and quotes from Agricultural Prorate Comm. v. Superior Court, 31 Cal.App.2d 518, 88 P. 2d 253, in commenting on the type of "review" provided by section 735.6 of the Milk Act. The court in that case stated at page 524 of 31 Cal.App.2d, at page 256 of 88 P. 2d: "It is quite clear it was intended by the right of review that an interested party should have a right to put in issue before a superior court a question arising as a result of the promulgation of any order the commission might make." After this quotation the Ray opinion cites the Standard Oil Co., Whitten, Drummey and McDonough cases, supra, which, of course, all stand for the propositions that an administrative board cannot exercise full judicial powers; that an administrative board cannot make conclusive findings of fact and thereon base an order which would deprive a person of a property right; and that such a person has the right to a trial de novo in a superior court. In view of the above, it seems idle to argue that the Ray case stands for just the contrary propositions.

Reference is made to the cases of Gaylord v. City of Pasadena, 175 Cal. 433, 166 P. 348; Globe Cotton Oil Mills v. Zellerbach, 200 Cal. 276, 252 P. 1038; and East Bay Municipal Utility District v. Department of Public Works, 1 Cal.2d 476, 35 P.2d 1027, cited in the Ray opinion. The Gaylord case involved the constitutionality of a *local* ordinance and the powers of the administrator thereunder. This fact alone is sufficient to render impotent any language in the case which might tend to support the respondents' position. However, this further observation should be made in regard to the Gaylord case. It is disclosed by the opinion that the findings of the city electrician were questioned in the superior court, and the court determined that the building installations were safe and were not dangerous to life or property. This finding was contrary to the findings made by the city electrician. In other words, the aggrieved party was given a trial de novo in the superior court when he contested the ruling of the administrative agent.

The East Bay Municipal Utility District case is relevant only for its quotation from the Gaylord case; therefore, no comment need be made on it.

The Globe Cotton Oil Mills case is clearly distinguishable from the situation in the present case. There the Fish and Game Commission had refused to act on an application for a permit authorizing the petitioner to use a certain quantity of fish in its reduction plant, on the ground that it would be exercising judicial functions to do so. This court ordered a writ of mandate to issue and held that such actions would not transgress upon the exclusive functions of the judicial department. Here we have a "refusal to issue" not a "revocation," and thus, as was determined in the McDonough case, supra, no property right was involved. But more than that, the petitioner was not contesting the findings of the commission and the order based thereon, but was merely requesting that the commission act in the first instance.

[6] In regard to the numerous cases containing language to the effect that administrative agencies may make findings of fact and the reasons of expediency given therefor, it must again be pointed out that it is *not* the fact-finding power alone that is involved in the present situation. It is the facts found plus the order based thereon depriving a person of a property right which is the full exercise of the judicial power. If one whose license has been revoked fails to question the order in a court of law, then, of course, the ruling of the administrative board will stand because such failure is an admission of violation. However, if the order is questioned in a court of law, then under the Constitution of this state the petitioner must be given a trial de novo on the issues involved.

[7] Up to this point the discussion has been devoted primarily to the necessity of a trial de novo because of the provisions of article III, section 1, and article VI, section 1, of the Constitution of this state. A further reason and one of equal strength is that if binding fact-finding power is conferred upon purely administrative boards, and if the courts in reviewing the administrative boards' actions do not exercise an independent judgment on the facts as well as on the law, the due process provisions of both the federal and state Constitutions will have been violated. In support of this proposition the Drummey case, supra, cites the cases of Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908; Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598; and St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033. The actual holdings of those cases and the strength of such holdings in view of numerous other and conflicting opinions by the Supreme Court of the United States (see Den ex dem. Murray v. Hoboken Land & Imp. Co., 18 How. 272, 15 L.Ed. 372; Bauman v. Ross, 167 U.S. 548, 17 S.Ct. 966, 42 L.Ed. 270; Interstate Commerce Comm. v. Union Pacific R. Co., 222 U.S. 541, 547, 32 S.Ct. 108, 56 L.Ed. 308; United States ex rel. Tisi v. Tod, 264 U.S. 131, 133, 44 S.Ct. 260, 68 L.Ed. 590; Del Vecchio v. Bowers, 296 U.S. 280, 56 S.Ct. 190, 80 L. Ed. 229; Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 304, 57 S.Ct. 478, 81 L. Ed. 659) have been the subject of much discussion by leading authorities in the field of administrative law.

The Crowell v. Benson case, supra, has been considerably weakened by the case of South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 60 S.Ct. 544, 84 L.Ed. 732. In the Benson case the court, per Hughes, C. J., held that there were two "jurisdictional" questions of fact: (1) whether the injury occurred upon navigable waters and (2) whether the relationship of master and servant existed, that could not be conclusively determined by the administrative agent. Yet in the South Chicago case, also written by the Chief Justice, the question of fact of whether a man was a member of the crew of a certain vessel was held to be a question to be finally determined by the administrative agent. It is difficult to recognize any distinction between this latter question of fact and the so-called "jurisdictional" facts mentioned above. Obviously, if the man was a member of the crew of the vessel, the administrative agent would not have jurisdiction to make an award under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U.S.C.A. § 901 et seq.

[8] The opinion in the Drummey case supra, recognized that there was some confusion in the federal cases, and it must be admitted that the cited cases appear to be exceptions to the general rule which gives federal administrative agencies the power to make conclusive findings of fact. However, this does not detract from the strength of the language of these cases when applied to the question of the powers of state-wide administrative agencies as controlled by the provisions of the Constitution of this state. Article III, section 1, of the federal Constitution vests the judicial power of the United States in one Supreme Court and "in such inferior Courts as the Congress may from time to time ordain and establish." Under the federal Constitution then, with the exception of the Supreme Court, there are no enumerated courts. Therefore, the question of whether a certain inferior body created by Congress is exercising judicial power becomes relatively unimportant for the reason that if it is acting in a judicial capacity, it may be classified as one of the "inferior courts" which Congress is given the power to create. On the other hand, as previously pointed out, under the Constitution of this state, there are certain enumerated courts which may alone exercise state-wide judicial power to the exclusion of all other bodies. Therefore, if a body other than one of the enumerated courts makes findings of fact, on those findings determines that the provisions of a certain statute have been violated, and issues an order or renders a judgment which has the effect of depriving a person of a valuable property right, such action denies the aggrieved party the due process of law guaranteed to him by the state and federal Constitutions, unless such action by such body may be questioned in a court of law. It should always be kept in mind that the evil of administrative action which must be guarded against is not the fact-finding power, but the conclusiveness of the fact-finding power coupled with the order based on the findings made which would deprive a person of a property right. Such is the full exercise of judicial power, and such power in this state can be exercised only by one of the enumerated courts. The language of the federal cases cited in the Drummey case, supra, is therefore peculiarly applicable to the powers of restriction on the powers of state-wide administrative boards under the state Constitution. On page 85 of 13 Cal.2d, 87 P.2d on page 854 of the Drummey case is found a quotation from the case of St. Joseph Stock Yards Co. v. United States, supra. The quotation is concluded with the following sentence: "Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." Regardless of the strength or weakness of that sentence in relation to federal administrative agencies, it may be directly applied to administrative agencies of this state. The state Constitution limits the exercise of judicial power to the enumerated courts. The federal cases previously cited, which hold that federal administrative boards may make conclusive findings of fact, are therefore not controlling on this court when the power of a state administrative board is in question.

The distinction between the powers of state-wide administrative boards and federal administrative boards is also existent between boards with state-wide authority in this state and local bodies created by legislature. By article VI, section 1, of the state Constitution, the judicial power of the state is vested in the enumerated courts, municipal courts as may be established, and "such inferior courts as the Legislature may establish in any incorporated city or town, township, county or city and county." This latter provision is similar to the provision in the federal Constitution. Therefore, it has been held that the rulings of local boards acting in a judicial capacity may be reviewed on certiorari. See Imperial Water Co. No. 1 v. Board of Supervisors, 162 Cal. 14, 120 P. 780; Miller & Lux v. Board of Supervisors, 189 Cal. 254, 208 P. 304; Ludolph v. Board of Police Com'rs, 30 Cal.App.2d 211, 86 P.2d 118; Nider v. City Commission, 36 Cal.App.2d 14, 97 P.2d 293. That the rulings of local bodies might be reviewed on certiorari was recognized in both the Standard Oil Co. and Drummey cases. Cases in other states holding that state-wide administrative agencies might exercise judicial power and that their rulings might be reviewed on certiorari may be distinguished on the same ground. The Supreme Court of Arizona in the re cent case of Batty v. Arizona State Dental Board, 57 Ariz. 239, 112 P.2d 870, so held and criticized the Standard Oil Co. case. However, the court failed to consider the difference between the provisions of article VI, section 1, of the California Constitution and article VI, section 1, of the Arizona Constitution. The latter provides: "The judicial power of the state shall be vested in a Supreme Court, superior courts, justices of the peace, and such courts inferior to the superior courts as may be provided by law." This provision is quite similar to that of the federal Constitution [art. 1, sec. 1] but is clearly distinguishable from article VI, section 1, of the Constitution of this state, which confers upon the legislature the power to establish inferior courts only with local jurisdiction.

[9] Respondent boards urges that by not providing for a court hearing after determination by the board, the legislature intended that the board's action should be final or at least that a court should be confined to a consideration of the evidence introduced at the hearing before the board. As evidence of the legislative intent in such matters, we have only to refer to the act of the last legislature in proposing to the voters of the state a constitutional amendment [Senate Constitutional Amendment No. 8, see St.1941 p. 3549] which purports to give to the legislature the right "to confer power on administrative officers, boards or commissions to make decisions." If this proposed amendment is adopted by the people, it will authorize the legislature to confer upon such administrative bodies the right to exercise judicial power, the same power the respondent board claims the legislature now possesses. Obviously, the legislature in proposing said constitutional amendment was of the opinion that it now has no such power.

[10] Other questions were raised in the briefs and on oral argument, but they are of minor importance and their determination would in no way affect our decision in this case. In consideration of our decision that the trial court erroneously denied appellant the right to introduce material and competent evidence at the trial of this action in the superior court, it is our opinion that the judgment should be reversed, and it is so ordered.

SHENK, HOUSER, and CARTER, JJ., concur.

GIBSON, Chief Justice (dissenting).

I dissent.

The majority opinion in this case is the culmination of a series of decisions in which this court, since 1936, has overturned long established rules in the field of administrative law. The constitutional principles announced by the majority will vitally impair the effectiveness of many administrative agencies upon which we rely for the expert conduct of the complex affairs of state government. It follows from this decision that a state-wide administrative agency is without power to make a binding determination of fact affecting rights of property and that any act of the legislature conferring such authority is unconstitutional. It is held here that, although such an agency is vested with statutory authority to revoke professional licenses, there is a constitutional requirement that after hearing and determination by the administrative board the entire matter must be tried anew in a court of law. The conclusion that the petitioner in this case is entitled to a trial de novo means, in the language of the author of the majority opinion as expressed in another case, "a new hearing, or a hearing the second time. * * * Such a hearing contemplates an entire trial of the controversial matter in the same manner in which the same was originally heard. It is in no sense a review of the hearing previously held, but is a complete trial of the controversy, the same as if no previous hearing had ever been held." Collier & Wallis v. Astor, 9 Cal.2d 202, 205, 70 P.2d 171, 173.

Prior to 1936 it was established by a great many cases that where a state-wide board was given the power to revoke professional licenses for cause and where the supervision of the courts extended only to an inquiry as to whether the board had regularly pursued its authority, there was no violation of the provisions of the Constitution. Suckow v. Alderson, 182 Cal. 247, 187 P. 965; Brecheen v. Riley, 187 Cal. 121, 200 P. 1042; State Board, etc., v. Superior Court, 201 Cal. 108, 255 P. 749; Bold v. Board of Medical Examiners, 133 Cal.App. 23, 23 P.2d 826; Gustason v. Board of Osteopathic Examiners, 10 Cal. App.2d 436, 51 P.2d 1106. In this regard it seems very significant that although many professional licenses have been revoked in this state by administrative boards under statutory authorization, our attention has not been called to a single instance in which a trial de novo has been had before a court.

The constitutional doctrines which find their ultimate expression in the present case originated in two erroneous decisions of this court, one in the procedural field in 1936 and the other in the field of constitutional law in 1939. Both decisions have been subjected to severe criticism by experts in this field of the law. In the first of these cases, Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P. 2d 119, decided in 1936, it was held that the writ of certiorari would no longer lie to review the quasi-judicial acts of state-wide administrative agencies in California. See criticism in Rode, "Administrative Adjudication in California and Its Review by the Writ of Certiorari," (1937) 25 Cal.L. Rev. 694; Turrentine, "Restore Certiorari to Review State-Wide Administrative Bodies in California," (1941) 29 Cal.L.Rev. 275; Gellhorn, "Administrative Law—Cases and Comments," (1940) p. 819, n. The second case, Drummey v. State Board of Funeral Directors & Embalmers, 13 Cal.2d 75, 87 P.2d 848, decided in 1939, held that the writ of mandate could be used to review the orders of professional licensing boards and thus fill the procedural gap caused by the refusal to permit the use of certiorari for this purpose. The reinstatement on mandamus of professional licenses suspended by the State Board of Funeral Directors was sustained, and it was held that the trial court was required under the state and federal Constitutions to exercise its independent judgment upon the facts as well as upon the law. This constitutional doctrine, obviously contrary to the former decisions in this state, was explained in McDonough v. Goodcell, 13 Cal.2d 741, 752, 91 P.2d 1035, 123 A.L.R. 1205, as having resulted from certain recent decisions of the United States Supreme Court which appeared to make such a conclusion "mandatory". See criticism in McGovney, "Administrative Decisions and Court Review Thereof, in California," (1941) 29 Cal.L. Rev. 110.

This case is not the first in which an opportunity has been presented to correct the error in the Standard Oil and Drummey cases. So long as the issue remained primarily one of procedure, however, there was no irreparable damage which required that the judicial error involved in those decisions be rectified. While it was possible, by use of the writ of mandate, to review the acts of state-wide administrative bodies and accord the findings of such bodies a substantial degree of finality, it appeared that the substantive evils resulting from the procedural error might be eliminated in time. Cf. Bodinson Mfg. Co. v. California Emp. Comm., 17 Cal.2d 321, 109 P.2d 935; Webster v. Board of Dental Examiners, 17 Cal.2d 534, 110 P.2d 992; Olive Proration, etc., Committee v. Agricultural, etc., Comm., 17 Cal.2d 204, 109 P.2d 918. The majority opinion in the present case, however, enunciates a doctrine of constitutional law which can be corrected only by a reversal of the decision or by constitutional amendment. The present holding goes far beyond the rule laid down in Drummey v. State Board of Funeral Directors & Embalmers, supra, although that fact is not immediately discernible from the face of the opinion. The Drummey case did not require a trial de novo by the court, but spoke of an independent judgment on the facts. This independent judgment, which was presumably to be exercised with reference to the evidence produced before the board, was tempered with the cautionary instruction that the board's findings were to be given a "strong presumption of their correctness." Drummey v. State Board of Funeral Directors & Embalmers, supra, 13 Cal.2d page 85, 87 P.2d page 854; cf. McGovney, supra, p. 129, et seq. Under the trial de novo rule of the present case, however, no finality whatever is to be attributed to the findings of state-wide administrative agencies. This requirement of a trial de novo, based upon the rigid foundations of our Constitution, can no longer be said to affect matter of procedure only. We find it necessary, therefore, to trace the successive steps which the court has followed in reaching its present position.

1. *The Procedural Problem.*

In Standard Oil Co. v. State Board of Equalization, supra, it was held that the writ of certiorari could no longer be used in this state as a means of reviewing the acts of state-wide administrative bodies, notwithstanding express statutory authorization therefor. Without discussing the nature of the particular act involved (in that case the assessment of an additional tax), the court decided that the action of the board could not have been judicial in nature because article VI, section 1 of the Constitution vests all judicial power in certain specified courts. Furthermore, it was said, the writ of certiorari may be used to review judicial power only and, that being so, it could not be used to review the act of the Board of Equalization in assessing an additional tax. This decision was soon followed by others which held that the judicial power was not involved in the revocation of a professional license by a state-wide agency. (Whitten v. California State Board of Optometry, 8 Cal.2d 444, 65 P.2d 1296, 115 A.L.R. 1; Hartman v. Board of Chiropractic Examiners, 20 Cal.App.2d 76, 66 P.2d 705; Jacobs v. Board of Dental Examiners, 24 Cal.App.2d 359, 75 P.2d 96) nor in the suspension by the Commissioner of Corporations of a permit authorizing the sale of stock. Schwab-Wilson M. Corp. v. Daugherty, 15 Cal.App.2d 701, 59 P.2d 1057. Since these duties were said not to involve an exercise of judicial power, it was held that neither the writ of certiorari nor the writ of prohibition was available to review such acts. None of these cases suggest that the statutes vesting this kind of power in state-wide boards are unconstitutional. Rather, they characterize the power exercised as "administrative" in nature, and hold that the inapplicability of certiorari and prohibition to review administrative orders is caused by the limited nature of these writs.

From the procedural point of view alone, this conclusion is contrary to the weight of authority both in California and elsewhere. There are many cases where the writ of certiorari has been used to review orders of state-wide administrative agencies whose power, while quasi-judicial in nature, was not the basic judicial power vested by the Constitution in courts of law. These cases include assessments of taxes made by the State Board of Equalization as well as orders revoking professional licenses. San Francisco & N. P. R. R. v. State Board of Equalization, 60 Cal. 12; Suckow v. Alderson, supra; Brecheen v. Riley, supra; see, Rode, op. cit. supra, p. 695, et seq.; Turrentine, op. cit. supra, p. 280, et seq.; McGovney, op. cit. supra, pp. 114, 146, et seq. Furthermore, it has long been recognized that, of all the extraordinary common law writs, certiorari is the one best adapted to review the acts of boards, tribunals and officers which exercise quasi-judicial power, although concededly such bodies cannot constitutionally exercise the basic judicial power of courts of law. 14 C.J.S., Certiorari, § 17, p. 142; 10 Am.Jur. 534; Jarman v. Board of Review, 345 Ill. 248, 178 N.E. 91, 77 A.L.R. 1357; McGovney, op. cit. supra, p. 147. Until the Standard Oil case in 1936, this was the established doctrine in California as well as in the rest of the nation. The effect of that decision and the ones which followed it was to limit certiorari and prohibition to a review of the orders of courts of law. This conclusion as to the nature of certiorari is not supported by the holdings of the cases cited. The two cases relied upon most heavily in the Standard Oil case are Tulare Water Co. v. State Water Comm., 187 Cal. 533, 202 P. 874, and Department of Pub. Works v. Superior Court, 197 Cal. 215, 239 P. 1076. In each of these cases the court held that a statutory proceeding before a state-wide administrative agency in which no formal hearing was authorized in which no notice to opposing parties was provided, and in which the procedure did not contemplate the adjudication of any rights, was merely for the guidance of the agency in issuing a preliminary permit. Tulare Water Co. v. State Water Comm., supra, 187 Cal. page 537, 202 P. 874; Department of Pub. Works v. Superior Court, supra, 197 Cal. page 221, 239 P. 1076. Since the proceeding had no judicial aspect, either quasi-judicial or otherwise, it was obviously not a case in which certiorari would lie. The decision in the Standard Oil case, however, draws a far different conclusion from certain language of Chief Justice Shaw, concurring in the Tulare Water Co. case. In addition to the fact that this language was not the basis for the decision in that case, it did not mean that certiorari could only be used to review an exercise of constitutional judicial power as the Standard Oil case interpreted it to mean. Turrentine, op.cit. supra, p. 283. Chief Justice Shaw himself said shortly before the Tulare case, "It must be conceded that the power given to the board to revoke or suspend the license of a person duly admitted to practice medicine * * * is judicial in its nature. * * * That a board or tribunal so authorized exercises at least *quasi* judicial power in so doing is well established by our decisions. The judicial function is to decide on the property or rights of the citizen * * *. The determination that plaintiff was guilty and that his right to practice should be suspended comes clearly within the scope of these definitions. *Nevertheless it is now well established in this state that tribunals* *such as the board of medical examiners * * * are not courts in the strict sense; they are not exercising 'the judicial power of the State' as that phrase is used in the Constitution * * * and that statutes creating such boards and conferring upon them such powers are constitutional. * * * It is also settled that, where a board has exercised quasi judicial power of the nature of that here in question, its decisions are subject to revision by way of certiorari."* Suckow v. Alderson, supra, 182 Cal. pages 249, 250, 187 P. page 966.

On the procedural point, therefore, the conclusion reached in the Standard Oil case that certiorari will lie only to review the exercise of true judicial power by courts of law is erroneous. The cases therein cited hold that if it appears that the particular act sought to be reviewed does not involve any judicial or quasi-judicial functions whatsoever, certiorari will not lie. This recognized principle is far from the rule of the Standard Oil case that only the exercise of constitutional judicial power can be reviewed upon certiorari and that the quasi-judicial acts of state-wide administrative boards can not be reviewed by this traditional procedure.

2. *The Constitutional Problem.*

It was immediately recognized that if the holding in the Standard Oil case could be confined solely to matters of procedure, no irreparable damage had been done since the customary kind of judicial review might be provided in some other way. Cf. Rode, op. cit. supra, pp. 702–703. A substitute procedure was, in fact, created by this court when it sanctioned the use of the writ of mandate in cases formerly reviewed by the writ of certiorari. Whitten v. California State Board of Optometry, supra. So long as it was possible, by use of the writ of mandate, to evolve a proper relationship between the courts and administrative agencies, it did not seem essential to insist upon a return to the historically correct procedure from which the court had strayed. Cf. Bodinson Mfg. Co. v. California Emp. Comm., supra.

(a) The constitutional theories resulting from the Standard Oil decision.

The procedural error of the Standard Oil case, however, soon led to the announcement of erroneous principles of constitutional law. Citing the Standard Oil case, which dealt with the nature of certiorari and not with the constitutionality of a delegation of quasi-judicial power, it was said for the first time in Whitten v. California State Board of Optometry, supra, 8 Cal.2d page 446, 65 P.2d 1296, 115 A.L.R. 1, that it would be unconstitutional to confer *quasi-judicial power* upon state-wide administrative agencies. Consequently, the powers which such boards exercised could no longer be called quasi-judicial. See, criticism of this reasoning in McGovney, op. cit. supra, p. 114; see, also, opinion of Supreme Court on denial of hearing, Cullinan v. Superior Court, 24 Cal.App.2d 468, 475, 75 P.2d 518, 77 P.2d 471. It should be noted, at this point, that the Standard Oil case itself approved language which refers to these functions as quasi-judicial in nature. Standard Oil Co. v. State Board of Equalization, supra, 6 Cal.2d page 563, 59 P.2d 119. Instead of declaring the statutes vesting quasi-judicial functions in state-wide administrative boards to be unconstitutional, however, the court undertook to bring these statutes within the new constitutional doctrines by altering the nature of the duties delegated to such boards by the legislature. Thus, despite a clear indication that the legislature intended a certain degree of finality to attach to the quasi-judicial acts of administrative agencies, this court, under asserted constitutional compulsion, as will be seen later, has successively reduced that finality so as to make the duties of such boards ministerial, rather than quasi-judicial, in nature. The statement in the Whitten and Cullinan cases to the effect that a professional board does not and can not act quasi-judicially in revoking a license is both contrary to authority and unsupported by the only case relied upon, the Standard Oil case. That case does not invalidate the delegation of such power or classify it, except to say that these boards do not exercise the constitutional judicial power asserted therein to be required for the issuance of a writ of certiorari.

(b) Reliance upon the requirements of the federal Constitution.

In the next step, which was taken in the Drummey case, it was held that upon a writ of mandate the reviewing court was constitutionally required to exercise an independent judgment on the facts. In part, this conclusion rested upon the language in the Whitten case concerning quasi-judicial functions, but the main ground for the decision was the asserted requirement of the due process clause of the federal Constitution. See, Drummey v. State Board of Funeral Directors & Embalmers, supra, 13 Cal.2d page 85, 87 P.2d 848; McDonough v. Goodcell, supra, 13 Cal.2d page 752, 91 P.2d 1035, 123 A.L.R. 1205. The former doctrine will be examined in detail in connection with the majority opinion in the present case, but the discussion at this point will serve to demonstrate the mistaken reliance upon certain federal cases in the Drummey and McDonough cases. The formula laid down in the Drummey case was "independent judgment on the facts." This theory, which had no prior existence in California, was taken literally from the language of the United States Supreme Court in St. Joseph Stockyards Co. v. United States, 298 U.S. 38, 52, 56 S.Ct. 720, 80 L.Ed. 1033. Two other federal cases were also cited Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908; and Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598. The conclusion drawn from these cases was that the due process clause of the Fourteenth Amendment to the federal Constitution required the state courts to re-examine the evidence upon which administrative boards had acted in suspending a professional license.

In reaching this conclusion the decision in the Drummey case ignored the general rule followed in the federal system which makes administrative findings of fact conclusive if supported by substantial evidence. Finality on fact of value in an eminent domain proceeding: Bauman v. Ross, 167 U.S. 548, 593, 17 S.Ct. 966, 42 L.Ed. 270; see, Crane v. Hahlo, 258 U.S. 142, 148, 42 S.Ct. 214, 66 L.Ed. 514. Finality as to value for assessment of duty on imported goods: Hilton v. Merritt, 110 U.S. 97, 107, 3 S.Ct. 548, 28 L.Ed. 83; Bartlett v. Kane, 16 How. 263, 14 L.Ed. 931. Finality for tax purposes: Den ex dem. Murray v. Hoboken Land & Imp. Co., 18 How. 272, 15 L.Ed. 372; Helvering v. Rankin, 295 U.S. 123, 131, 55 S.Ct. 732, 79 L.Ed. 1343; Phillips v. Commissioner of Internal Rev., 283 U.S. 589, 600, 51 S.Ct. 608, 75 L.Ed. 1289. Finality on matters of fact in an alien deportation proceeding: United States ex rel. Tisi v. Tod, 264 U.S. 131, 133, 44 S.Ct. 260, 68 L.Ed. 590. Finality in assessment of penalty for violation of immigration law by a shipping company: Lloyd Sabaudo Soc. v. Elting, 287 U.S. 329, 335, 53 S.Ct. 167, 77 L.Ed. 341. Conclusive determination of facts in the field of governmental regulation: Interstate Commerce Comm. v. Union Pac. R. R. Co., 222 U.S. 541, 547, 32 S.Ct. 108, 56 L.Ed. 308; Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 444, 50 S.Ct. 220, 74 L.Ed. 524; Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297, 304, 57 S.Ct. 478, 81 L.Ed. 659; Del Vecchio v. Bowers, 296 U.S. 280, 286, 56 S.Ct. 190, 80 L.Ed. 229; Voehl v. Indemnity Insurance Co., 288 U.S. 162, 166, 53 S.Ct. 380, 77 L.Ed. 676, 87 A.L.R. 245; Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126; Federal Trade Comm. v. Algoma Lumber Co., 291 U.S. 67, 73, 54 S.Ct. 315, 78 L.Ed. 655; Federal Radio Comm. v. Nelson Bros., etc., Co., 289 U.S. 266, 277, 53 S.Ct. 627, 77 L.Ed. 1166, 89 A.L.R. 406. The due process clause of the federal Constitution imposes no barrier to this general rule of administrative finality as to findings of fact. See Black, "'Jurisdictional Fact' Theory and Administrative Finality" (1937) 22 Cornell L.Q. 349, 369; Tollefson, "Administrative Finality" (1931) 29 Mich.L.Rev. 839, 840; Landis, Administrative Law and the Courts (1938) 47 Yale L.J. 519; (1925) 23 Mich.L.Rev. 233; (1938) 24 Va.L.Rev. 653, 655; (1941) 8 Geo.Wash.L.Rev. 409, 508.

The conclusion is inevitable that the due process clause of the Fourteenth Amendment imposes no restriction on the action of the states which the due process clause of the Fifth Amendment does not impose upon the federal government. There are, in fact, decisions of the United States Supreme Court (not mentioned in the Drummey decision) which hold that the due process clause of the Fourteenth Amendment does not prohibit the vesting of power in a state administrative agency to make findings of fact which are final if based upon substantial evidence. Helfrick v. Dahlstrom Metallic Door Co., 256 N.Y. 199, 176 N.E. 141, affirmed per curiam, Dahlstrom Metallic Door Co. v. Industrial Board, 284 U.S. 594, 52 S.Ct. 202, 76 L.Ed. 511; see, also, Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co., 284 U.S. 151, 157, 158, 52 S.Ct. 69, 76 L.Ed. 214; Long Island Water-Supply Co. v. Brooklyn, 166 U.S. 685, 17 S.Ct. 718, 41 L.Ed. 1165; Louisville & Nashville R. Co. v. Garrett, 231 U.S. 298, 313, 34 S.Ct. 48, 58 L.Ed. 229; Reetz v. Michigan, 188 U.S. 505, 507-509, 23 S.Ct. 390, 47 L.Ed. 563; State ex rel. Williams v. Whitman, 116 Fla. 196, 199, 150 So. 136, 156 So. 705, 95 A.L.R. 1416; Stettler v. O'Hara, 69 Or. 519, 139 P. 743, L.R.A.1917C, 944 Ann.Cas. 1916A, 217, affirmed 243 U.S. 629, 37 S. Ct. 475, 61 L.Ed. 937; People ex rel. Lieberman v. Vandecarr, 175 N.Y. 440, 445, 67 N.E. 913, 108 Am.St.Rep. 781, affirmed, 199 U.S. 552, 562, 26 S.Ct. 144, 50 L.Ed. 305; Nega v. Chicago Rys. Co., 317 Ill. 482, 148 N.E. 250, 39 A.L.R. 1057; People ex rel. Consolidated Water Co. v. Maltbie, 275 N.Y. 357, 9 N.E.2d 961; General Acc. F. & L. Assur. Corp. v. Industrial Comm., 223 Wis. 635, 271 N.W. 385; see 21 R.C.L. 365; 12 Am.Jur. 329; 16 C.J.S., Constitutional Law, § 629, p. 1287. It has been held that the due process clause does not guarantee judicial process in all cases (Dohany v. Rogers, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904, 68 A.L.R. 434; Den ex dem. Murray v. Hoboken Land & Imp. Co., 18 How. 272, 15 L.Ed. 372), and that it does not guarantee any particular procedure. Hurtado v. California, 110 U.S. 516, 537, 4 S.Ct. 111, 292, 28 L.Ed. 232. It was even held in Reetz v. Michigan, supra, 188 U.S. page 507, 23 S.Ct. 390, 391, 47 L.Ed. 563, that the due process provision was not violated by a state statute vesting the final decision of *questions of law* in a state board of medical examiners. The court said, "* * * we know of no provision in the Federal Constitution which forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. * * * Due process is not necessarily judicial process. * * *"

Finally, the conclusion in the Drummey decision concerning the due process requirements of the Fourteenth Amendment resulted, not only from failure to consider the other federal decisions in the field, but from a misapplication of the three decisions which were cited. The requirement in those cases of a judicial re-examination of administrative findings of fact was an exception to the general doctrine of administrative finality expressed above, and it was limited to two specific situations where the particular factual determination involved the constitutional jurisdiction of the particular agency. Thus, in establishing rates for public utilities it was held that an administrative finding that the rate was nonconfiscatory should be subjected to the same scrutiny that a legislative declaration to that effect would be accorded in order that the court might assure itself that the constitutional guarantee of just compensation had been met. Ohio Valley Water Co. v. Ben Avon Borough, supra; St. Joseph Stockyards Co. v. United States, supra. A recent case indicates clearly that this exception to the rule of administrative finality is limited to this phase of the rate-making power. Railroad Comm. of Texas v. Rowan & Nichols Oil Co., 310 U.S. 573, 581, 60 S.Ct. 1021, 84 L.Ed. 1368. The other exceptional situation involved an issue of fact upon which the jurisdiction of the agency depended within the provisions of the federal Constitution. Thus, it was held in Crowell v. Benson, supra, that the existence of the master and servant relation and the question of whether the injury occurred upon navigable waters were facts which, if erroneously determined, might permit the agency to operate outside the scope of its constitutional power. The rule of administrative finality on findings of fact could not be applied, therefore, because the court was required to satisfy itself that constitutional limitations had not been exceeded. Crowell v. Benson, supra, 285 U.S. pages 56–58, 52 S.Ct. 285, 76 L.Ed. 598. The limited nature of this exception, also, is indicated by the cases involving the same statute which hold that ordinarily administrative findings of fact are conclusive if supported by substantial evidence. South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 258, 60 S.Ct. 544, 84 L.Ed. 732; 24 Va.L.Rev. 653; 25 Cornell L.Q. 274. Upon examination of the many federal cases defining the requirements of the due process clause so far as administrative findings of fact are concerned, it can no longer be disputed that the Drummey decision reached a wholly erroneous conclusion through its reliance upon three federal cases which deal with dissimilar situations and which are conceded to be sporadic exceptions to the general rule of administrative finality. See, McGovney, op. cit. supra, p. 134 et seq.; Dickinson, "Crowell v. Benson; Judicial Review of Administrative Determinations of 'Constitutional Fact'", 80 U. of Pa.L.Rev. 1055; Black, "'Jurisdictional Fact' Theory and Administrative Finality," 22 Cornell L.Q. 349.

(c) Reliance upon the requirements of the California Constitution.

Although the majority opinion in the present case adopts and extends the conclusions announced in the Drummey and McDonough decisions, it concedes in effect that the theory underlying those decisions was in error. The so-called "mandatory" requirement of the federal cases (see McDonough v. Goodcell, supra) has been re-stated and the federal cases are now said to be persuasive only. The support for the majority opinion in this case, therefore, is sought in the provisions of the California Constitution.

The reasoning in support of this position is based upon a misapplication of the doctrine of separation of powers. The position advanced, simply stated, is this: (1) The basic judicial power of the state can be vested only in certain named courts of law; and (2) the power to make binding determinations of fact and to issue orders based thereon affecting private rights of property, which has traditionally been said to be quasi-judicial in nature, constitutes an exercise of power so basically judicial that it can be performed only by a court of law. The first proposition has been accepted doctrine throughout the United States for generations; the second announces a new rule as to the lesser, quasi-judicial power which is not supported by our cases or decisions elsewhere. It results from the failure to recognize the hitherto well-established class of inferior adjudicating functions which have been called "quasi-judicial" in nature. It has long been established that the separation of powers doctrine cannot be interpreted as a rigid and absolute separation of governmental functions. It is, rather, a general doctrine designed to prevent the vesting of the basic power of any branch of the government in the hands of another branch. Hart, Introduction to Administrative Law (1940) pp. 146-150; Cushman, The Independent Regulatory Commissions (1941) pp. 420–448; Green, Separation of Governmental Powers (1920) 29 Yale L.J. 369; (1935) 2 Univ. of Chi.L.Rev. 385; (1934) 58 Am.Bar Assn.Rep. 407, 410–414; (1936) 51 Pol.Sci.Q. 383. The California decisions have not followed any different rule. See, Parker v. Riley, 18 Cal.2d 83, 113 P.2d 873, 134 A.L.R. 1405; Ray v. Parker, 15 Cal.2d 275, 290, 101 P.2d 665; Agricultural Prorate Comm. v. Superior Court, 5 Cal.2d 550, 568, 55 P.2d 495; Globe Cotton Oil Mills v. Zellerbach, 200 Cal. 276, 252 P. 1038; Brecheen v. Riley, supra; Housing Authority of L. A. County v. Dockweiler, 14 Cal.2d 437, 94 P.2d 794; (1931) 19 Cal.L.Rev. 448; 5 Cal.Jur. 658, 677, 683.

Although the basic power of any one of the three co-ordinate branches of the government can be exercised by the individual branches only, there are incidental governmental activities which may appropriately be exercised by any or all of the agencies of the government. Certain of these functions may be a normal incident of legislative action or an ordinary accompaniment of true judicial action, but unless the basic constitutional power of the particular branch of the government is involved, such quasi-legislative or quasi-judicial power may be exercised by other agencies of government. Thus, it has been recognized that the ascertainment of facts based upon evidence taken in the course of a hearing, while an ordinary incident of a judicial proceeding, may also have an appropriate place in action by the legislative or executive branch of the government. See Brown, Administrative Commissions and the Judicial Power (1935) 19 Minn.L.Rev. 261, 275. As the United States Supreme Court has said in a leading case: "Even where it is essential to maintain strictly the distinction between the judicial and other branches of the government, it must still be recognized that the ascertainment of facts, or the reaching of conclusions upon evidence taken in the course of a hearing of parties interested, may be entirely proper in the exercise of executive or legislative, as distinguished from judicial, powers. The legislature, had it seen fit, might have conducted similar inquiries through committees of its members, or specially constituted bodies * * * and it might have used methods like those of judicial tribunals in the endeavor to elicit the facts." Louisville & N. R. R. Co. v. Garrett, 231 U.S. 298, 307, 34 S.Ct. 48, 52, 58 L.Ed. 229; see, also, In re Battelle, 207 Cal. 227, 277 P. 725, 65 A.L.R. 1497. It has been held in this state, in conformity with the prevailing doctrine, that the power to make findings of fact upon the basis of which legislation is to become effective may be vested in administrative agencies (Olive Proration Program Committee v. Agricultural Prorate Comm., 17 Cal.2d 204, 208, 109 P.2d 918; Globe Cotton Oil Mills v. Zellerbach, supra, 200 Cal. at page 277, 252 P. 1038) and in members of the executive branch of the government. Brock v. Superior Court, 9 Cal.2d 291, 71 P.2d 209, 114 A.L.R. 127; Ray v. Parker, supra, 15 Cal.2d pages 290–292, 101 P.2d 665.

It therefore becomes apparent that there is both a subsidiary legislative function which may properly be devolved upon other agencies of government without violating the provisions of the Constitution (Parker v. Riley, supra) and an inferior adjudicating function which, though judicial in nature, may be performed by other agencies of government without amounting to an unconstitutional exercise of judicial power. The contention has frequently been made that a statute vesting power in a state-wide administrative agency to make orders based upon determinations of fact is unconstitutional as vesting judicial power in the agency. These contentions have been repeatedly rejected. Ray v. Parker, 15 Cal.2d 275, 290, 101 P.2d 665; Brecheen v. Riley, 187 Cal. 121, 200 P. 1042; Suckow v. Alderson, 182 Cal. 247, 187 P. 965; Globe Cotton Oil Mills v. Zellerbach, 200 Cal. 276, 252 P. 1038; Ex parte Whitley, 144 Cal. 167, 77 P. 879, 1 Ann.Cas. 13; Dominguez Land Corp. v. Daugherty, 196 Cal. 468, 483, 238 P. 703. It has been held that the power to make determinations of fact upon the basis of which a license to engage in business may be revoked or suspended may be vested in an administrative agency without violating the Constitution. Ray v. Parker, supra, 15 Cal.2d pages 290–292, 101 P.2d 665. The right to engage in a lawful business or profession is a valuable right, but it is subject to the proper exercise of the police power; and the power to make determinations of fact upon which a license revocation is based does not constitute an exercise of the judicial power of the state. Brecheen v. Riley, supra, 187 Cal. page 125, 200 P. 1042. Such power partakes of the judicial function, but it does not constitute "the judicial power" within the meaning of the constitutional provision. Suckow v. Alderson, supra, 182 Cal. page 250, 187 P. 965, 966; Ex parte Whitley, supra, 144 Cal. page 179, 77 P.2d 879, 1 Ann.Cas. 13. Even though a statute provides that the determinations of fact of a state-wide administrative agency are to be conclusive (Stats.1925, pp. 595, 599) there is no unconstitutional delegation of judicial power to the agency. Globe Cotton Oil Mills v. Zellerbach, supra, 200 Cal. page 277, 252 P. 1038.

In the face of this trend of authority, it is difficult to see how the majority could escape the conclusion that the functions of the Board of Optometry in the present case, while partaking of the adjudicating function, were properly classifiable as quasi-judicial in nature and properly delegable to administrative agencies. The explanation is found in the two decisions previously referred to. In Whitten v. California State Board of Optometry, supra, the court might have merely repeated the procedural error of the Standard Oil case by holding that, while quasi-judicial functions were exercised, constitutional judicial power was not involved, and thus no basis was presented for the use of certiorari or prohibition. The court in that case, however, added the wholly unnecessary comment that the functions of such professional licensing boards could no longer be called quasi-judicial and doubt was cast upon the previous cases which had so classified these functions. In Drummey v. State Board of Funeral Directors & Embalmers, supra, 13 Cal.2d page 81, 87 P.2d 848, this statement was rephrased and it was said that the Constitution forbade the vesting of *either* judicial or quasi-judicial powers in administrative boards. The majority opinion in the present case does not mention quasi-judicial functions, and the inference seems to be that any function which partakes of the adjudicating power must be classified as the constitutional judicial power and may be exercised by courts of law alone. The conclusion that it would be an unconstitutional delegation of basic judicial power to authorize an administrative board to revoke professional licenses upon determinations of fact which are conclusive if founded upon substantial evidence finds no support in the decisions of this state prior to 1936 and it is contrary to the decisions of other jurisdictions. See: State Board of Medical Examiners v. Spears, 79 Colo. 588, 247 P. 563, 54 A.L.R. 1498, error dismissed, 275 U.S. 508, 48 S.Ct. 158, 72 L.Ed. 398, 719; State ex rel. Williams v. Whitman, 116 Fla. 196, 199, 150 So. 136, 156 So. 705, 95 A.L.R. 1416; Klafter v. State Board of Examiners, 259 Ill. 15, 102 N.E. 193, 46 L.R.A., N.S., 532, Ann.Cas.1914B, 1221; Nega v. Chicago Rys. Co., 317 Ill. 482, 148 N.E. 250, 39 A.L.R. 1057; Hunter v. Colfax Consol. Coal Co., 175 Iowa 245, 308–319, 154 N.W. 1037, 157 N.W. 145, L.R.A. 1917D, 15, Ann.Cas.1917E, 803; Iowa Eclectic Med. College Ass'n v. Schrader, 87 Iowa 659, 55 N.W. 24, 20 L.R.A. 355; State v. State Board of Med. Examiners, 34 Minn. 387, 26 N.W. 123; State ex rel. Hurwitz v. North, 304 Mo. 607, 264 S.W. 678, affirmed, 271 U.S. 40, 46 S.Ct. 384, 70 L.Ed. 818; Missouri, K. & T. R. Co. v. Shannon, 100 Tex. 379, 389, 100 S.W. 138, 10 L.R.A., N.S., 681.

The majority of the court now seeks additional support for its position in the specific wording of the California Constitution, article VI, section 1, which provides that the judicial power of the state shall be vested "in the Senate, sitting as a court of impeachment, in a supreme court, district courts of appeal, superior courts, such municipal courts as may be established * * * and *such inferior courts as the Legislature may establish in any incorporated city or town,* township, county or city and county." Cases from all other states and from the federal system are distinguished by the majority upon the theory that only in California is the power of the legislative branch in creating inferior courts limited to *local* inferior courts. Therefore, it is argued state-wide administrative boards in other jurisdictions may be considered inferior courts which can constitutionally exercise true judicial power. There are two answers to this. The first is that such administrative agencies are not in fact considered inferior courts by the jurisdictions in which they exist, and it has repeatedly been held that such bodies cannot exercise constitutional judicial power. Cf. Batty v. Arizona State Dental Board, Ariz., 112 P.2d 870, 873; Cushman, "The Constitutional Status of the Independent Regulatory Commissions," 24 Cornell L.Q. 13, 37. The second answer is that reliance upon this constitutional provision begs the question at issue here *since it assumes that a grant of basic judicial power has been made* to the state-wide licensing agencies in this state. The provisions of article VI, section 1, add nothing to the separation of powers provision of article III, section 1, for if quasi-judicial power, rather than constitutional judicial power, is actually involved, no violation of either constitutional provision is present.

Finally, then, let us examine the cases which the majority cites in support of the conclusion (which is contrary to the cases in this state prior to 1936 and to decisions throughout the country) that the power to make an order of revocation based upon a binding determination of fact is an exercise of constitutional judicial power, rather than an exercise of quasi-judicial power. We may exclude those cases, derived from the Standard Oil case, which we have already shown to be erroneous. The first group of cases relied upon by the majority merely states the fundamental principle that the constitutional judicial power can be exercised only by courts of law, or by special bodies invested with such power by the Constitution. Cf. Pryor v. Downey, 50 Cal. 388, 19 Am.Rep. 656; and other cases cited in the majority opinion. The second group of cases involves the Industrial Accident Commission. Insofar as these cases repeat the general separation of powers doctrine they add nothing to the cases first cited, and the principle stated is the traditional one. The decisions in Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 P. 24, and Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P. 491, Ann.Cas.1917E, 390, contain particular language, however, upon which the majority relies. In these cases it was said that, where a statute creates a special liability upon the part of employers and grants power to an agency of government to determine when liability exists and to render a judgment in favor of the employee against the employer, the power exercised constitutes basic judicial power within the meaning of the Constitution. Western Metal Supply Co. v. Pillsbury, supra, 172 Cal. page 410, 156 P. 491, Ann.Cas.1917E, 390. The Industrial Accident Commission cases, however, cannot be used to support the theory that constitutional judicial power is involved in making determinations of fact upon which professional licenses are revoked, for in those cases the court clearly distinguished the licensing situation as one in which strictly judicial power was not involved. See Western Metal Supply Co. v. Pillsbury, supra, 172 Cal. page 412, 156 P. 491, Ann. Cas.1917E, 390. Those cases, in other words, clearly recognize the distinction between the constitutional judicial power and the quasi-judicial power. The duties of the professional licensing agencies were conceded to be quasi-judicial in nature. Such quasi-judicial determinations were, of course, reviewable on certiorari and the board's determinations of fact were final if supported by evidence. Fuller v. Board of Medical Examiners, 14 Cal.App. 2d 734, 742, 59 P.2d 171; Suckow v. Alderson, supra.

The third group of cases relied upon by the majority is the so-called Water Commission group. We have already indicated the use which was made of these cases as a means of supporting the Standard Oil and Drummey decisions. The cases held that where an agency had a mere supervisorial authority in the granting of preliminary water permits and where none of the ordinary incidents of quasi-judicial power were found, there was neither quasi-judicial nor judicial power conferred upon the agency. Tulare Water Co. v. State Water Comm., supra, 187 Cal. page 537, 202 P. 874. These decisions do not support the conclusion of the majority that basic judicial power is involved in the present situation. The dictum in the concurring opinion means only that, as an aid to interpreting the legislative intent in delegating the duty of issuing permits, the court could consider the probability that an unconstitutional delegation of judicial power might have been involved if the statute were interpreted to authorize the commission to adjudicate title to real property. See, Turrentine, op. cit. supra, p. 282. At that very time, however, the same court recognized that the revocation of professional licenses involved only quasi-judicial power reviewable by certiorari. Brecheen v. Riley, 187 Cal. 121, 200 P. 1042.

The final group of cases relied upon by the majority involves the State Bar Act. It should be noted first that they furnish no direct authority upon the constitutional point for which they are cited since the cases have consistently held that the legislature *did not intend* the determinations by the Board of Governors to be final even though based upon substantial evidence. In re Shattuck, 208 Cal. 6, 12, 279 P. 998. It has also been said that the Board of Governors is an administrative arm of the court (Fish v. State Bar, 214 Cal. 215, 225, 4 P.2d 937; Furman v. State Bar, 12 Cal.2d 212, 214, 83 P.2d 12) and that its findings are merely those of a special intermediary agency. In re Petersen, 208 Cal. 42, 46, 280 P. 124. Insofar as the nature of constitutional judicial power is involved in these State Bar decisions as a basis for the interpretation given the statute, there is authority which contradicts the suggestion that the disbarring of an attorney requires a judicial examination of the evidence. See Turrentine, "May the Bar Set Its Own House in Order," 34 Mich.L.Rev. 200, 214, et seq. But even conceding the validity of that assumption, it is clear that the discipline of attorneys is a matter of particular judicial concern over which the courts have asserted inherent power. See In re Lacey, 11 Cal.2d 699, 701, 81 P.2d 935. If there is basic judicial power involved in the disciplining of an attorney, therefore, the explanation comes from the peculiar relation which the attorney bears to the judicial system. This is particularly obvious in view of the fact that when this theory was announced in the Shattuck case and thereafter, the court was apparently satisfied that the revocation or suspension of other professional licenses involved only quasi-judicial power the exercise of which was reviewable on certiorari. See Painless Parker v. Board of Dental Examiners, 216 Cal. 285, 14 P.2d 67. It follows that the State Bar cases do not support the conclusion of the majority that constitutional judicial power would be involved if an administrative agency were empowered to make binding determinations of fact upon the basis of which orders revoking or suspending professional licenses were issued.

3. *The Practical Problem.*

The interpretation placed upon our state Constitution by the majority opinion is unsound, as was the interpretation placed upon the federal Constitution in the Drummey and McDonough decisions. Once the absence of any constitutional requirement on this point is understood there remains no possible justification for the result in the present case. Any rule which requires that a complete judicial retrial be held *in each case* where administrative action results in the deprivation of a property right is unworkable. It must be kept in mind that the majority opinion announces *principles of constitutional law* that of necessity apply to all determinations of fact affecting property and are not limited to the revocation of professional licenses. Courts will be required to try questions of fact in countless situations heretofore settled by administrative agencies. In many such cases those facts may be determined by jurors, certainly no better qualified than trained administrators to weigh evidence in cases that frequently involve technical subjects. We must also consider that the administrative agency will be stripped of the prestige and authority necessary to enable it to perform its functions efficiently if the courts will neither rely upon the record made before it nor accord its findings any finality whatsoever. What useful purpose can an agency serve by conducting hearings in such cases?

We cannot treat the judicial review of administrative action as a static procedure requiring an identical judicial investigation in each instance. The degree of finality accorded the findings of administrative agencies created to carry out the legislative purposes is primarily a question of policy for the legislature and issues of such fundamental importance to the administration of government must be determined by reference to the intention of the law-making body. The legislature is precluded by our Constitution from imposing non-judicial duties upon our courts, thus it cannot provide for a direct appeal from an administrative agency to a court. Mojave River Irr. Dist. v. Superior Court, 202 Cal. 717, 724, 262 P. 724; Collier & Wallis v. Astor, 9 Cal.2d 202, 70 P.2d 171; cf. Federal Radio Comm. v. General Electric Co., 281 U.S. 464, 469, 50 S.Ct. 389, 74 L.Ed. 969; Federal Radio Comm. v. Nelson Bros., 289 U.S. 266, 276, 53 S.Ct. 627, 77 L.Ed. 1166, 89 A.L.R. 406. In many instances, however, the legislature has sought to indicate the degree of finality to be given to administrative findings of fact. Where it was proper to do so, the legislature has occasionally specified a review of the administrative action by an original court proceeding in which the facts determined by the administrative agency are accorded no finality at all but are determined de novo in the superior court. See Alcoholic Beverage Control Act, Deering's Gen.Laws (1937), Act 3796, sec. 46; Deering's Gen.Laws (1937), Act 986, sec. 13.12; Labor Code, sec. 1647, Stats. 1937, page 240; also, Collier & Wallis v. Astor, supra. In certain instances the legislature has merely indicated that the findings of fact of a particular administrative agency or officer are to be accorded a high degree of finality. See, Labor Code, sec. 1598, Stats.1937, p. 234; Public Resources Code, sec. 3355, Stats.1939, p. 1132; Deering's Gen.Laws (1937), Act 3421, sec. 9. In other statutes the legislature has provided generally that action taken under the authority thereof may be reviewed in court, without making any provision as to the nature and extent of the review. Agricultural Code, sec. 735.6, Stats.1935, p. 924; Vehicle Code, sec. 317, Stats.1935, p. 141. In most of the regulatory statutes incorporated in the Business and Professions Code, including the statute here involved, the legislature has indicated its intention that the administrative decision be accorded as much finality as possible by vesting in such agencies the power to revoke or suspend licenses without any provision at all for the judicial review of such action. Dental Practice Act, Bus. & Prof. Code, secs. 1670–1680; Medical Practice Act, Bus. & Prof. Code, secs. 2360–2408; Optometry Act, Bus. & Prof. Code, secs. 3090–3106; Pharmacy Act, Bus. & Prof. Code, secs. 4210–4214.

Where there is neither a constitutional nor statutory requirement that a court make the determination of fact or reweigh the evidence upon which the administrative agency acted, the duty of the judicial branch is adequately fulfilled by a review upon certiorari which extends to the questions of law involved. A review upon the issues of law would, of course, include such questions as whether the agency has regularly pursued the authority vested in it, whether it has acted arbitrarily and whether there is substantial evidence to support its determinations of fact. Our decisions have recognized that administrative rulings on questions of law cannot be accorded finality. Such questions may be determined conclusively only by a court exercising constitutional judicial power. Bodinson Mfg. Co. v. California Emp. Comm., 17 Cal.2d 321, 109 P.2d 935. Upon issues of fact, however, where there is no constitutional requirement that the facts be judicially determined and no statutory indication that the review was meant to extend to a re-examination of questions of fact, the court should uphold the administrative determination unless it is found that there is no substantial evidence to support the finding. This rule, which is accepted in other jurisdictions, can be re-established here only by overruling the recent decisions which we have shown to be in error. Where any court has declared a rule that, upon re-examination, seems clearly erroneous, it has both a power and a duty to reject it and to state the correct rule, to avoid further confusion. See, Hart v. Burnett, 15 Cal. 530, 600; Houghton v. Austin, 47 Cal. 646, 668; People v. Lynch, 51 Cal. 15, 39, 21 Am. Rep. 677; 7 Cal.Jur. 632. As this court has said, "If, after fully considering a former decision, a Judge is convinced that it is wrong, it becomes simply a question of public policy, whether * * * it will produce more of evil than of good to restore the law to its integrity. * * * 'Such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired * * * by the perpetuity of error'." Houghton v. Austin, supra, 47 Cal. page 667, quoting

Chancellor Kent, in overruling the conclusion previously reached in Savings & Loan Society v. Austin, 46 Cal. 415.

This concept of judicial duty is particularly apt in the present situation. Not only is the majority of this court engaged in perpetuating self-induced error, but the error constantly reacts upon other situations to create logically unsound distinctions. For example, where the functions of a local administrative agency are involved it would be proper under the majority position to classify its activities as judicial and reviewable on certiorari, while exactly the same function performed by a state-wide agency could not even be classified as *quasi-judicial* in nature. See Elliott, "Certiorari and the Local Board," 29 Cal.L.Rev. 586. If upon analysis, the duties of each agency are *quasi-judicial*, the court should recognize that fact. Similarly, the majority position has led to an unsound distinction between suspending a professional license and refusing to grant a license where the result in each instance is to eject a person from a business in which he has engaged for a number of years. Cf. Drummey v. State Board of Funeral Directors & Embalmers, supra; McDonough v. Goodcell, supra; McGovney, op. cit. supra, p. 134; 21 R.C.L. 362. The position taken in the majority opinion can lead only to further unfortunate complications in this field of the law.

For the reasons set forth herein, it seems clear to me that the following decisions of this court should be overruled insofar as they are contrary to the views expressed herein: Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119; Whitten v. California State Board of Optometry, 8 Cal.2d 444, 65 P.2d 1296, 115 A.L.R. 1; Drummey v. State Board of Funeral Directors & Embalmers, 13 Cal. 2d 75, 87 P.2d 848, and McDonough v. Goodcell, 13 Cal.2d 741, 91 P.2d 1035, 123 A.L.R. 1205. The proceeding in mandamus in the present case should be treated as a proceeding in certiorari (Board of Trustees v. State Board of Equalization, 1 Cal.2d 784, 37 P.2d 84, 96 A.L.R. 775), and the judgment of the trial court should be affirmed.

EDMONDS, and TRAYNOR, JJ., concur.

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20 Cal.2d 56

PEOPLE v. ZEMAVASKY.

Cr. 4378.

Supreme Court of California.

March 24, 1942.

1. Criminal law 🔑1163(1)

An appellate court must consider the state of the evidence in determining whether errors are prejudicial, and in a close case any error of a substantial nature may require reversal, and any doubt as to its prejudicial character should be resolved in favor of accused.

2. Witnesses 🔑337(4), 344(2)

In prosecution for rape of accused's stepdaughter, wherein prosecutrix' mother testified for accused, evidence that accused was probably not married to prior alleged wife, that the children of such alleged marriage were probably illegitimate, and that accused had been frequently charged with nonsupport of such children, was inadmissible, as attempt to impeach accused, and perhaps prosecutrix' mother, by evidence of particular wrongful acts. Code Civ.Proc. § 2051.

3. Criminal law 🔑1036(9)

In prosecution for rape of accused's stepdaughter, wherein prosecutrix' mother testified for accused, admission of evidence that accused was probably not married to prior alleged wife, that the children of such alleged marriage were probably illegitimate, and that accused had been frequently charged with nonsupport of such children, required reversal of conviction, where case was close on the facts, notwithstanding absence of objection on cross-examination of accused as to such matters, where accused had objected to cross-examination of prosecutrix' mother on such matters. Code Civ. Proc. § 2051.

4. Criminal law 🔑1170½(1)

Where the prosecution's rebuttal character witness admitted, on cross-examination, that she was prejudiced against accused, permitting redirect examination as to grounds of prejudice, which brought out witness' belief that accused was not married to alleged wife, that children of such alleged marriage were illegitimate, and that accused abandoned such children and failed to support them, was erroneous and required reversal of conviction, especially where case was close on the facts. Code Civ.Proc. § 2051.

5. Witnesses ⚷287(3)

In prosecution for criminal offense, witness' unqualified admission of ill will against accused on cross-examination does not open the door to proof on redirect examination of the reasons for such ill will, especially where such reasons involve other alleged offenses outside the issue. Code Civ.Proc. § 2051.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Nick Zemavasky was convicted of rape, and he appeals.

Reversed.

Prior opinion, 115 P.2d 45.

James F. Brennan, Saul Perlis, and Alexander Raiboff, all of San Francisco, for appellant.

Earl Warren, Atty. Gen., Dennis Hession, William F. Cleary, and David K. Lener, Deputy Attys. Gen., and Matthew Brady, Dist. Atty., and John R. Golden, Asst. Dist. Atty., both of San Francisco, for respondent.

PER CURIAM.

The appellant was convicted of statutory rape allegedly perpetrated upon his seventeen-year-old stepdaughter. Upon this appeal from the judgment and order denying a new trial he contends that the evidence is insufficient to support the verdict; that the trial court committed prejudicial error in certain rulings on the admissibility of evidence and in the giving and refusing of instructions; and that the district attorney was guilty of prejudicial misconduct. The reply brief filed by the Attorney General, when the cause was pending before the District Court of Appeal, merely served to accentuate the appellant's contentions. It submitted the case without argument, declaring that "it appears that the evidence against appellant was not overly credible." However, the District Court of Appeal affirmed the judgment of conviction, one justice dissenting. Thereafter, upon petition, a hearing was granted in this court. Heartened apparently by the majority decision of the appellate court, the Attorney General has since filed in this court a brief in which he now vigorously challenges appellant's contentions and in which it is argued that the record contains adequate substantial and trustworthy evidence to support the conviction. We have examined the record. While we may not declare the story of the prosecutrix to be wholly improbable, the presence of inconsistencies and contradictions therein, coupled with the unusual delay in reporting the asserted attack upon her, serves to detract materially from its persuasiveness. These matters, when considered with appellant's denial at all times that he had perpetrated the attack charged against him, much of his testimony being corroborated by his wife, the mother of the prosecutrix, require a conclusion that the errors to be hereinafter referred to must be held to have been prejudicial to appellant.

Appellant is a contracting painter. In 1932 he married the mother of the prosecutrix in San Francisco, and thereafter lived with his wife and stepdaughter. The girl had known appellant since she was seven years old. She testified that he had been having sexual relations with her since she was twelve years old. The criminal act of which he was convicted, however, was committed, so the prosecutrix testified, on May 29, 1939. At that time Mrs. Zemavasky was visiting relatives in Poland and, according to her testimony, she had gone there because of the illness of her father. She left San Francisco on May 6, 1939, and, before leaving, at the suggestion of appellant, she had arranged for her daughter, who was attending high school, to live with a friend. In response to inquiry, the mother of the prosecutrix testified that appellant suggested that the prosecutrix live elsewhere during the mother's absence in Europe "because he knows she has been already like this and he don't want to keep her home." On cross-examination by the prosecution, the friend with whom the prosecutrix was left during her mother's absence, and who was paid $40 a month for the maintenance of the prosecutrix, testified that she told the mother, "If you go to Europe maybe something happen. I am afraid about daughter, I know she has that boy." Against her mother's wishes the girl had been keeping company with a young man and on May 23, two and one-half weeks after the mother's departure, they ran away to Redwood City and were married. Following the marriage they went to Long Beach and there visited the boy's aunt. She refused to believe they were married and caused them to be taken into custody by the juvenile court authorities. That same night the police telephoned to the boy's grandmother, Mrs. Pagel, and upon being informed by her that the couple had been married the police stated they would be released. At Mrs. Pagel's request, however, the police consented to hold them until arrangements could be made to return them to San Francisco. Immediately upon receiving the telephone message Mrs. Pagel communicated with appellant and, at her request, he called at her home. Mrs. Pagel and appellant agreed to send the necessary money to bring the couple back to San Francisco. They did so, and the couple arrived in San Francisco by bus about five o'clock on the morning of May 29th. They went to Mrs. Pagel's home, where they met, among others, Mrs. Pagel and appellant, and the question was discussed as to whether the couple wanted to continue living together. There was discussion of an annulment. Appellant took the girl home with him, so that he could talk with her alone. Upon reaching their home, the prosecutrix went to her bedroom to collect some clothing to take with her. She testified that in about five minutes appellant entered the room, and, under threats of violence and that he would turn her over to the juvenile authorities, compelled her to have sexual intercourse with him. Later that morning he drove the girl back to Mrs. Pagel's home and, upon leaving her there, stated to Mrs. Pagel that the girl wanted to live with her husband. Mrs. Pagel noticed that the girl had been crying, which condition could have resulted from a discussion directed at an annulment of the marriage. At any rate, no charge was then made against appellant, although there were several persons present to whom the girl could have complained.

Appellant denied having had sexual relations with the girl at any time and denied having gone to her room at all on the morning of May 29th. He testified that after they entered the home she went to her room; that he prepared breakfast, which they ate; and that soon afterwards he drove her back to Mrs. Pagel's home. The girl admitted having breakfast with appellant after the alleged assault. Appellant produced a corroborating witness, a friend of some twenty-five years' standing, who testified that he was spending the weekend with appellant, and that he had accompanied appellant to Mrs. Pagel's home the night she received the telephone message from the police. The witness testified that he was sitting in the living room of appellant's home, reading a paper, when appellant and the girl arrived on the morning of May 29th; that from where he sat in the living room he could see whether anybody went in or out of the girl's bedroom; that he saw the girl go into the bedroom, but that she did not see him; and that appellant did not at any time enter her room that morning. The prosecution challenged the credibility of this witness. In this regard Mrs. Pagel and her daughter testified that the witness was not the man who came to their home with appellant on the night in question. Moreover, the prosecutrix testified that no one besides appellant and herself was present in the house that morning and that if any one had been sitting in the living room she could and would have seen him. In considering the accuracy of her report of this incident, certain discrepancies in other portions of her testimony may be considered. There is a conflict, for instance, between the testimony given by the girl at the trial as to when she told her husband about appellant having assaulted her and the testimony given by her in that respect at the preliminary examination. Appellant was not formally charged with the commission of the offense until March, 1940, some ten months after its asserted occurrence. Delays in filing charges of this kind are looked upon as a weakness in the prosecution's case and may be considered in weighing any errors upon the trial.

After the asserted commission of the offense, and prior to any charge against appellant, the prosecutrix accepted gifts from her mother and appellant on her eighteenth birthday in September, 1939, and on the following Christmas they exchanged gifts. In the ten-month period between the asserted offense and the arrest of appellant, the prosecutrix occasionally visited her mother and saw and talked with appellant. Admittedly during this period she never mentioned the matter to her mother or to any one else except her husband. At the trial she testified that she told her husband about July 4, 1939, but, in spite of this, the parties exchanged Christmas gifts that year.

[1] There was evidence offered by the defense tending to indicate that the prosecutrix had been carrying on intimate relations with the boy prior to their marriage. The landlady where the boy roomed testified that the prosecutrix spent much

time in the boy's room and that unusual noises emanated therefrom. Upon inquiry, they told her they were married. At the time, this was not so. Upon the trial, both denied any such improper relations but admitted falsifying as to their then marital status. However, the mother of the prosecutrix testified that after the matter had come to her attention she remonstrated with the prosecutrix and threatened to place her in the detention home, whereupon the girl admitted that she had been living with the boy for six months and promised to cease such relations if not placed in the detention home. Appellant and his wife, the mother of the prosecutrix, also testified that prior to the filing of the charge against appellant the girl and her husband had tried to obtain money from them. This the young couple denied. The evidence is clear, however, that the boy was earning little, if any, money at the time. Although there is some conflict in that respect, there is evidence indicating that early in 1940 the relationship between the prosecutrix and her mother was becoming strained. Upon the mother's return from Poland she was considerably disturbed to learn of the marriage of the prosecutrix during her absence, her disappointment being reflected in her actions toward the couple. There is evidence also tending to indicate that the prosecutrix and her husband felt that the former was entitled to a fund which had been promised her by her mother and appellant for her education. As stated in People v. Gump, 17 Cal.App.2d 221, 61 P.2d 970, 971, "grave suspicion is cast upon the story when it is shown that it was only told after the trouble had arisen" between the parties. Such suspicion and any contradictions or weaknesses in the story of the prosecutrix require that close examination be made of any errors committed upon the trial. An appellate court is not only permitted to, but must, consider the state of the evidence in determining whether errors are prejudicial. In a close case, such as this, any error of a substantial nature may require a reversal and any doubt as to its prejudicial character should be resolved in favor of the appellant.

[2] In the light of the entire circumstances disclosed by the record, we now direct ourselves to what we consider to have been prejudicial errors committed upon the trial. Evidence was produced by the prosecution, over objection, tending to show that appellant was probably not married to a prior wife; that the three children of that marriage were probably illegitimate; and that appellant had been frequently charged with non-support of those children. This evidence could have no purpose other than to blacken the reputation and character of appellant without in any manner tending to prove any of the elements of the crime of which appellant stands convicted. This, in our opinion, constituted an attempt to impeach appellant, and perhaps his wife, the mother of the prosecutrix, who appeared as a defense witness, by evidence of particular wrongful acts, in violation of section 2051 of the Code of Civil Procedure.

[3] It is no sufficient answer to urge that this or similar evidence was presented without objection when appellant was under cross-examination by the prosecution. We are cognizant of the rule that error in the admission of evidence is harmless if the fact involved is proved by other evidence which is admitted without objection. The rule, however, is not applicable where, as here, the prosecution, over appellant's objection, at an earlier stage of the trial was permitted to cross-examine appellant's wife as to appellant's children by another woman. In view of the earlier rebuff, it was not thereafter incumbent upon appellant to object repeatedly to such evidence when later sought to be elicited by the prosecution. Objection, under the circumstances, would have been useless and would have served only to emphasize the matter to the jurors.

[4, 5] The error and resulting prejudice were magnified many fold, in our opinion, when the prosecution later produced a Municipal Judge of San Francisco as a rebuttal character witness. We agree with what Presiding Justice Peters said in his dissenting opinion with respect to this episode when the cause was before the appellate court. He stated [115 P.2d 45, 54]: "After testifying that defendant's reputation for 'truth, honesty and integrity, morality and upright living' was 'bad', she was cross-examined by defendant's counsel. He properly brought out the fact that she was prejudiced. She admitted that she knew nothing about the facts of the case then on trial; that she was 'very much prejudiced against Mr. Zemavasky', and admitted telling counsel for defendant that she 'hoped this man would go to San Quentin'. Then on redirect examination, over defendant's objections, she was per-

mitted to answer the question, 'On what, Judge, do you base that hope?' She replied, 'Well, I met Mr. Zemavasky in the court charged with omitting to provide for three minor illegitimate children. I knew his former wife, and that he had gone through a service that was not a marriage and then left her with these three children. I made every effort to collect money from him for those three children and to no avail; I made arrangements with him to come to my office at the City Hall; he never kept it, and those three children had to be taken care of by the City and County of San Francisco'. She was the last witness. The question and answer were not only improper because they tended to bring out evidence of other wrongful acts, but also because it is an unquestioned rule of evidence that when any witness admits bias and prejudice on cross-examination, on redirect the reasons for such prejudice cannot be gone into, at least where such reasons involve other alleged offenses outside the issue. The rule, supported by many cases, is stated as follows in 70 Cor.Jur., p. 1007, § 1217: '* * * nor does the witness' unqualified admission of ill will open the door to proof of the reasons therefor, especially where such reasons involve other alleged offenses outside the issue * * *.' The reason for the rule is obvious. When the defendant is able to prove that a prosecution witness is prejudiced, if that witness could then explain the reason for the prejudice by stating what he knows about other wrongful acts, it would bring into the case all kinds of extraneous and unrelated offenses not relevant to the issue, and would permit the prosecuting attorney to do indirectly what he cannot do directly. Exactly the same problem involved in the instant case was presented in Sneed v. State, 40 Ariz. 441, 14 P.2d 248. At page 249 of 14 P.2d the court stated: 'The reason why the witness was hostile towards appellant was not a proper subject for either direct or redirect examination by the prosecution. The elicitation by the appellant of the witness' ill feeling towards him did not open the door to proof by the prosecution that such ill feeling was the result of criminal acts of appellant against the witness. Otherwise it would be most dangerous to cross-examine a witness as to his bias and prejudice towards the accused, for, if such reason may be given, all kinds of extraneous and unrelated offenses might be detailed to the jury, so that the trial would be not of the particular offense charged but of many offenses not charged. The court should have sustained the appellant's objection on the ground of the incompetency of the testimony to prove any issue of the case.'"

The factual situation here presented is distinguishable from that involved in any of the cases cited by the Attorney General as pointing to the propriety of the ruling admitting the challenged evidence. Here, the defense on cross-examination did not elicit from the witness evidence merely tending to show a possible bias or prejudice against appellant. Instead, on cross-examination, the witness frankly admitted that she was "very much prejudiced" against appellant. In the light of such positive declaration of prejudice by the witness, no amount of discussion or explanation by her on redirect examination as to the reasons or causes underlying such frame of mind could have any tendency to counteract her testimony on cross-examination or tend to indicate an absence of prejudice against appellant. On the contrary, it served only to bring before the jury extraneous matters prejudicially harmful to appellant.

The principle is stated in 3 Wigmore on Evidence, 511, § 952(2), as follows: "When to a witness is imputed hostility to the opponent, the true process of explanation consists in showing that the facts offered do not really indicate the conclusion suggested, i. e., the hostility. Thus, when the counter-evidence does not attempt to do this, but admits the hostility and desires to show that it was justifiable by the opponent's conduct, the offer is improper in two ways, first, because it does not at all explain away, but concedes that hostility exists, and, secondly, because it tends to prejudice unfairly the cause of the opponent by showing him to be an unjust man. For these reasons such evidence may be excluded: * * *"

Under all of the circumstances, we are satisfied that appellant has not received a fair and impartial trial. We cannot say that appellant would have been convicted without the admission of the erroneous and prejudicial evidence above mentioned.

The judgment and order denying a new trial are, and each is, therefore reversed.

ROTHSCHILD et al. v. WOLF et al.

Sac. 5375.

Supreme Court of California.

March 23, 1942.

As Corrected April 24, 1942.

1. Executors and administrators ⚿315(6)

Decree of distribution which adopted agreement between heirs and beneficiaries relating to a stairway easement was final and excluded any implied covenants with respect to the easement. Civ.Code, § 1656.

2. Easements ⚿26(1)

That it might be economically advantageous for owner of building burdened with a stairway easement in favor of adjoining property to destroy the building and thus terminate the easement was immaterial with respect to owner's right to terminate the easement and would not justify the voluntary destruction of the easement.

3. Easements ⚿26(4)

A grant of the right to use a hall or stairway of a building gives no interest in the soil which will survive the destruction of the building.

4. Easements ⚿1, 26(4)

An "easement" is an interest in real estate and survives the destruction of a part of the servient tenement when there is anything remaining upon which the easement may operate.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement".

5. Easements ⚿26(1, 4)
Licenses ⚿44(3)

A grant of right to use stairway in building was not a "license" revocable at the will of the servient owner, but was an "easement" which servient owner could not voluntarily destroy and which would continue until destruction of the building without the fault of the servient owner.

See Words and Phrases, Permanent Edition, for all other definitions of "License".

GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting.

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In Bank.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

On rehearing.

Judgment modified, and, as modified, affirmed.

Prior opinions, 104 P.2d 685, 115 P.2d 801.

Nutter & Rutherford, Rutherford, Jacobs, Cavalero & Dietrich, Newton Rutherford, D. R. Jacobs, Philip Cavalero, and Stephen Dietrich, all of Stockton, and Weinmann, Quayle & Berry and Donald K. Quayle, all of Oakland, for appellants.

Gaylord & Gaylord and Robert B. Gaylord, all of San Francisco, for respondents.

PER CURIAM.

After further consideration of this case we find ourselves in accord with the opinion of the District Court of Appeal, Third Appellate District, rendered when the case was before that court. We therefore adopt said opinion, prepared by Justice pro tem. Steel, as the opinion of this court. It reads as follows:

"Defendants Franklin Wolf and Yosemite Theatre Company appeal from a declaratory judgment in favor of plaintiffs, decreeing that plaintiffs, as servient owners, may terminate a stairway easement by voluntarily removing or destroying the servient tenement.

"The appellant, Franklin Wolf, and the respondents, Rothschild, are owners of adjoining premises fronting on Main street in the city of Stockton, the appellant Wolf owning lot 7 and the respondents the easterly 32.29 feet of lot 5 in block 14, east of Center street in said city.

"In 1905, Andrew Wolf, now deceased, father of appellant, Franklin Wolf, owned the premises here involved, together with other adjoining lots in said block and during that year erected a two-story brick structure known as the Wolf building upon said premises. In that portion of the structure now owned by respondents a stairway was built extending from the Main street sidewalk to the hallway on the second floor thereof, the hallway running parallel with Main street for the entire length of the structure. Various rooms and offices were maintained for occupancy by tenants on this second floor and the only entrance thereto from Main street was by the aforesaid stairway.

"In 1911 Andrew Wolf died, leaving a will wherein he devised lot 5 to his daughter Delia Wolf Meiggs and lot 7 to certain of his grandchildren. The remainder of his estate was left to various legatees and devisees. In his will deceased expressed the wish that his devisees preserve the stairways and that they be kept and used for the benefit of said buildings on Main street. The other stairway referred to extends from the California street side of the property and connects with the hallway above referred to.

"During the probate proceedings dissatisfaction with the provisions of the will arose among the heirs and beneficiaries which resulted in their entering into a written agreement which provided, among other matters not material here, that lot 5, being the property now owned by respondents, should be distributed to said Delia Wolf Meiggs, predecessor in title to respondents, and lot 7 to Franklin Wolf, the appellant herein.

"By the terms of the agreement it was stipulated and agreed:

"'That the stairway on Main Street now used for the purpose of ingress and egress to and from the properties mentioned in this Agreement, and fronting on Main Street of Stockton, California shall be kept and maintained as a stairway for the use of all the property hereinbefore mentioned, fronting on Main Street of said City of Stockton, so long as the lot on which said stairway is now built, is occupied by the building now on said lot of which said stairway forms a part.'

"In due course the estate was closed and distributed in accordance with the terms of this agreement, the decree adopting the language of the agreement in so far as its provisions relate to the stairway here in issue. The sole issue, therefore, is a determination of the rights of the parties hereto under this agreement as incorporated in the decree of distribution. Trial was had before the court sitting without a jury.

[1] "Considerable evidence was introduced as to whether or not the structure built upon the two lots in question comprised one building or two separate buildings. This evidence was directed principally to the nature of the construction of the building, the partition wall, fire wall, and the general physical conditions and facts relating thereto, it being one of the contentions of appellants that the structure is but one building originally built and owned by one person and that an easement by implication arose when the property was devised into two or more ownerships upon the death of Andrew Wolf. The trial court found that the improvements did not constitute a single building, but that the portion thereof on lot 7 and the portion thereof on lot 5 constituted separate and distinct buildings. This finding appears to be supported by the record.

"We do not, however, consider this question of vital importance for the heirs and beneficiaries subsequently partitioned the property among themselves upon a basis entirely different from the provisions of the will, and expressly agreed as to the right and use of the stairway and the duration of such right. The decree of distribution makes no attempt to construe the will in this regard, but does adopt the terms and provisions of the agreement and therefore the easement implications, if any, arising by virtue of the will, cannot now be resorted to for the reason that the decree is final and excludes any implied covenants upon this subject. Civ.Code, sec. 1656. The trial court found in substance and effect that a stairway easement existed, and in this we concur. However, the court further found upon evidence introduced over the objection of appellants, and submitted upon the question of depreciation because of obsolescence, that such depreciation and obsolescence had not so far progressed as to be the equivalent of the destruction of the building, but had so far progressed as to make it *economically advantageous* to plaintiffs, as owners of the premises, to destroy the present improvements thereon and, in lieu thereof, to erect a new building.

[2] "The fact that it may be *economically advantageous* for the owner of a building, burdened with a stairway easement in favor of an adjoining property, to voluntarily destroy it and thus terminate such easement is, in our opinion, immaterial and not in accord with the weight of authority applicable to such servitudes.

"In this respect, however, we do not wish to be understood as intimating that depreciation or obsolescence of a building may not in the course of time so far progress as to impair property rights in the further maintenance thereof even though not to the extent of being the equivalent of destruction of such building. In the instant case no claim is made that the property is being operated at a loss, but to the contrary the evidence discloses a fair net return to respondents on their investment.

[3] "While there are very few cases relating to destruction of servient tene-

ments involving stairway easements, the doctrine appears to be generally established that a grant of the right to use a hall or stairway of a building gives no interest in the soil which will survive the destruction of the building. Cohen v. Adolph Kutner Co., 177 Cal. 592, 171 P. 424, L.R.A.1918D, 410; Muzio v. Erickson, 41 Cal.App. 413, 182 P. 974, [975].

[4] "In the case last cited, the principal question before the court was whether stairway rights survived the destruction of the building by fire and therein it was held that the right to use the stairway terminated with the destruction of the building *without the fault of the owner thereof.* In this connection the court states:

"'It is the established doctrine that where a mere right to use a part of a building is granted, no proprietary interest in the land is conveyed. Upon this principle it has been held that a grant of the right to use the stairway of a building gives no interest in the soil which will survive the destruction of the building, and the right ceases whenever the building is destroyed *without the fault of the owner of the servient tenement,* and the owner of the right to use the stairway will not acquire any right in any new building which may be erected in the place of the one destroyed. An easement, in the true sense of the word, is an interest in real estate, and survives the destruction of a part of the servient tenement when there is anything remaining upon which the easement may operate. But a right in the nature of "an easement in a building," as it is sometimes called, is extinguished by the destruction of the building, or the part thereof upon which the easement is imposed, so that there is nothing upon which it can operate. Cohen v. [Adolph] Kutner Co., 177 Cal. 592, 171 P. 424, L.R.A.1918D, 410; Brechet v. Johnson Hardware Co., 139 Minn. 436, L.R.A.1918D, 691, 166 N.W. 1070; Shirley v. Crabb, 138 Ind. 200, 37 N.E. 130, 46 Am.St.Rep. 376; 14 Cyc. 1194.' (Italics added.)

"Respondents contend that the rule laid down in the two California cases above cited is dictum in so far as it applies to the instant case, in that the destruction of the buildings was involuntary in both cases. Irrespective of the construction placed upon such language with reference to destruction of the buildings without fault of the owner, the court was, in both cases, engaged in a consideration of the law applicable to the destruction of stairway easements, and in our opinion fully stated the rule in that regard. The authorities in other jurisdictions appear to be in harmony with this principle; thus in Brechet v. Johnson Hardware Co., 139 Minn. 436 [166 N.W. 1070, 1071], L.R.A.1918D, at page 693, cited in Muzio v. Erickson, supra, it is stated:

"'Where an easement has been granted for a particular purpose in connection with a particular building, it is extinguished by a destruction of that building. A grant of the right to use the hall or stairway in a certain building gives no interest in the soil which will survive a destruction of the building, *and the right ceases whenever the building is destroyed without the fault of the owner of the servient estate,* and the owner of the easement will not acquire any right in a new building which may be erected in the place of the one destroyed.' (Italics added.)

"Respondents cite the case of Union National Bank [of Lowell] v. Nesmith, 238 Mass. 247, 130 N.E. 251, wherein the majority of the court held that such an easement is also lost when the building is destroyed by the intentional act of the owner of the servient estate. Such apparently is the rule in Massachusetts, although we find no other authority supporting such contrary doctrine in any of the other jurisdictions.

[5] "It is further argued by respondents that the servitude in the instant case is in the nature of a license to use the stairway as distinguished from an easement which is an interest in land, and therefore revocable at the will of the servient owner. The covenant in the agreement creating the servitude is reasonably definite and certain. The authorities uniformly hold that such a grant of the use of a stairway constitutes an easement and does not necessarily attach to the underlying soil. In both the Cohen case, supra, and the Muzio case, supra, the court held that such use does not survive destruction of the building, although the covenant creating the right provided in one case that the right shall be 'forever' and in the other case 'perpetual'."

Since the rendition of said opinion by the District Court of Appeal, Franklin Wolf, one of the original appellants, has died, and by an order of this court, the American Trust Company, as the executor of his last will and testament has been substituted in his place and stead as one of the appellants herein.

We therefore conclude that the decree herein should be and it is modified to provide that respondents may not destroy the easement for the use of the stairway without the consent of the appellants and that without such consent the easement shall continue until the building on lot 5 is destroyed or the easement becomes inoperative without the fault of the respondents.

As so modified the judgment is affirmed, appellants to recover their costs.

GIBSON, Chief Justice (dissenting).

Plaintiffs seek a declaratory judgment establishing the extent of the burden imposed upon their property under the terms of a written instrument which subjects that property to a stairway easement in favor of defendants. The only uncertainty relates to the duration of the easement which is created by the following language: "* * * the stairway on Main Street then and now used for the purposes of ingress and egress to and from the properties hereinbefore mentioned, and fronting on Main Street of Stockton, California, should be kept and maintained as a stairway for the use of all properties hereinbefore mentioned * * * *so long as the Lot on which said stairway is now built, is occupied by the building on said Lot,* of which building said stairway forms a part." The property involved consists of two adjoining buildings, each two stories in height, built in 1905. The principal means of access to the second floor of the building on defendants' property, however, has been provided under the terms of the stairway easement by the stairway in plaintiffs' building. Plaintiffs allege that the building upon their property is obsolete and that they desire to destroy their building, together with the stairway, and to erect a modern building thereon. The trial court rendered a declaratory judgment decreeing that plaintiffs' title should be quieted against the defendants "as to the use of said or any stairway upon said premises above described as belonging to said plaintiffs in the event of the removal or destruction of the building now located thereon, whether by voluntary act of plaintiffs or otherwise * * *."

The judgment of the trial court should be affirmed. The right to use a stairway on the property of another constitutes a grant in the nature of an easement. The easement, however, is in the building rather than in the land upon which the building is located. Thus, it is held that the destruction of the building in which the stairway is located also extinguishes the easement since there is no longer a servient tenement in existence upon which the right can operate. Cohen v. Adolph Kutner Co., 177 Cal. 592, 171 P. 424, L.R.A.1918D, 410; Muzio v. Erickson, 41 Cal.App. 413, 182 P. 974; Civil Code, § 811 (2); Brechet v. Johnson Hardware Co., 139 Minn. 436, 166 N.W. 1070, L.R.A.1918D, 691; Shirley v. Crabb, 138 Ind. 200, 37 N.E. 130, 46 Am.St.Rep. 376; Rudderham v. Emery Bros., 46 R.I. 171, 125 A. 291, 34 A.L.R. 602; 9 Cal.Jur. 959; 19 C.J. 955, [28 C.J.S., Easements, § 55]; 17 Am.Jur. 1024; 2 Thompson, Real Property (1939), p. 362; 34 A.L.R. 606; (1918) 6 Cal.L.Rev. 299. Citing many of the cases listed above, the majority opinion in this case concedes that the destruction of plaintiffs' building by natural forces would terminate defendants' stairway easement by destroying the servient tenement. It is held, however, that this rule is operative only where the servient tenement is destroyed without the fault of the servient owner. The limitation thus placed upon the rule appears to me to be illogical. An easement of this kind requires both a dominant and a servient tenement and a complete destruction of the servient tenement destroys the easement because one of the requisite elements of such a property interest is lacking. Cf. Bonney v. Greenwood, 96 Me. 335, 341, 52 A. 786; Day v. Walden, 46 Mich. 575, 586, 10 N.W. 26; Jones, Easements, p. 673, § 838. This is true even though the interest granted has been described as one which was to endure "forever." Cohen v. Adolph Kutner Co., supra. The conclusion seems inescapable, therefore, that the grantee of a stairway easement who possesses merely a right measured by the existence of the particular structure has no property interest which survives the total destruction of the servient tenement, even though that destruction be accomplished by an act of the owner. Civil Code, § 811 (2).

Most of the cases in which the courts have held that destruction of the building constituting the servient tenement extinguishes the stairway easement have involved destruction by natural causes over which the servient owner had no control. See 34 A.L.R. 606. But the question of a voluntary destruction of the servient tenement in a similar situation was presented to the court in Union National Bank of

Lowell v. Nesmith, 238 Mass. 247, 130 N. E. 251. In that case two adjoining buildings were erected in 1852 with a common entrance, stairways and landings. A successor in title to one of the buildings proposed to tear it down and erect a new one without making provision for the common entrance and stairways. The court held, in 1921, that this could be done, saying (page 249 of 238 Mass., page 252 of 130 N.E.): "Where there is an easement of way through a building as distinguished from such right upon and over land without reference to a structure thereon, the incorporeal hereditament is measured and limited by the existence of the structure in which it only can exist and be exercised; and the person owning the easement by the evident intent of the parties has no easement in the servient estate apart from the building. If the structure ceases to exist, the right ends as there is nothing upon which it can be exercised. * * * In the opinion of a majority of the court, the easement is also lost when the building is destroyed by the intentional act of the owner of the servient estate. The person entitled to such right has no interest in the land as such.* * *" Very few cases have discussed the problem of voluntary destruction, and the question has not previously been passed upon in this state. Defendants rely upon certain language in Muzio v. Erickson, supra, as indicating that the rule is limited to destruction of the servient building without the fault of the owner, but the court in that case was dealing with an accidental destruction by fire and did not have in mind the specific problem here considered. Since such an easement cannot exist without a servient tenement, I cannot agree with the conclusion that it would not be terminated by the voluntary destruction of the servient tenement.

Although it is true that the destruction of the servient tenement would terminate the stairway easement regardless of how the destruction was brought about, a declaration to that effect would not answer the main issue presented by plaintiffs in this action. Plaintiffs seek a declaration that they "may remove their building, including said stairway." Plaintiffs desire to know, in other words, whether they may remove their building, thus terminating the stairway easement, without incurring liability to the owners of the dominant tenement. The answer to this question depends upon the intention of the parties as expressed in the written instrument providing for the easement. Assuming, under the principles set forth above, that the stairway easement would be terminated by any destruction of the servient structure, the easement owner might nevertheless be entitled to the aid of a court in preventing such destruction or in recovering damages where the destruction is in violation of the clear intention of the parties. In the present case the instrument provides that "the stairway on Main Street * * * should be kept and maintained as a stairway for the use of all the properties * * * so long as the Lot on which said stairway is now built is occupied by the building on said Lot, of which building said stairway forms a part." This language in no way limits the power of the owner of the servient structure in dealing with his own property, nor does it suggest that he must maintain the building in its present form for any particular period of time. In the absence of a clear indication of the intent of the parties, it is impossible to imply, as suggested by defendants, that the parties intended the plaintiffs' building to be maintained in its present form, despite changing circumstances, pending its destruction by natural causes. The imposition of affirmative duties upon an owner of land should result only from a clear expression of the intent of the parties, and should not be implied in the absence of such an expression. See Coulter v. Sausalito Bay Water Co., 122 Cal.App. 480, 494, 10 P.2d 780; Civil Code, § 806. The agreement itself does not indicate that any such obligation is imposed upon the owner of the servient building, and there are strong objections of policy to the creation of such an affirmative burden by implication. An implied obligation to maintain the building until its destruction by natural causes or by order of the public authorities might easily result in a situation where the building could neither be disposed of nor replaced for a considerable period of time, contrary to the settled policy against undue restrictions upon the free use and alienation of property. See Friesen v. City of Glendale, 209 Cal. 524, 529, 288 P. 1080; 7 Cal.Jur. 733; 3 Tiffany, Real Property (1939), p. 474.

Defendants, as disclosed in their cross-complaint, interpret the instrument creating the present easement in direct opposition to these fundamental principles. They seek a decree requiring that plaintiffs' building be kept and maintained to provide a stairway for defendants' building "so long as that portion of said Wolf Building * * * exists and until the same be destroyed without the fault of plaintiffs." The majority opinion in effect adopts this position by decreeing that "without the consent of the appellants [defendants] * * * the easement shall continue until the building on lot 5 is destroyed or the easement becomes inoperative without the fault of the respondents [plaintiffs]." In support of this interpretation of the instrument defendants urge that the servient owner should not be permitted to destroy another's vested property right by his own voluntary act. It is true that during the life of an easement the servient owner may not interfere with the easement which he has granted. See 9 Cal. Jur. 953. It is established, nevertheless, in the law of real property that, if the parties so intend, they may create an interest in real property which is determinable upon the happening of a stated event even though that event is dependent in some measure upon the volition of the one granting the interest. Restatement, Property, § 44, comment h; Id., § 45, comments g, h, i; see La Laguna Ranch Co. v. Dodge, 18 Cal. 2d 132, 114 P.2d 351, 135 A.L.R. 546. Language providing that a property interest shall endure "so long as" a specified condition exists, as in the present case, is ordinarily interpreted to create such a determinable interest. See Restatement, Property, § 44, Illus. 5-8.

In view of the principles stated herein and the considerations of public policy involved, I do not believe that the easement in the present case should be interpreted to compel the maintenance of plaintiffs' building in its present condition until it is destroyed by natural forces or by an act of the public authorities. The conclusion of the trial court in this case seems more reasonable. As the court said in Union National Bank of Lowell v. Nesmith, supra, 238 Mass. page 249, 130 N.E. page 252: "The parties did not intend to and did not create a right of any greater permanency in the use of the petitioner's building than was assured by the character of the structure and the likelihood that the owner would not for a considerable time change the manner of the use of his premises. This is the reasonable construction of their rights." See Cotting v. City of Boston, 201 Mass. 97, 87 N.E. 205; 3 Tiffany, Real Property, 3d Ed.1939, p. 354. This construction of the easement would not result in a mere illusory interest. See Conard, "Easement Novelties," 30 Cal. L.Rev. 125, 139. In this case, for example, the arrangement made in 1911 has actually been carried out for over thirty years. Only by the complete destruction of the servient tenement could the voluntary act of the servient owner terminate the easement and, considering that both buildings were new at the time the servitude was created, such a drastic step was highly improbable for a considerable period.

For these reasons the judgment of the trial court which permitted plaintiffs to remove their building, thus terminating the easement, seems to me to declare the rights of the parties correctly. The judgment should be affirmed.

EDMONDS and TRAYNOR, JJ., concurred.

20 Cal.2d 28

MARTIN et al. v. RILEY, State Controller.

S. F. 16718.

Supreme Court of California.

March 23, 1942.

1. Statutes ⚷251

The words "office" and "officer" within constitutional provision that no measure creating or abolishing any office or changing the salary, term or duties of any officer shall be construed to be an urgency measure so as to become immediately effective, refers to a governmental office and officer, but it does not necessarily follow that military offices and officers are governmental offices and officers within meaning of Constitution. Const. art. 4, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Office" and "Officer".

2. Statutes ⚷251

Under constitutional provision that no measure creating or abolishing any office or changing the salary, term or duties of any officer shall be construed to be an urgency measure so as to become immediately effective, and related statutes, failure to distinguish between civil and military officers creates such ambiguity as to require a construction in favor of immediate effectiveness of California Guard Act of 1942 on theory that members of the state guard are not "officers" within meaning of Constitution. Military and Veterans Code, §§ 321, 340, 395, and §§ 555–556.1, 555.1, 555.2, as amended by St.1941–1942, First Ex.Sess., c. 19; Const. art. 4, § 1.

3. Militia ⟸2

The militia is governed by laws relative to military affairs and not by laws regulating civil matters unless an unmistakable intention to the contrary clearly appears, since military service is based on a duty owed to the sovereign, may be compulsory and cannot be terminated at will.

4. Statutes ⟸219, 220

That urgency measures were enacted in 1917 relating to the national guard, in 1940 establishing a state guard, and in 1941 also relating to the state guard, without any question as to propriety of immediate effectiveness of the acts, while not controlling is persuasive that executive and legislative branches of state government did not consider that military offices and officers should be classed with civil offices and officers as contemplated by constitutional provision that no measure creating or abolishing any office or changing the salary, term or duties of any officer shall be construed to be an urgency measure, so as to become immediately effective. St.1917, pp. 279, 302; St.1941, pp. 392, 2291; Const. art. 4, § 1.

5. Statutes ⟸251

Under the California Guard Act of 1942 none of the restrictions, limitations and additions prescribed in performance of duties of Governor, adjutant general and controller, constitute a "change of duties" within constitutional provision that no measure changing the duties of any officer shall be construed to be an urgency measure, so as to become immediately effective. Military and Veterans Code, §§ 146, 148, 160, 163, 321, 340, 395, and §§ 555, 555.1, as amended by St. 1941–1942, First Ex.Sess., c. 19; Const. art. 4, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Change of Duty".

6. Statutes ⟸251

An addition or subtraction in relation to the volume of duties required to be performed by an officer, which does not substantially affect primary duties of his office, is not such a "change of duties" as would prevent immediate effectiveness of legislation properly declared to be urgent within constitutional provision that no measure changing the duties of any officer shall be construed to be an urgency measure. Const. art. 4, § 1.

7. Statutes ⟸251

The California Guard Act of 1942 did not change the duties of any officer within meaning of Constitution providing that no measure changing the duties of any officer shall be construed to be an urgency measure so as to become immediately effective, and hence the act became immediately effective upon its passage as an urgency measure. Military and Veterans Code, §§ 321, 340, 395, and §§ 555–556.1, 555.1, 555.2, as amended by St.1941–1942, First Ex.Sess., c. 19; Const. art. 4, § 1.

8. Statutes ⟸5

The duty of Legislature in special session to confine itself to the subject matter of the Governor's call is "mandatory" and Legislature cannot legislate on any subject not specified in Governor's proclamation. Const. art. 5, § 9.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

9. Statutes ⟸5

Under constitutional prohibition against enactment by Legislature in extraordinary session of legislation on subjects other than those specified in proclamation, when Governor has submitted a subject to Legislature, designation of that subject opens for legislative consideration matters relating to, germane to and having a natural connection with the subject matter and any matter of restriction or limitation becomes advisory or recommendatory only and not binding on the Legislature. Const. art. 5, § 9.

10. Constitutional law ⟸48

The same presumptions in favor of the constitutionality of an act passed at regular session apply to acts passed at a special session. Const. art. 5, § 9.

11. Constitutional law ⟸48

The California Guard Act of 1942 passed by the extraordinary session of Legislature pursuant to Governor's proclamation will be held to be constitutional if by any reasonable construction of language of the proclamation it can be said that subject of legislation is embraced therein, in view of presumptions in favor of constitutionality of the act.

Military and Veterans Code, §§ 321, 340, 395, and §§ 555–556.1, 555.1, 555.2, as amended by St.1941–1942, First Ex.Sess., c. 19; Const. art. 5, § 9.

12. Statutes ⚷5

Under Governor's proclamation convening Legislature in extraordinary session to consider and act upon "legislation augmenting the appropriation" for the operation, maintenance and organization of the state guard, quoted phrase should not be narrowly construed in determining whether the California Guard Act of 1942 was on a subject contemplated by the proclamation within Constitution, and Legislature was not thereby necessarily restricted to enacting provisions for a direct increase of previous appropriation but could augment available appropriation by direct increase and by limitations upon expenditure of funds. Military and Veterans Code, §§ 321, 340, 395, and §§ 555–556.1, 555.1, 555.2, as amended by St. 1941–1942, First Ex.Sess., c. 19; Const. art. 5, § 9.

13. Constitutional law ⚷70(3)

In determining validity of the California Guard Act of 1942 as to whether it came within subject contemplated by Governor's proclamation convening Legislature in extraordinary session, the wisdom or desirability of manner of augmenting the appropriations for the state guard was not a question for the judicial department. Military and Veterans Code, §§ 321, 340, 395, and §§ 555–556.1, 555.1, 555.2, as amended by St.1941–1942, First Ex.Sess., c. 19; Const. art. 5, § 9.

14. Statutes ⚷5

The California Guard Act of 1942 was on a "subject" contemplated by Governor's proclamation convening Legislature in extraordinary session for purpose of augmenting the appropriation for the operation, maintenance and organization of the state guard and to amend sections of the Military and Veterans Code with respect to pay privileges, allowances and rights for the state guard, and hence the act does not violate constitutional prohibition against enactment by Legislature in extraordinary session of legislation on subjects other than those specified in proclamation. Military and Veterans Code, §§ 321, 340, 395, and §§ 555–556.1, 555.1, 555.2, as amended by St.1941–1942, First Ex.Sess., c. 19; Const. art. 5, § 9.

See Words and Phrases, Permanent Edition, for all other definitions of "Subject".

15. Militia ⚷2

The section of the California Guard Act of 1942 authorizing Governor to call into service all or any part of active members of state guard and all or a portion of reserve forces when he has by proclamation declared a state of insurrection to exist is not unconstitutional as encroaching upon constitutional power of Governor to call forth the militia to execute the laws of the state, suppress insurrections and repel invasions, since the act does not deprive the Governor of any of his powers as commander-in-chief of the militia which includes the state guard. Military and Veterans Code, § 122, and § 555.2, as amended by St.1941–1942, First Ex.Sess., c. 19; Const. art. 8, § 1.

* * *

In Bank.

Proceeding in mandamus by Arthur R. Martin and others to compel Harry B. Riley, as state controller, to issue warrants in payment of services performed by petitioners as members of the state guard.

Writ denied and judgment made final.

Robert Clifton, of Los Angeles, for petitioners.

Earl Warren, Atty. Gen., and James H. Oakley and Chas. W. Johnson, Deputies Atty. Gen., for respondent.

SHENK, Justice.

This is a proceeding in mandamus to compel the respondent, as State Controller, to issue warrants in payment of services performed by petitioners as members of the State Guard. An alternative writ was issued. There are no disputed questions of fact. The purpose of the proceeding is to test the constitutionality of an act passed by the Fifty-fourth (First Extraordinary) Session of the Legislature (Stats. 1941-42, First Ex. Sess., ch. 19), entitled: "An act to amend Sections 555 and 556.1 of the Military and Veterans Code and to add Sections 555.2, 555.5, 555.6, 556.3 and 556.4 thereto, relating to the State Guard, providing for the pay privileges, allowances and rights of the State Guard, for the organization and administration of the State Guard to permit the efficient operation thereof consistent with such privileges, allowances and rights, permitting school districts to make school buses available for use by the State Guard, making an appropriation for the operation, maintenance and organization of the State Guard and providing for the expenditure thereof, declaring the urgency of this act, and providing that it shall take effect immediately," and hereafter referred to as chapter 19.

On December 16, 1941, the Governor issued a proclamation convening the Legislature in extraordinary session. One of the subjects for legislative action stated in the proclamation was as follows: "1. To consider and act upon legislation augmenting the appropriation for the operation, maintenance and organization of the State Guard during the ninety-third and ninety-fourth fiscal years and amending sections 321, 340, 395 and 555 of the Military and Veterans Code, with respect to the pay privileges, allowances, and rights for the State Guard."

Chapter 19 was enacted in purported conformity to the foregoing subject of the call. A brief résumé of its provisions will be noted. Section 1 provides for an amendment to section 555 of the Military and Veterans Code. By this amendment commissioned officers of the State Guard while in active service are allowed a salary equivalent to the base pay only of officers of the same rank in the United States Army and actual and necessary traveling expenses on the same basis as provided for state officers. Enlisted men in active service are allowed pay at the rate of $2 per day with certain increases for enlisted men above the rank of private. Officers and enlisted men in the nautical and marine force in active service are granted the same pay and allowances as officers and enlisted men of comparable rank in the infantry.

Section 2 adds section 555.2 to the code. It provides that the State Guard shall be a part of the active militia and shall consist of the adjutant general and his staff, an infantry of thirteen regiments and a nautical and marine force not in excess of 700 enlisted men. It also provides for organization by the adjutant general of the infantry to consist of not more than 2,160 enlisted men in each regiment of which 720 shall constitute active and the remainder reserve forces. It also specifies the officers of each regiment and the organization and officering of battalions, companies and platoons, with power in the adjutant general to add platoons to the reserve force if it appears to be in the best interests of the state to enlarge the reserve force of any regiment or company beyond the maximum strength specified. The adjutant general is also given the power to organize the nautical and marine force, designating certain numerical limitations and officering. These provisions also reduce the number and the pay of officers theretofore authorized.

In the event of civil insurrection or of actual invasion by a foreign enemy the Governor is empowered to call into action all or part of the active force and all or part of the reserve force as he may deed necessary. During such time as the United States is engaged in war, in addition to the Governor's powers to call the active and reserve forces of the militia and as a limitation upon his power to call the State Guard into active service under section 554 of the code, the Governor is empowered to call into full time service the active membership of the State Guard not in excess of 7,000 enlisted men and the officers provided therefor. In addition, not to exceed three officers and twelve enlisted men in each regiment may be called into active service on a full time basis for the administration of the regiment.

Further provisions of section 555.2 have to do with voluntary service, qualifications and tests, removals, workmen's compensation benefits, and related matters. Section 3 adds section 555.5 to the Military and Veterans Code, permitting use of school busses by the State Guard. Section 4 amends section 556.1 of the code by authorizing the governor to organize and maintain a State Guard within the limitations of chapter 19. Section 5 adds to the code section 556.3 relating to shoulder ornaments on uniforms. Section 6 adds section 556.4 to the code requiring cessation of pay upon enactment of federal law providing for federal organization and control of State Guards. Section 7 adds section 555.6 providing for unemployment insurance benefits.

By section 8 an appropriation, in addition to other moneys available by law, of the sum of $7,934,365 is made for the equipment, support and maintenance of the State Guard during the designated fiscal years. This section expressly provides that no part of the appropriation shall be available or be expended for payment to any commissioned officer of a salary or allowance in excess of amounts set forth by amended section 555. The controller is directed to audit all proper claims and draw his warrant therefor, which the treasurer is directed to pay. Section 9 contains the short title of the act, viz., "California

Guard Act of 1942." Section 10 declares the existence of an emergency and directs the immediate effect of the act. The facts constituting the necessity for the immediate preservation of the public peace, health, and safety are stated to be: "The declaration of war by the United States and the fact that the State of California is an area designated as a combat zone necessitate an immediate redefining of the rights and privileges of the State Guard and adequate provision in connection therewith for providing an effective State Guard to meet the demands of State and National defense. It is also necessary that adequate funds be made available to the State Guard in order that it may perform its functions properly in this critical period."

By section 11 the Legislature expressed its intent that the entire act should take effect immediately, but that any portion which might not have immediate effect should be deemed severable from the remainder of the act and be effective at the time provided by law, and if any such portion should be deemed to prevent the act from being an urgency measure, it should be deemed to be inoperative and the remaining portions should take effect immediately.

Section 12 provides that the invalidity of any provision shall not affect the remaining valid provisions.

The bill was passed by a two-thirds vote of all members of each House and was approved by the Governor on January 31, 1942. The Legislature adjourned on January 22, 1942.

On February 9, 1942, the Superior Court in Los Angeles County issued a temporary restraining order on the application of one Heinrich enjoining his discharge from active service in the State Guard and, pending a hearing on the order to show cause, restraining the Governor, the Adjutant General, the Controller and the Treasurer, from taking any step in the reorganization under the State Guard Act of 1942, except the appropriative provisions of section 8 thereof, prior to the expiration of ninety days from the adjournment of the Legislature on January 22, 1942. That action is still pending and undecided.

The petitioners are a first lieutenant, a second lieutenant, and a private in the State Guard. On a day in the first week of February they were ordered to active duty in a company which was already fully staffed in accordance with the provisions of chapter 19. A pay roll certifying a claim for their services was drawn against the appropriation provided by section 8 of chapter 19. The claims for such salaries were rejected by the respondent Controller on the grounds, (1) that he had been restrained by the order of the superior court above mentioned; and (2) that the claim was not in conformity with the California Guard Act of 1942.

Because of the urgency brought about by the existing state of war and the importance of the element of time in effecting a final conclusion in the matter we have deemed it appropriate to consider the merits of the application.

The petitioners contend that the controller unlawfully rejected the claim for the reason that none of the provisions of chapter 19 were properly urgency measures except the appropriative provisions of section 8, and that only the latter provisions became effective immediately and prior to the expiration of the ninety-day period provided by section 1 of article IV sometimes called the referendary provision of the Constitution of this state; also that none of the provisions of said act, except the appropriative provisions of said section 8 and the numbered sections following, were within the subject designated in the Governor's proclamation.

Section 1 of article IV of the Constitution reserves to the people the power of the referendum and provides that no act of the Legislature shall go into effect until ninety days following final adjournment, excepting acts calling elections, acts providing for tax levies or appropriations for the usual current expenses of the state, and urgency measures necessary for the immediate preservation of the public peace, health or safety, passed by a two-thirds vote of all the members elected to each House, which excepted acts have immediate effect. A proviso is included that "no measure creating or abolishing any office or changing the salary, term or duties of any officer, * * * shall be construed to be an urgency measure."

The petitioners contend that by chapter 19 the Governor, adjutant general, controller, and the officers and enlisted men of the State Guard are officers whose salaries, terms of office and duties have been changed, and that offices have been abolished within the meaning of this constitutional section by provisions effecting a reduction in the number of officers. The petitioners assert that the purpose of the reserved power of the referendum is to retain for popular vote the control of the system of government including the right to prevent a reorganization of the government.

[1] It must be taken for granted that the words "office" and "officer" as used in the constitutional section, refer to a governmental "office" and "officer." But it does not necessarily follow that military offices and officers are governmental offices and officers within the meaning of the constitutional section.

[2] The facts which created the emergency declared in chapter 19 may be said to be the following: On December 7, 1941, Pearl Harbor, and immediately thereafter the islands of Midway, Wake and Guam, were attacked by the armed forces of Japan. On December 8, 1941, war was declared between the United States and Japan. On December 11, 1941, a state of war was declared to exist between the United States and Germany and Italy. The situation of the State of California in relation to war activities was readily and immediately apparent. Vital areas and projects in the state needed to be guarded and protected. Lines of communication and transportation were required to be kept open. The preservation of the public peace, as against threatened subversive activities within the state, was of likewise paramount importance. In an effort to meet the emergency the State Guard was called to active duty. Available funds were insufficient to finance its activities, and existing laws probably appropriate for peace time, were deemed inadequate. These conditions unquestionably prompted the Governor's proclamation of December 16, 1941, and the call for the extraordinary session of the Legislature. They also confronted the Legislature when it convened in response to the call. It must be assumed that it enacted chapter 19 as an emergency measure in an attempt to meet those acute conditions. To hold that it was intended by the people of the state in adopting the referendary provisions of the Constitution to prevent the Legislature from putting into immediate effect a reorganization or other change in statutory provisions relating to the militia of the state under conditions so vital to the public welfare would be to ignore the first fundamental of government, the preservation of the state. To so hold would be to declare that the people of the state intended that laws designed to safeguard their lives, their liberty and their property against immediately threatened aggression should be subject to the delays attendant upon a submission of those laws to popular vote at an election thereafter to be held. Such a result should not be permitted except under the mandate of plain and unambiguous language of the fundamental law. The failure of the referendary provisions of the constitution and related statutes of the state to draw the fundamental distinction between civil and military officers—the first to govern, and the other to defend—must be deemed to create such an uncertainty and ambiguity as to justify and impel a construction in favor of the immediate effectiveness of the statute in question. And this is so even though other provisions of the Constitution and statutory law enacted in times of peace refer to both civil and military officers as "officers of government" (Constitution, sec. 6, art. V.) or "executive officers" (Political Code, sec. 341). As indicated in Spreckels v. Graham, 194 Cal. 516, 530, 228 P. 1040, the real question is not whether members of the State Guard are public officers, but whether it was intended that they should be included as such within the meaning and operation of the provisions of the Constitution. In concluding that they were not, it becomes unnecessary to discuss further cases such as Spreckels v. Graham, supra; Logan v. Shields, 190 Cal. 661, 214 P. 45; Coulter v. Pool, 187 Cal. 181, 201 P. 120; and Curtin v. State of California, 61 Cal.App. 377, 214 P. 1030, defining an office or officer as one performing or relating to the performance of governmental functions, or distinguishing between an employee and a public officer. This court recently considered the application of article IV, section 20, of the California Constitution and said: "Not only have state and national legislative bodies been alert to meet the need for special protective measures, but state and federal courts have kept pace and have evinced a firm intention to take a liberal view of these emergency enactments in order that their protective purposes may be fulfilled without undue imposition of constitutional limitations or hindrance through narrow judicial construction." McCoy v. Board of Supervisors, 18 Cal.2d 193, 196, 114 P.2d 569, 571.

[3, 4] The Supreme Court of Texas (Texas Nat. Guard Armory Board v. Mc-

Craw, 132 Tex. 613, 126 S.W.2d 627) differentiated between civil and military officers in applying certain sections of the constitution of that state. Likewise in Goldstein v. State, 281 N.Y. 396, 24 N.E.2d 97, 129 A.L.R. 905, a distinction was made between civil and military offices in the application of certain statutory provisions. The militia is governed by laws relative to military affairs and not by laws regulating civil matters unless an unmistakable intention to the contrary clearly appears. Military service is based on a duty owed to the sovereign, may be compulsory (Selective Draft Law Cases (Arver v. United States), 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349, L.R.A.1918C, 361, Ann.Cas.1918B, 856), and cannot be terminated at will. Urgency measures were enacted in 1917 relating to the National Guard (Stats.1917, p. 302, Stats.1917, p. 279), in 1940 establishing a State Guard (Stats.1941, p. 392), and in 1941 also relating to the State Guard (Stats.1941, p. 2291) apparently without any question as to the propriety of the immediate effectiveness of the acts. While this observation is not controlling, it is persuasive that the executive and legislative branches of out state government have not considered that military offices and officers should be classed with civil offices and officers as contemplated by the referendary provisions of the Constitution.

It may be assumed that the Governor, the adjutant general, and the controller are officers and hold offices within the meaning of the constitutional provision. But it does not follow that the legislative enactment here involved includes any matter which would justify the conclusion that the provisions relating to such officers could not be given immediate effect. Certainly their offices are not created or abolished by the act. Their salaries and terms of office are not changed. Nor are their duties changed within the meaning of the Constitution. The Governor still retains his duties as the chief executive officer of the state and as the commander-in-chief of the militia. The law provides that as commander-in-chief he may call the militia into service (sec. 146, Military and Veterans Code), make rules and regulation in conformity with said code (sec. 148), and organize and maintain a State Guard within the limitations prescribed (sec. 555.1). Changes in the limitations respecting the organization of the State Guard do not affect the duties of his office. He still retains those duties.

The adjutant general is the chief of staff of the Governor and subordinate only to him. Military and Veterans Code, sec. 160. He is required to perform the duties prescribed in the code and such additional duties, consistent with the regulations and customs of the United States Army and Navy, as may be prescribed by the Governor, and to issue all orders in the name of the Governor (sec. 163). He likewise retains those duties.

The controller is required to audit all claims against the state and to draw warrants against the treasurer for payment of moneys. He still retains those duties.

[5-7] Certain restrictions, limitations, and additions in the performance of the duties of each of the above offices may have been prescribed by the amendatory act. But none of such restrictions, limitations, or additions is a "change" of duties within the meaning of the constitutional provision. Davis v. Los Angeles County, 12 Cal.2d 412, 84 P.2d 1034. An addition or subtraction in relation to the volume of the duties required to be performed by an officer, which does not substantially affect the primary duties of his office, is not such a change of duties as would prevent immediate effectiveness of legislation properly declared to be urgent. The changes here enacted are for the most part merely additions to similar duties already imposed by law upon the particular officers. It may be said that if the duty thus prescribed is one which falls within the primary duties a particular officer is required to perform, generally it would not be a change of his duties specifically to require him to perform it. There is nothing here presented which would justify a conclusion that chapter 19 changed the duties of any officer within the meaning of the Constitution.

We now turn to a consideration of the petitioners' contention that the provisions of chapter 19 with the exception of the appropriation of the sum of $7,934,365 for the equipment, support and maintenance of the State Guard, are in contravention of section 9 of article V of the Constitution. That section empowers the Governor on extraordinary occasions to convene the Legislature by proclamation stating the purpose of the call, and provides that when so convened the Legislature "shall have no power to legislate on any subjects other than those specified in the proclamation, but may provide for the expenses of the session and other matters incidental thereto." As noted, one of the purposes of the call was "to consider and act upon legislation augmenting the appropriation for the operation, maintenance and organization of the State Guard * * * and amending sections 321, 340, 395, and 555 of the Military and Veterans Code, with respect to the pay, privileges, allowances, and rights for the State Guard." The Governor also addressed a message to the special session recommending that an allowance be made to support actual dependents of enlisted men in active service, that enlisted men receive a 10 per cent increase in base pay for each step in rank above private or apprentice seamen, that provision be made for workmen's compensation and unemployment insurance benefits. The remainder of the provisions amending sections of the Military and Veterans Code with minor exceptions, dealt with the reorganization of the State Guard. In section 555.2 it was declared that reorganization should be administered as therein provided in order that the rights and privileges of the State Guard "may be exercised as completely as possible consistent with the need of the State for an adequate mobile force available for general duty and a sufficient reserve force in the State Guard to meet any emergency that may arise, to the end that the State Guard may effectively perform its functions in protecting the people of this state."

It is contended by the petitioners that the Legislature had no power to reorganize the State Guard because such reorganization was not within the subjects of the proclamation; that all the Legislature could do at said session was to increase the appropriation for the operation, maintenance and organization of the State Guard and amend the Military and Veterans Code in the respects noted in the call and in the Governor's message to the special session.

[8, 9] These contentions cannot be sustained. The duty of the Legislature in special session to confine itself to the subject matter of the call is of course mandatory. It has no power to legislate on any subject not specified in the proclamation. People v. Curry, 130 Cal. 82, 62 P. 516; Swing v. Riley, 13 Cal.2d 513, 518, 90 P.2d 313. But when the Governor has submitted a subject to the Legislature, the designation of that subject opens for legislative consideration matters relating to, germane to and having a natural connection with the subject proper. Blackford v. Judith Basin County, 109 Mont. 578, 98 P.2d 872, 877, 126 A.L.R. 639, and cases cited. Any matter of restriction or limitation becomes advisory or recommendatory only and not binding on the Legislature. People v. District Court, 23 Colo. 150, 46 P. 681; Long v. State, 58 Tex.Cr.R. 209, 127 S.W. 208, 21 Ann.Cas. 405. In Baldwin v. State, 21 Tex.App. 591, 3 S.W. 109, 110, it was held that the call "to reduce the taxes, both ad valorem and occupation, so far as it may be found consistent with the support of an efficient state government," embraced the entire subject of taxation, and a bill authorizing the levy of taxes on occupations not theretofore taxed was upheld. The court said: "To so legislate as to *reduce the taxes,* and at the same time *provide for the support of an efficient state government,* in our opinion, includes the power to levy taxes upon property and occupations not taxed before. It might be wholly impracticable to accomplish a *reduction* of taxes, and at the same time maintain the state government, without the exercise of such power. * * * Legislative power, except when the constitution has imposed limits upon it, is practically absolute; and, when limitations upon it are imposed, they are to be strictly construed, and are not to be given effect as against the general power of the legislature, unless such limitations clearly inhibit the act in question."

[10] The same presumptions in favor of the constitutionality of an act passed at a regular session apply to acts passed at a special session. Long v. State, 58 Tex.Cr.R. 209, 127 S.W. 208, 210, 21 Ann. Cas. 405. In the last cited case it was said that when the Legislature acting under a special call, undertakes "to consider subjects and pass laws in response thereto, and such laws receive the approval of the executive, courts are and should of right be reluctant to hold that such action is not embraced in such call, and will not so declare unless the subject manifestly and clearly is not embraced therein."

[11] Inasmuch as the presumptions are in favor of the constitutionality of the act, it will be held to be constitutional if by any reasonable construction of the language of the proclamation it can be said that the subject of legislation is embraced therein. Blackford v. Judith Basin County, supra; State v. Shores, 31 W.Va. 491,

7 S.E. 413, 13 Am.St.Rep. 875; State v. Woollen, 128 Tenn. 456, 161 S.W. 1006, Ann.Cas.1915C, 465.

[12-14] There were two general purposes relating to the State Guard which were stated in the call, one to consider and act upon legislation augmenting the appropriation for the operation, maintenance, and organization of the State Guard; the other to amend sections 321, 340, 395, and 555 of the Military and Veterans Code with respect to the pay, privileges, allowances and rights for the State Guard. The phrase "legislation augmenting the appropriation" should not be considered in a narrow sense. The Legislature was not thereby necessarily restricted to enacting provisions for a direct increase of the previous appropriation. It could, as it did, augment the available appropriation both by direct increase and by limitations upon the expenditure of the funds. The wisdom or desirability of the manner of augmenting the appropriations is of course not a question for the judicial department. It is concerned only with the question of interpretation. In the second purpose stated in the call, the Legislature was given power to amend certain sections of the Veterans and Military Code. It enacted amendments. Those amendments were pertinent to the subject matter of the sections involved. It may even be said that they were pertinent to the "pay, privileges, allowances and rights for the State Guard," as stated in the call. But if it be arguable that they were not so restricted, we are again brought to a realization that the call had submitted to the Legislature the subject matter of those sections and when so submitted the Legislature could not be circumscribed in the enactment of any appropriate legislation within that field. We conclude that the Legislature did not violate section 9 of article V of the Constitution.

[15] The petitioners also contend that section 2 of chapter 19 encroaches upon the constitutional power of the Governor to call forth the militia to execute the laws of the state, to suppress insurrections and repel invasions. (Sec. 1, art. VIII, Const.) The amendatory act authorizes the Governor to organize and maintain a State Guard within the limitations prescribed and requires certain duties to be performed by the adjutant general. Those provisions do not purport to deprive the Governor of any of his powers as commander-in-chief of the militia. The Governor acts through the adjutant general and the adjutant general acts only in the name of the Governor. The provisions of section 555.2(d) authorize the Governor to call into service all or any part of the active members of the State Guard and in addition all or a portion of the reserve forces when he has by proclamation declared a state of insurrection to exist. Those provisions are not to be deemed a curtailment of his powers. The State Guard is only a part of the militia which consists of all able-bodied males resident in this state as designated by section 122 of the Veterans and Military Code. The petitioners do not question that the section referred to defines the Governor's constitutional powers in calling the State Guard into service when a state of insurrection is proclaimed to exist. That section contains a statement of a portion only of the constitutional powers vested in the Governor as commander-in-chief of the militia. It is not intended to be nor may it be deemed to be exclusive.

Other points do not require special discussion. The foregoing observations and conclusions sufficiently answer all the petitioners' contentions.

The petition for the peremptory writ is denied, and it is further ordered that the judgment herein is hereby made final.

GIBSON, C. J., and CURTIS, EDMONDS, HOUSER, and TRAYNOR, JJ., concurred.

CARTER, Justice.

I concur in the conclusion reached in the majority opinion but I do not agree with that portion of said opinion which holds that when the Governor has submitted a subject to the Legislature at an extraordinary session, the designation of that subject opens for legislative consideration all matters relating to, germane to and having a natural connection with the subject matter, and that any matter of restriction or limitation embraced within the proclamation becomes advisory or recommendatory only and not binding on the Legislature. In my opinion this declaration is altogether too broad. I do not believe it would be reasonable to say that if the proclamation submitted to the Legislature designated such subjects as shortening or lengthening the fishing season, increasing or decreasing the number of game wardens or increasing or decreasing their compensation, it would give the Legislature power to enact legislation reorganizing the Department of Natural Resources or even the Division of Fish and Game of that department.

In my opinion, section 2 of chapter 19 which adds section 555.2 to the Military and Veterans Code contains provisions which can reasonably be said to cover subjects not embraced within the purview of the Governor's proclamation calling the special session, and had the Governor vetoed the measure, and the Legislature had passed it over his veto, I would be disposed to hold that the Legislature had violated the constitutional mandate contained in section 9 of article V of the Constitution. But since the Governor could have included such subjects in his proclamation, and he having approved the legislation by signing the bill embracing such subjects, I am forced to conclude that he considered his proclamation sufficiently broad to cover the subjects embraced in the bill, and in view of the urgency of the measure, I am disposed to hold that it constitutes a valid exercise of executive and legislative power.

TANNER et al. v. TITLE INSURANCE & TRUST CO. et al.*

L. A. 17671.

Supreme Court of California.

March 24, 1942.

Rehearing Granted April 20, 1942.

1. Mines and minerals 🔑79(1)

The distinguishing feature of "community oil lease" under which several landowners lease their respective lots as one tract with exclusive right to lessee to drill for and produce oil upon any part of it, is that each owner shares proportionately in royalties irrespective of the lots upon which oil is discovered, and such lease usually provides for withdrawal from the lease of land which is either nonproductive or cannot be economically used by lessee, and for apportionment of benefits among all owners, notwithstanding such withdrawal by lessee of a part of the land.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Oil Lease".

2. Mortgages 🔑533, 535(1)

Where parties to deed of trust agreed that community oil lease previously executed by mortgagors was subordinate to deed of trust, and that sale of mortgaged property in accordance with provisions of deed of trust would convey property free of lease, mortgagee purchasing property at trustee's sale acquired title free of lease, including benefits of lease as well as burdens thereof, and could not assert a claim to royalties accruing under lease.

3. Mines and minerals 🔑77

Where community oil lease provided that owner of each tract should share proportionately in royalties irrespective of tract on which oil was produced, and gave lessee right to surrender any portion of land and specifically provided that surrender should not affect distribution of royalties, bilateral surrender agreement between lessee and all the lessors, terminating lease with respect to land surrendered by lessee, and stating that lessee and lessors mutually released each other from all obligations under lease with respect to surrendered land, did not bar owners of surrendered land from future participation in royalties accruing under lease, since word "terminate" was used only in the sense of dissolving lessee's relationship under the lease.

See Words and Phrases, Permanent Edition, for all other definitions of "Terminate".

4. Contracts 🔑170(1)

In the determination of meaning of contract claimed to be indefinite, interpretation placed on contract by the parties themselves as evidenced by their conduct subsequent to its execution may be considered.

5. Mines and minerals 🔑79(1)

Where parties to community oil lease, providing for lessee's surrender of any portion of land, did not for five years object to sharing of royalties by owners of surrendered lands, any ambiguity in surrender agreement must be resolved against construction that such agreement terminated right of owners of surrendered lands to share in royalties.

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* Subsequent opinion 129 P.2d 383.

6. Contracts ⚷143, 147(2)

In absence of fraud or mistake, intention of parties as expressed in agreement is controlling, and courts are not empowered under guise of construction or explanation to depart from plain meaning of writing and insert a term or limitation not found therein.

7. Contracts ⚷168

Courts have frequently considered implied covenants as being within a contract, but such covenants are justified only when they are not inconsistent with some express term of contract and, in absence of such implied terms, the contract could not be effectively performed.

8. Contracts ⚷303(4)

Every contract contains an implied covenant on the part of each party not to prevent or hinder performance by the other party.

9. Mines and minerals ⚷79(1)

The law will not allow one to claim royalties under community oil lease and at the same time diminish amount of oil which might otherwise be recovered for common benefit of all the lessors.

10. Mines and minerals ⚷79(1)

Owners of land surrendered by lessee were not deprived of their right under community oil lease to share in royalties accruing under lease after surrender, by producing oil from surrendered land and appropriating all the royalties to themselves, where lease did not prohibit production of oil from surrendered land or provide that owners of land retained under lease should be entitled to participate in royalties therefrom, and no evidence was offered to show that well on surrendered land was draining oil from the source of supply under the community lease.

11. Evidence ⚷10(1)

In absence of evidence that well on land surrendered to community oil lessee was draining oil from source of supply under community lease, Supreme Court would not take judicial notice of any such alleged fact.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Action to quiet title as to share in royalties provided for by community oil lease and to entire proceeds of oil which was discovered on land after date of lessee's surrender, by George Tanner, and others, against the Title Insurance and Trust Company, and others. From the judgment, the defendants appeal.

Affirmed in part and reversed in part.

William H. Cree, Cree & Brooks, and Frank C. Charvat, all of Long Beach, for appellants Olds.

Richardson & Jordan, of Whittier, for appellant Whittier Building & Loan Ass'n.

Burke, Hickson, Burke & Marshall, Harry C. Williams, and Daniel G. Marshall, all of Los Angeles, for respondents.

EDMONDS, Justice.

A rather unusual situation in the relations of adjoining landowners has occasioned the present controversy. Each of the parties, or his predecessor in interest, was, at one time, a lessor, with others, under what is termed a community oil lease. The judgment appealed from was rendered in an action brought by the respondents, as the owners of two lots from which oil is being produced, to quiet their respective titles against the claims of the appellants who are the owners of land which has been surrendered by the lessee. The appellants assert the right to share in the royalties provided for by this lease, and, also, to the entire proceeds of the oil which was discovered upon their land after the date of the surrender.

There is no dispute concerning the facts of the case. In 1921, Standard Oil Company leased nine contiguous parcels of land, described as lots, each of which comprises five acres. One Beaty and his wife were then the owners of the westerly one-half of lots 171 and 172 and joined in the lease. Some years later they executed a deed of trust for the benefit of the appellant Whittier Building and Loan Association. Under the terms of an agreement executed by the lessee, the trustors, the trustees and the association, the lease was made subordinate to the deed of trust. In 1934 the beneficiary became the purchaser of the property at a trustee's sale and three years later conveyed it, without reservation. Frank H. Olds and his wife, who are the other appellants, executed the lease as the owners of lot 173. The respondents are, respectively, the owners of lots 174 and 176.

The lessee drilled two wells, one on lot 174, and the other on lot 176. Oil in paying quantities has been produced from each of these wells for some years.

In 1933, the old company, by an instrument in writing executed by it and the lessors, surrendered all land included within the terms of its lease except lots 174 and 176. At the time of the surrender, each of the lessors was then participating in the landowners' royalties accruing under the terms of the lease. This participation continued until the commencement of the present action.

Three years later, the owners of the surrendered lots sued the respondents to quiet their respective titles and in June, 1937, a decree was rendered in their favor. Following the discovery of deeper sand in the Montebello Oil Field in the latter part of 1937, the appellants Olds leased their lot to the Bush Oil Company. Beginning in May, 1939, oil was produced from that lot and was being produced at the time of the trial. Royalties paid to the appellants Olds upon this production up to November 1, 1939, amounted to $13,500. No part of these royalties has been shared with the respondents. About the same time, and following its conveyance of the westerly half of lots 171 and 172, this land was also leased to Bush Oil Company, which, from 1939 and to the time of the trial of this action has produced oil in paying quantities from it.

As their sole ground for a reversal of the judgment, the appellants rely upon a provision of the lease reading as follows: "Said Lessors agree to, and they do hereby, pool their interest in this lease, and agree that during the continuance of this lease each owner of land subject thereto shall share in all benefits accruing to the whole lease in the ratio which the acreage owned by said Lessors bears to the entire acreage leased. This provision as to apportionment of benefits to be operative, notwithstanding the surrender by the Lessee of any land described herein." The respondents contend that the Whittier Building and Loan Association did not acquire any right to share in the royalties by virtue of the subordination agreement executed in connection with the Beaty deed of trust. And conceding, for the purpose of argument, that it did acquire such a right, so they say, the association divested itself of that right by its conveyance of the Beaty land. As against all of the appellants, the respondents urge that the surrender agreement extinguished the rights of the owners of the surrendered lots, including the appellants, to further participation in the community royalties. And as another and alternative ground, they contend that, under a proper construction of the clause relating to the sharing of royalties after a surrender, the owners of the surrendered lots forfeited their right to participation when, subsequent to the time of the release of their lots, they began producing oil from them and failed to share the royalties derived from that production with their colessors under the community lease.

[1] The distinguishing feature of a lease under which several landowners lease their respective lots as one tract, with the sole and exclusive right to the lessee to drill for and produce oil upon any part of it, is that each owner shares proportionately in the royalties irrespective of the lot or lots upon which oil is discovered. The owners of lots upon which no well is drilled share equally the fruits of the common venture with the lessors whose land proves productive. Also, it is often found that certain lots are either non-productive or cannot be economically used by the lessee. Under such circumstances it is usual to provide for the withdrawal of such land from the lease in order that it may be devoted to profitable uses. In the event of such a release, the rights of the owners of the surrendered lots to continued participation in royalties from production upon the land remaining under the lease must be considered. Accordingly, community oil leases commonly provide for the apportionment of benefits among all owners, notwithstanding the surrender by the lessee of any of the lands subject to the lease.

Such a provision was considered in First National Bank of Redondo v. Standard Oil Co. of California, 91 Cal.App. 705, 267 P. 548. That case arose after oil was discovered upon lots retained under the lease following the surrender of the non-producing lots. The owners of the producing lots claimed all of the royalties under the lease, asserting that the notice of surrender terminated the lease given by the lessee. The court rejected this contention and decreed that the owners of the surrendered lands were entitled to participate in future royalties. The appellants contend that the principles stated and applied in that case are controlling in the present controversy.

[2] However, under the terms of the subordination agreement, the appellant

Whittier Building and Loan Association did not acquire the right to participate in royalties under the community lease. This agreement recites the execution of the community lease and the deed of trust, and after stating that the loan secured thereby was made by the appellant association upon the condition that the deed of trust be a lien upon the property paramount to the community lease, provides that the Beaty property "shall be * * * made subject to the above mentioned deed of trust and all of the provisions thereof, and that in the event of the foreclosure of said deed of trust or sale of property therein described in the manner therein specified, that the purchaser of said property shall acquire the same free and clear of said lease."

By the clear and unmistakable terms of this instrument, all of the parties to it agreed that a sale of the Beaty property, in accordance with the provisions of the deed of trust, would convey such property to the purchaser free and clear of the lease. The agreement provides no option whereby the purchaser might elect to take the property subject to the lease. On the contrary, by the very terms of the agreement, any such sale would automatically terminate the lease as to such property. Accordingly, when appellant association purchased the lots in 1934 at the trustees' sale, it acquired title free and clear of the lease and has no claim to royalties accruing thereunder.

The association maintains that the only effect of the agreement was to terminate, in the event of foreclosure, the right of the lessee to explore or drill for oil on the Beaty lots. In other words, it insists that the agreement was intended to free the purchaser of the lots of the obligations of the lease but was not intended to deprive him of any royalties thereunder. The plain language of the agreement, however, contemplates the complete release of the lots from the operation of the lease, including the benefits as well as the burdens. True, the agreement could not affect the rights of the other lessors, who were not parties thereto and who therefore might have insisted upon a retention of the lands under the lease. However, these other lessors did not object, but on the contrary agreed to a surrender of the property in 1933, one year before the appellant association became the owner of the lots. Having bargained for and secured the right to subordinate the lease to its lien on the Beaty lots, the appellant association, as the purchaser at the trustees' sale, may not successfully assert a claim to royalties accruing under the lease, and the trial court properly quieted the respondents' titles against such claim. This conclusion makes it unnecessary to determine the effect of the association's conveyance.

[3] The rights of the appellants Olds, however, are governed by the principles followed in First National Bank of Redondo v. Standard Oil Co. of California, supra, unless it may be said that the surrender agreement of 1933, or the independent oil development by them, terminated their right to the royalties under the community lease. The respondents concede that a mere unilateral surrender by the lessee, as was involved in the Bank of Redondo case, does not terminate the right of the owners of surrendered premises to continue to share in the royalties accruing under the community lease. But the agreement of June 1, 1933, they urge, is not a simple surrender by the lessee, but is a bilateral agreement, executed by the lessee and all of the lessors, for the purpose of terminating the lease as to all of the land except lots 174 and 176, and by its terms foreclosed the appellants Olds, as the owners of surrendered lot 173, from further participation in the community royalties.

This agreement recites that "pursuant to the provisions of said agreement of lease * * * the parties hereto desire to terminate [it] * * * as to all of the lands covered thereby, save and except that portion of said lands hereinafter described, * * *." "In consideration of the premises," the agreement continues, "the parties hereto do hereby mutually agree as follows: The lessee does hereby terminate and surrender all of its right, title and interest in and to said agreement of lease * * * as to all of the lands covered thereby, save and except [Lots 174 and 176] * * *. The lessors hereby accept the foregoing termination and surrender * * * and the parties hereto do hereby mutually release and discharge each other from any and all obligations thereunder with respect to all of the lands covered thereby, save and except that portion of said lands hereinabove specifically described. * * *"

According to respondents, the effect of this agreement was to terminate the entire community lease, including the provision relating to the continued sharing of royalties after a surrender, as to all of the withdrawn lots, including the lot owned by the appellants Olds. Referring to the last provision of the agreement, they contend that when the parties "mutually released and discharged each other from any and all obligations" with respect to the surrendered lands, the appellants thereby released their right to continue to receive a share of the community royalties.

Admittedly this agreement is more than a quitclaim by the lessee since it was executed by all of the parties to the community lease. But its form and terms indicate an intention to affect only the relationship between the lessors, collectively, and the lessee. As to certain lots, the right to explore and drill for oil was terminated, but the rights and obligations of the lessors, among themselves, with respect to the lots remaining under the lease were in no way affected.

In this connection, it should be stated that the surrender agreement was entered into at the request of the lessee. Therefore, it is only reasonable to assume that the agreement was intended to relate only to the rights and duties of the lessee and not to the contractual relationship existing among the lessors themselves. The purpose of the lessee in employing the bilateral form of agreement was to eliminate any question which might well arise as to its rights and duties with reference to the surrendered lots by a unilateral contract. In the agreement executed by the parties the lessors together are designated as "the parties of the first part" and the lessee is referred to as "the party of the second part." The agreement recites that it is made pursuant to the lease, which may only be taken to mean that it was executed in accordance with the provision giving the lessee the right to surrender any portion of the premises. And the lease specifically provides that such surrender shall not affect the existing distribution of royalties.

The respondents attach undue significance to the word "terminate." That word is used several times in the lease itself but only in the sense of dissolving the lessee's relationship thereunder. Bearing in mind that the parties making the mutual release are the lessors together on the one part, and the lessee on the other part, the clause of the agreement whereby "the parties" mutually release and discharge each other from any and all obligations under the lease with respect to the surrendered lands, should be interpreted as meaning that the lessee agrees to a discharge of the lessors' obligation to retain such lots under the lease, and the lessors agree to release the lessee's obligation thereunder.

There is no reasonable basis for construing the provision to mean that the owners of the released lands surrendered their rights as community lessors in the lots retained under the lease. As to those lots, the relationship of the parties continued as before, and the owners of the surrendered lands have the right to participate in all royalties payable under the lease.

[4, 5] However, assuming that there is any ambiguity in the wording of the surrender agreement, such ambiguity must be resolved against the construction contended for by the respondents by reason of their conduct thereunder. From June, 1933, until 1938, when this suit was filed, the owners of the surrendered lands, including the appellants Olds, continued regularly to receive their share of the royalties under the lease, and the respondents at no time voiced any objection to this continued apportionment. In the determination of the meaning of a contract claimed to be indefinite, the interpretation placed upon the contract by the parties themselves, as evidenced by their conduct subsequent to its execution, may be considered. Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 19 P.2d 785. The present position of the respondents is in direct conflict with their conduct for over five years after the agreement was made. For these reasons, the surrender agreement does not bar the appellants Olds from future participation in the royalties accruing under the community lease.

[6-11] The respondents also contend that the appellants forfeited their right to share in royalties under the lease by producing oil from their surrendered lot and appropriating all of the royalties therefrom to themselves. The underlying intent and purpose of a community lease, they urge, is that each party shall participate in all of the production from any of the lands in proportion to his holdings, and it would be destructive to this fundamental purpose to permit one lessor to retain all of the royalty from oil produced upon his land and at the same time participate in

the royalty payable on account of oil produced from the lands of the other lessors.

The argument would be sound if all of the lands upon which oil is being produced were included in the community lease. But since the surrender agreement was executed, the lots mentioned in it have not been a part of the land leased to the Standard Oil Company. The owners of these lots, therefore, might devote them to any profitable use. The community lease contains no provision prohibiting the production of oil from surrendered lots, nor that, in the event of such production, the owners of lands retained under the lease are entitled to participate therein. On the contrary, it particularly specifies that the owners of the surrendered lots shall be entitled to share in royalties under the community lease notwithstanding the surrender.

To sustain the respondents' contention, such a limitation would have to be added to the clause providing for continued apportionment. But in the absence of fraud or mistake, the intention of the parties as expressed in the agreement is controlling, and courts are not empowered under the guise of construction or explanation to depart from the plain meaning of the writing and insert a term or limitation not found therein. Brant v. California Dairies, Inc., 4 Cal.2d 128, 48 P.2d 13; Adams v. Cook, 15 Cal.2d 352, 101 P.2d 484. The parties might have added a clause under which an owner of surrendered land would have no further right to royalties in the event that oil was discovered upon it. Certainly such subsequent discovery of oil may not be deemed an unforeseen event and therefore without the contemplation of the parties to a community oil lease. Such a lease is executed by the respective parties to it because of their hope or expectation that oil may be found under some or all of the land leased. But as the parties to the contract now before the court did not limit the rights of an owner of surrendered land, a court may not do so upon a claim that, as events now show, it operates unfairly.

True, courts have frequently considered implied covenants as being within a contract but such covenants are justified only when they are not inconsistent with some express term of the contract and, in the absence of such implied terms, the contract could not be effectively performed. Williston on Contracts, vol. 5, § 1293; Jones v. Interstate Oil Corp., 115 Cal.App. 302, 1 P.2d 1051. But the facts of the present case do not show any basis for implying a covenant in the lease which would have the effect of dividing the royalty provided for in it differently than the parties have agreed upon by the plain terms of their contract.

The respondents would be in an entirely different position if their suit was based upon pleadings and proof that the appellants Olds, by the production of oil on their land, are draining oil from the pool tapped by the wells on lots 174 and 176, and are thus impeding the full performance of the community lease. Every contract contains an implied covenant on the part of each party not to prevent or hinder performance by the other party. Williston on Contracts, vol. 5, § 1293A. Upon fundamental principles, the law will not allow one to claim royalties under a community lease and at the same time diminish the amount of oil which might otherwise be recovered for the common benefit of all the lessors.

For example, in Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 73 P.2d 1163, the defendant leased plaintiff's oil property and also acquired a lease on adjacent land upon which it drilled wells, thereby draining oil from the plaintiff's land. The lease with the plaintiff contained no offset clause. Nevertheless, the court held that a covenant would be implied obligating the lessee to drill wells to offset those on the adjacent property. In the present case, however, no evidence was offered to show that the well on the land of the Olds is draining oil from the source of supply under the community lease, and contrary to the contention of respondents, this court may not take judicial notice of any such alleged fact.

The judgment as to appellant Whittier Building and Loan Association is affirmed; as to appellants Olds, the judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.

20 Cal.2d 48

In re MITCHELL'S ESTATE.

MANSON et al. v. HAMILTON.

S. F. 16393.

Supreme Court of California.

March 24, 1942.

1. Executors and administrators 🔑82

An order directing executors to pay to broker commission on sale of realty owned by decedent's estate was appealable under provision of Probate Code authorizing appeal from order instructing or directing an executor or administrator. Probate Code, §§ 760, 1240.

2. Executors and administrators 🔑97

The fact that letter, listing property of decedent's estate for sale by real estate broker, did not expressly provide for a commission and provide that such commission should be paid out of proceeds of sale, did not preclude recovery of commission by broker who was procuring cause of the sale, on ground that agency contract was not in compliance with the applicable provision of the Probate Code. Probate Code, § 760.

3. Statutes 🔑227

The word "shall" used in statute may be merely directory, and whether it should be construed as "mandatory" or "directory" depends on intention of legislature in enacting the statute.

See Words and Phrases, Permanent Edition, for all other definitions of "Directory", "Mandatory", and "Shall".

4. Statutes 🔑183

The cardinal canon of interpretation of a statute requires that the Supreme Court give effect to intention of the lawmakers although it may seem opposed to the letter of the statute.

5. Executors and administrators 🔑97

The statute authorizing executor to enter into contract with broker to secure purchaser for realty owned by decedent's estate, which contract "shall" provide for payment of commission to broker out of proceeds of sale to any purchaser secured by him, is "mandatory" only in so far as it imposes limitation on source of payment of the commission, and the statute does not require contract executed by executors to recite that the commission shall be paid out of proceeds of sale. Probate Code, § 760.

In Bank.

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Proceeding in the matter of the estate of James McL. Mitchell, deceased, wherein Phillip I. Manson and others, executors, opposed payment to O. L. Hamilton of a commission for consummating a sale of realty of the estate in the course of the administration thereof. From an order directing executors to pay the commission, the executors appeal.

Affirmed.

For prior opinion, see, Cal.App., 115 P. 2d 27.

Thos. A. Allan and Manson & Allan, all of San Francisco, for appellants.

Stanley Pedder and Kenneth Ferguson, both of San Francisco, for respondent.

SHENK, Justice.

The executors of the will of James McL. Mitchell, deceased, appeal from an order directing them to pay to the respondent a real estate commission on the sale of real property consummated and confirmed by the court in the course of the administration of the estate of the decedent.

The respondent, a duly licensed real estate agent, was employed under a contract in writing to sell a ranch belonging to the estate. The authorization was contained in a letter written by one of the executors in response to a letter of the respondent requesting authority to list the property. The executor wrote: "We refer you to your letter of December 1, 1938, in which you inquired of the James McL. Mitchell ranch near Morgan Hill. We would be pleased to list this property with you for sale. For your information the inheritance appraisal on this property is $34,000.00 Any sale would be subject to court approval, and all offers should be accompanied by a check for not less than 10 per cent of the offered price. Before taking any client to the property it will be necessary to make an appointment with Mrs. Mitchell, who is now residing on the premises."

The respondent showed the property to Mrs. Doudell and her son. Mrs. Doudell eventually purchased the property from the executors. In confirming the sale the probate court found that the authority of the respondent to show the property was legally sufficient, that the respondent was the procuring cause of the sale, and was entitled to a commission of five per cent of the purchase price of $30,600.

[1] The contention is made by the respondent that the order directing the executors to pay the commission is not an appealable order. The 1935 amendment to section 1240 of the Probate Code provides that an order instructing or directing an executor or administrator is appealable. Howaldt v. Superior Court, 18 Cal.2d 114, 114 P.2d 333; Estate of Keet, 15 Cal.2d 328, 100 P.2d 1045. The order appealed from should be deemed such an order.

The appellants contend that the agency contract was not in compliance with section 760 of the Probate Code, and was therefore void. That section provides: "The executor or administrator may enter into a written contract with any bona fide agent to secure a purchaser for any real or personal property of the estate, *which contract shall provide for the payment to such agent out of the proceeds of a sale to any purchaser secured by him of a commission,* the amount of which must be fixed and allowed by the court upon confirmation of the sale; and when said sale is confirmed to such purchaser, such contract shall be binding and valid as against the estate for the amount so allowed by the court. By the execution of any such contract no personal liability shall attach to the executor or administrator, and no liability of any kind shall be incurred by the estate unless an actual sale is made and confirmed by the court." (Emphasis added.)

[2] It is true that the contract here does not expressly provide for a commission and that such commission shall be paid out of the proceeds of the sale. However, a proper application of the code section does not require a holding that the contract here involved was void because the substance of the clause which we have italicized in the foregoing quotation was not copied into the contract.

Although the parties did not expressly provide for a commission, it is not seriously questioned that a commission was intended, if a sale was consummated and confirmed by the court. The exchange of letters clearly indicated that a commission was contemplated. A statement therein of the amount of the commission would be nugatory, for the reason that the statute requires the court to fix the commission upon the confirmation of the sale.

Prior to the enactment of section 1559 of the Code of Civil Procedure (now section 760 of the Probate Code), it was held that an executor or administrator could not bind the estate by a contract for a broker's commission on the sale of real property. Hickman-Coleman Co. v. Leggett, 10 Cal.App. 29, 100 P. 1072; Estate of Shaw, 85 Cal.App. 518, 524, 260 P. 351. One of the purposes of the amendment was to authorize executors and administrators to bind the estate by such contracts subject to approval by the court.

[3, 4] Furthermore the words, "shall provide for the payment to such agent out of the proceeds of a sale to any purchaser secured by him of a commission * * *" as used in this section are not necessarily mandatory in the sense urged by the appellants. The word "shall" has been held in some cases to be merely directory. Pappadatos v. Superior Court, 209 Cal. 334, 335, 287 P. 342; Rutledge v. City of Eureka, 195 Cal. 404, 424, 234 P. 82. Whether it should be construed to be mandatory or directory depends on the intention of the legislature in enacting the section. In re Chadbourne's Estate, 15 Cal.App. 363, 114 P. 1012, 1014. In the last cited case it was stated: "We must assume that the Legislature had before it this policy of the law when it enacted the statute in controversy. And, while the language upon its face seems to be mandatory, the cardinal canon of interpretation requires, of course, that we give effect to the intention of the lawmakers, though it may seem opposed to the letter of the statute," citing Chauncey v. Dyke Bros., 8 Cir., 119 Fed. 1, 9, 55 C.C.A. 579.

The appellants rely on the case of Wilson v. Fleming, 106 Cal.App. 542, 289 P. 658, 661, as support for their contention that the contract must recite that the commission be paid out of the proceeds of the sale. In that case the statute was invoked to protect the estate from a claim for commission under a contract which was different from the contract authorized by the statute and where no actual sale was made within the meaning of its provisions. The court said that the contract should provide that the commission be paid out of the proceeds of the sale, but its failure to so provide was not the ground of the decision. The court's statement meant no more than that the statute provided a limitation on the power of the executors and of the courts in authorizing commissions for the sale of real estate under written contracts of agency. In that case it was also recognized that "this section is by law a part of any such contract, and the provisions" of the section "must be read into" the contract, citing Caine v. Polkinghorn, 54 Cal.App. 387, 201 P. 936. The cases relied on by the executors do not support a conclusion that the contract was void because it omitted expressly to include the provisions of the statute.

[5] In this case the words of section 760 are to be considered as mandatory only in so far as they impose a limitation on the source of payment of the commissions, that is, solely from the proceeds of the sale.

We conclude that the statute effects the inclusion of the limitation in the contract and that failure to include it in the writing does not render the contract void.

The order is affirmed.

GIBSON, C. J., and CURTIS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.

* * *

19 Cal.2d 713

ROSE et al. v. STATE et al.

S. F. 16040.

Supreme Court of California.

March 4, 1942.

As Modified on Denial of Rehearing April 2, 1942.

1. Eminent domain 🔑4
States 🔑4

All powers not granted by the Constitution of the United States to the federal government are reserved to the states, and the power of eminent domain is one of such reserved powers.

2. Eminent domain 🔑1

The power of "eminent domain" does not depend for its existence on a specific grant in the constitution of a state, and is inherent in the sovereign state and founded on the law of necessity, but such power may be limited by constitutional provision.

See Words and Phrases, Permanent Edition, for all other definitions of "Eminent Domain".

3. Eminent domain 🔑70

The constitutional prohibition against taking or damaging private property for public use without just compensation is a restriction placed on the state and upon all its agencies who derive from it their power of eminent domain. Const. art. 1, § 14.

4. Eminent domain 🔑70

Failure of the legislature to enact a statute allowing suit against the state to recover value of private property taken or damaged for public use does not entitle the state to disregard the constitutional limitation on the state, requiring that just compensation be paid for private property taken or damaged for public use. Const. art. 1, § 14.

5. Constitutional law 🔑32
Eminent domain 🔑266
States 🔑191(1)

The constitutional provision against taking or damaging of private property for public use without just compensation is self-executing and by such provision, state has indicated its consent to be sued thereunder. Const. art. 1, § 14.

6. States 🔑191(1), 200

The constitutional provision that suits may be brought against the state in such manner and in such courts as shall be directed by law is not "mandatory" but is "permissive", and enables the legislature to specify what suits, other than those already provided for, might be brought against the state, and prescribes manner for so doing and the courts having jurisdiction thereof. Const. art. 20, § 6.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory" and "Permissive".

7. Constitutional law 🔑32

The constitutional provision that suits may be brought against the state in such manner and in such courts as shall be directed by law, does not require enactment of a statute permitting suit to be brought to secure right granted in constitutional provision against taking or damaging of property for public use without just compensation. Const. art. 1, § 14; art. 20, § 6.

8. Statutes 🔑181(1)

The language of a statute should never be so construed as to nullify the will of the legislature. Code Civ.Proc. § 1859.

9. Constitutional law 🔑15
Statutes 🔑174, 181(1, 2), 231

Statutes must be given a reasonable interpretation, and one which will carry out the intent of the legislators and render them valid and operative rather than defeat them, and sections of the constitution, as well as of the codes, will be harmonized where reasonably possible, in order that they all may stand.

10. Statutes 🔑207

A general provision of a statute is controlled by one that is special, and such special provision is treated as an exception to the general provision, and a specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the general provision, standing alone, would be broad enough to include subject to which a more particular provision related.

11. Constitutional law 🔑26

A constitutional right may be subject to reasonable rules and regulations for the enforcement or protection thereof.

12. Constitutional law 🔑36

The legislature by statutory enactment may not abrogate or deny a right granted by the constitution, and a right constitutionally granted cannot be taken away by failure of the legislature to act.

13. Eminent domain 🔑70

The constitutional provisions against taking or damaging of private property for public use without just compensation were not enacted to protect sovereign state, but were enacted to protect individual rights of subjects of the sovereign. Const. art. 1, §§ 13, 14.

14. Eminent domain 🔑266
States 🔑191(1)

No distinction can be drawn between suits against agencies of the state, and suits against state itself as affecting right to sue to recover compensation for the taking or damaging of private property for public use without just compensation. Const. art. 1, §§ 13, 14.

15. Eminent domain 🔑271

That property owner can, prior to construction of improvement in street fronting his property, either seek to enjoin construction of the improvement or sue for consequential damages does not preclude property owners from suing to recover consequential damages resulting from the construction of a subway in street fronting their property.

16. Highways 🔑86
Municipal corporations 🔑665

The owner of property fronting on a street or highway has as appurtenant thereto certain private easements in the street in front of or adjacent to the lot, distinguished from the public easements therein, which are a part of his property. Const. art. 1, § 14.

17. Eminent domain 🔑105, 106
Municipal corporations 🔑665, 669

Property which an abutting owner has in the street in front of his land is the right of access and of light and air, and for an infringement of such rights he is entitled to compensation. Const. art. 1, § 14.

18. Highways 🔑85

An abutting owner's "easement of access" is an easement in public highway upon which his land fronts, and it is as a matter of law peculiar to the individual owner, and an unreasonable interference with such an easement is an injury necessarily different from the injury suffered by general public.

See Words and Phrases, Permanent Edition, for all other definitions of "Easement of Access".

19. Highways 🔑85

An abutting owner's "easement of access" extends to a use of public highway upon which his land fronts for purposes of ingress and egress to his property by such modes of conveyance and travel as are appropriate to the highway and in such manner as is customary or reasonable.

20. Eminent domain 🔑106
Municipal corporations 🔑669

Abutting property owners possessed as a matter of law not only right to use of streets in common with other members of the public, but also a private right, known as "easement of access", which right may not be taken away or destroyed or substantially impaired or interfered with for public purposes without just compensation therefor. Const. art. 1, §§ 13, 14.

21. Appeal and error 🔑1010(1)

Where there is evidence to support a finding that substantial and unreasonable interference with landowner's easement of access has been caused as result of an obstruction in street or highway on which property abuts, an appellate court will not say as a matter of law that such finding is erroneous.

22. Appeal and error 🔑1008(1)

In action by abutting property owners for damages allegedly sustained as result of construction in street fronting their property of a subway and blind side lanes on each side of subway, whether abutting owners' "easement of access" to street fronting their property was impaired by the construction, and, if so, amount of damage suffered as result of such interference, were matters for trier of the facts. Const. art. 1, §§ 13, 14.

23. Eminent domain 🔑300

Evidence supported finding that abutting property owners' "easement of access" was substantially impaired by construction in street fronting their property of a subway and blind side lanes on each side of subway, so as to entitle owners to recover compensation from the state. Const. art. 1, §§ 13, 14.

24. Damages 🔑3
Eminent domain 🔑69

The rule of "damnum absque injuria", which means merely that a person may suffer damages and be without remedy because no legal right established by law and possessed by him has been invaded, or the person causing the damage owes no duty known to the law to refrain from doing the act causing the damage, has no application, where person suffering the damage has a property right, and the duty is imposed by constitution on person causing the damage to refrain from causing it without payment of compensation.

See Words and Phrases, Permanent Edition, for all other definitions of "Damnum Absque Injuria".

25. Damages 🔑208(1)
Eminent domain 🔑307(2)

Whether a person suffering damage has a property right, and whether duty is imposed by constitution on person causing the damage to refrain from causing it without payment of compensation, so that rule of "damnum absque injuria" is not applicable, is a "question of fact".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

26. Highways 🔑85
Municipal corporations 🔑669

The rights of property owner to access to abutting street or highway are the same whether property is situated on a street in business district of a large city or in residential district of a small town, although extent of damage for interference therewith might be different.

27. Eminent domain 🔑2(6)

Property owners whose easements of access were substantially impaired by construction in street fronting their property of a subway were not barred from recovery of compensation on ground that the damage occurred as result of an exercise of "police power", and was "damnum absque injuria", where there was no element of regulation or no suggestion of anything in nature of an emergency in the taking. Const. art. 1, §§ 13, 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

28. Constitutional law 🔑81

Generally, "police power" operates in the field of regulation, except possibly in some cases of emergency such as conflagration or flood when private property may be temporarily used or damaged or even destroyed to prevent loss of life or to protect the remaining property of an entire locality.

29. Eminent domain 🔑2(1)

Although the seeming absolute protection against taking or damaging of private property for public use provided for in state constitution may be qualified by the "police power" in the area in which such power operates, the police power doctrine cannot be invoked in the taking or damaging of private property in the construction of a public improvement where no emergency exists. Const. art. 1, § 14.

30. Appeal and error 🔑1171(2)

In property owners' suit to recover damages to right of access to property resulting from construction of a subway in street fronting their property, Supreme Court would not disturb finding that property owners' frontage was 120 feet, where reference to maps in evidence revealed that frontage was recorded thereon as 118 feet, plus or minus, and any discrepancy was so small as to come within "de minimus rule".

See Words and Phrases, Permanent Edition, for all other definitions of "De Minimus Rule".

31. Evidence ⟹568(4), 571(7)

In property owners' suit to recover damages allegedly resulting from construction of a subway in street fronting property, trial court was not bound by opinion of witnesses on market value of property, but province of such testimony was to aid court in arriving at a conclusion.

32. Eminent domain ⟹307(1)

Information obtained by trial judge who visited premises alleged to have been damaged by erection of subway in street fronting premises could be taken into consideration in determining extent of damages.

33. Eminent domain ⟹300

In property owners' suit to recover damages for impairment of their easement of access resulting from construction of subway in street fronting their property, evidence sustained trial court's findings as to amount of damages, where trial court viewed premises, and total damages awarded was within scope of testimony of valuation witnesses.

34. Evidence ⟹555

In property owners' suit to recover damages allegedly resulting from construction of a subway in street fronting property, the diversion of traffic as result of subway was not a proper element to be considered by witnesses in computing damages.

35. Eminent domain ⟹131

Where private property is taken for a public use, compensation required is to be measured by market value of property taken.

36. Eminent domain ⟹141(1)

Where private property is taken for public use and damage results to the remaining property of landowner, compensation for such damage must be awarded which is measured by diminution in value of that property which remains.

37. Eminent domain ⟹141(1)

If a state is required to make compensation for damage to private property resulting from a public use, where no property is actually taken, measure of damages generally applied is the diminution in value of the property caused by the public use, regardless whether provisions requiring compensation for damage are constitutional or statutory.

38. Damages ⟹18

Generally, where necessity for assessing damage to private property arises apart from any taking of property by public authority, owner has no right to recover for remote or speculative elements of damage.

39. Damages ⟹103, 174(1)

Where recovery of damages depends upon infringement of some right which property owner possesses in connection with his property, although measure of damages is generally the diminution in market value, evidence relied upon to establish such diminution must be based upon depreciation flowing from the actionable injury which is the basis for the right to recover damages.

40. Trial ⟹93

A motion to strike testimony must be directed with precision to the matters sought to be stricken.

41. Trial ⟹96

A motion to strike out inadmissible evidence may be properly denied where it is general and embraces evidence which is admissible as well as that which is inadmissible.

42. Appeal and error ⟹1050(1)

In property owners' suit to recover damages resulting from construction of a subway in street fronting property, error, if any, in permitting witness to consider diversion of traffic as result of the subway in computing damages was not prejudicial, where it appeared that plaintiffs had two witnesses, in addition to witness who considered diversion of traffic in computing damages, and that amount of damages found to have been suffered was considerably less than that appearing in their testimony, and that trial court viewed the property and arrived at its own judgment as to extent of damages suffered.

43. Appeal and error ⟹1032(1)

Appellant has burden of showing wherein it was injured, and injury will not be presumed from error.

GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting; HOUSER, J., dissenting in part.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by Mary V. Rose and others against the State of California and others for damages allegedly sustained as the result of street improvements. From a judgment for plaintiffs, the defendants appeal.

Affirmed.

Prior opinions, 94 P.2d 1058, and 105 P.2d 302.

Rehearing denied; GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting.

C. C. Carleton, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, all of Sacramento, for appellants.

Ray L. Chesebro, City Atty., William H. Neal and Leon T. David, Asst. City Attys., and Arthur W. Nordstrom, Deputy City Atty., all of Los Angeles, John J. O'Toole, City Atty., Henry Heidelberg, and Albert F. Skelly, Deputy City Atty., all of San Francisco, Hugh B. Bradford, City Atty., of Sacramento, Archer Bowden, City Atty., of San Jose, F. Bert Fernoff, City Atty., of Oakland, Raymond M. Dunne, City Atty., of Stockton, C. M. Ozias, City Atty., of Fresno, J. Allen Davis, of Los Angeles, and George E. Sandford, of San Francisco, amici curiae on behalf of appellants.

John T. Wentz and Booth B. Goodman, both of Oakland, for respondents.

Thos. J. Straub, of San Francisco, and W. K. Dunn, Holbrook & Tarr, Leslie R. Tarr, Hill, Morgan & Bledsoe, Stanley S. Burrill, Charles P. McCarthy, Kenneth K. Wright, and Meserve, Mumper & Hughes, all of Los Angeles, amici curiae on behalf of respondents.

CARTER, Justice.

Defendants appeal from a judgment for plaintiffs in an action for damages allegedly sustained as the result of the construction of an improvement in the street fronting plaintiffs' property.

This is one of a series of similar actions brought against the defendants by the owners of property fronting upon Jackson Street, in the town of Hayward in Alameda County, to secure compensation for damage allegedly caused by the construction of a subway or underpass in the center of Jackson Street. Although the actions were tried separately, and are before this court on separate appeals, the facts, rights and liabilities involved in each are substantially the same; therefore, the law applicable to each will be fully considered and determined herein.

Plaintiffs are and at all times pertinent to this action were the owners of approximately 3.05 acres of land fronting some 118 feet on Jackson Street in the town of Hayward. The property is devoted to a fruit orchard and is improved by a five room residence, windmill, tankhouse and barn, but has been zoned as "industrial property."

Jackson Street runs from East 14th Street in Hayward to Mt. Eden where it connects with the highway leading to the San Mateo toll bridge. During the month of December, 1935, the defendant, State of California, acting through its Department of Public Works, and under the authority of the Railroad Commission, awarded a contract for the building of a subway to eliminate a crossing at grade of Jackson Street and the tracks of the Western Pacific Railroad Company. Plaintiffs' property lies adjacent to the right of way of said railroad company on the north side thereof, and on the east side of Jackson Street. The entire parcel is opposite the approach to the subway. In front of plaintiffs' property Jackson Street is 66 feet wide. The subway, 24 feet in width, is located in the center of Jackson Street. It descends under the railroad tracks of said company to a depth of approximately 16½ feet, then ascends again to grade beyond said railroad tracks. On each side of the subway are "blind" lanes, 14.5 feet in width, which do not cross the tracks, but serve the owners of property adjacent thereto as means of ingress and egress to and from Jackson Street and their respective parcels of land.

The amended complaint alleges that the construction of the subway resulted in an impairment of plaintiffs' access to Jackson Street with a consequent depreciation in the market value of their property in the sum of $5,000. The case was tried by the court without a jury and from a judgment for plaintiffs, defendants prosecute this appeal.

Defendants maintain that their demurrer to the amended complaint should have been sustained on the ground that the trial court had no jurisdiction of these defendants nor of the subject of this action, and that the amended complaint did not state a cause of action. It is their position that plaintiffs' property has not been damaged, but, that even if it had been damaged, plaintiffs have no remedy because the state cannot be sued without its express consent, and no such consent has been given.

Plaintiffs on the other hand contend that they have suffered a damage peculiar to their individual property in that their means of ingress and egress thereto has been impaired; that they have thus been deprived of their property without just compensation in violation of article I, sections 13 and 14 of the Constitution of California, and the 5th and 14th Amendments to the Constitution of the United States; and that this cause of action may be brought under said article I, section 14 of the Constitution of California.

Two major questions then are presented by this appeal: (1) Is section 14 of article I of the Constitution of California self-executing? and (2) have the plaintiffs herein sustained a compensable damage within the meaning of said constitutional provision?

As to the first question our answer must be in the affirmative.

[1, 2] Under our system of government all powers not granted by the Constitution of the United States to the federal government are reserved to the states, and the power of eminent domain is one of those reserved powers. It does not as a consequence depend for its existence upon a specific grant in the constitution of a state. Instead, it is inherent in the sovereign state and founded upon the law of necessity. This power, however, may be limited by constitutional provision, and it has been held that a constitutional provision for the payment of compensation is a limitation aimed by the Constitution at the power of eminent domain, limiting the exercise of that power by the public in favor of the individual owner of property. Commonwealth v. Plymouth Coal Co., 232 Pa. 141, 81 A. 148, affirmed 232 U.S. 531, 34 S.Ct. 359, 58 L.Ed. 713; 18 Am.Jur. 635.

[3] It is plain from a reading of the following portion thereof that section 14 of article I is such a limitation:

"Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * *; provided, that in any proceeding in eminent domain brought by the State, or a county, or a municipal corporation, or metropolitan water district, municipal utility district, municipal water district, drainage, irrigation, levee, reclamation or water conservation district, or similar public corporation, the aforesaid State or municipality or county or public corporation or district aforesaid may take immediate possession and use of any right of way or lands to be used for reservoir purposes, required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposited as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto, including damages sustained by reason of an adjudication that there is no necessity for taking the property, as soon as the same can be ascertained according to law. * * *"

[4, 5] Since article I, section 14, therefore, is a restriction placed by the Constitution upon the State itself, and upon all of its agencies who derive from it their power of eminent domain, it cannot be said that the mere failure of the legislature to enact a statute allowing suit to be brought against the state entitles the state to disregard and violate that limitation. The logical inference is that said constitutional provision is intended to be self-enforcing.

In fact this court has already held section 14 of article I to be self-executing. Weber v. County of Santa Clara, 59 Cal. 265; Trahern v. San Joaquin County, 59 Cal. 320. Shortly after this constitutional enactment was adopted there arose a question as to whether section 14 of article I, or an act of the legislature which had previously been in effect, was controlling in the matter of condemning land for road purposes. Of said section 14, article I, this court in the case of Weber v. County of Santa Clara, supra, said: "The constitutional provision is prohibitory in its nature and is self-executing; it is in direct conflict with the Act of March 18th, 1874, and by necessary operation repeals the same. The Constitution contemplates and provides for a proceeding *in Court* in all cases where private property is sought to be taken for public use, and it prohibits any other proceeding to that end."

In the case of Trahern v. San Joaquin County, 59 Cal. 320, it was claimed that section 14 of article I was not self-executing. The appellant contended therein that the language—"as shall be prescribed by law"—in said section evidently contemplated some act of legislation on the subject, and until that had taken place no damages could be assessed in pursuance of the constitutional provision. The court, however, decided to the contrary, on the authority of the Weber case, cited and quoted supra. This court is not alone in holding such a constitutional provision self-executing. As to those cases in which, like the case at bar, the injury is consequential—damaging rather than a taking, it is said in 18 Am.Jur. at page 1028: "When there is no actual occupancy of the land * * * and the injury is not so severe as to constitute a taking in the constitutional sense, in the states which, by their Constitutions, require compensation when property is damaged, it is settled that the constitutional provision may be invoked in a proceeding other than an eminent domain proceeding. Under such a constitutional guaranty, the right to recover in an action in damages for consequential injury has been sustained in a number of cases. It is held that the constitutional provision is self-executing; that is, that even if a statute has not been enacted providing a remedy for damage from the construction of public works, the landowner is entitled to enforce his constitutional right to compensation in a common-law action." Board of Com'rs of Logan County v. Adler, 69 Colo. 290, 194 P. 621, 20 A.L.R. 512; Hickman v. Kansas City, 120 Mo. 110, 25 S.W. 225, 23 L.R.A. 658, 41 Am.St.Rep. 684; Chester County v. Brower, 117 Pa. 647, 12 A. 577, 2 Am.St.Rep. 713; Swift & Co. v. Newport News, 105 Va. 108, 52 S.E. 821, 3 L.R.A.,N.S., 404; Johnson v. Parkersburg, 16 W.Va. 402, 37 Am.Rep. 779; Washington Water Power Co. v. Waters, C.C., 186 F. 572; Campbell v. Arkansas State Highway Commission, 183 Ark. 780, 38 S.W.2d 753; City of Elgin v. Eaton, 83 Ill. 535, 25 Am.Rep. 412; McGrew v. Granite Bituminous Pav. Co., 247 Mo. 549, 155 S.W. 411; State ex rel. Applegate v. Taylor, 224 Mo. 393, 123 S.W. 892; Householder v. Kansas City, 83 Mo. 488; Chick Springs Water Co. v. State Highway Dept., 159 S.C. 481, 157 S.E. 842.

The above-cited cases appear to be the leading authorities holding that a constitutional provision such as article I, section 14 of our Constitution is self-executing, but there are many other cases to this effect. Many of these authorities are collected in the case of Chick Springs Water Co. v. State Highway Dept., supra.

In support of their contention that a sovereign state can not be sued without its express consent, defendant cites Perry v. United States, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912, 95 A.L.R. 1335, in which it was determined that a holder of a federal government bond providing for payment in gold coin of standard weight and fineness could not sue the United States government after deflation of the dollar for the reason that Congress had not passed a statute authorizing such an action. This case, however, does not involve a constitutional provision such as article I, section 14, and is not in point in the view we have taken of this case—that the State of California by said self-executing provision of its Constitution has indicated its consent to be sued thereunder.

As further authority for their position that the right granted by constitutional article I, section 14, may not be enforced without specific legislation providing the method of enforcing it, defendant has cited Spinney v. Griffith, 98 Cal. 149, 32 P. 974, and Bailey Ornamental Iron Co. v. Goldschmidt, 33 Cal. App. 661, 166 P. 363. In these cases actions were brought under section 15 of article XX of the Constitution, providing for various mechanics liens and stating that "the Legislature shall provide, by law, for the speedy and efficient enforcement of such liens." The legislature failed to enact such legislation and the courts held that the constitutional provision conferred no right whatever, but that the whole remedy was contingent upon statutory enactment. These cases clearly are different from the one at bar for they are concerned with a constitutional section wherein it is specifically provided that the legislature should provide a method for the enforcement of the right granted. Section 14 of article I contains no such mandate. The court in the Spinney case, supra, correctly held that the statute was not self-executing, that the plaintiff therein did not comply with the terms of the legislative enactment applicable to the enforcement of a lien and was therefore not entitled to defend his lien. This decision was followed in the Bailey case, supra, which also held that the constitutional provision was inoperative except as supplemented by legislative action and that it was not intended to be self-executing.

Defendants' attempt to distinguish decisions of other states holding a constitutional provision similar to article I, section 14 to be self-executing on the ground that the constitutions of said states do not contain a provision similar to article XX, section 6, of our Constitution. The language of said section is as follows: "Suits may be brought against the State in such manner and in such courts as shall be directed by law."

It is defendants' contention that the state, a sovereign body, cannot be sued without its express consent; that article XX, section 6 empowers the legislature to determine when and how suits may be brought against the state; that the legislature in Political Code, section 688, the only general statute on the subject, has seen fit to permit suits against the state only where the actions are on express contract or for negligence.

[6] In passing it may be noted that article XX, section 6 does not on its face appear to be mandatory and direct that *"all* suits against the State *must* be brought in such manner. * * *" On the contrary the wording of said section, and the fact that it is located in the portion of the constitution devoted to a discussion of "Miscellaneous subjects", tends rather to give the impression that said section was intended to be permissive, that is, to enable the legislature to specify what suits, other than those already provided for, might be brought against the state, and to prescribe the manner for so doing, and the courts having jurisdiction thereof.

Application of the rules of statutory interpretation to the two constitutional provisions under discussion does not disturb our conclusion as to the self-enforcing character of article I, section 14.

[7-9] As is declared in the Code of Civil Procedure, section 1859, "In the construction of a statute the intention of the legislature * * * is to be pursued, if possible." Certainly the language of a statute should never be so construed as to nullify the will of the legislature. If section 6 of article XX is to be construed as requiring the enactment of a statute permitting suit to be brought to secure the right granted in section 14 of article I, the effect would be to permit the legislature, by its refusal or neglect to act, to nullify the intent of the framers of the Constitution. Such a result would be inconsonant with the rule that statutes must be given a reasonable interpretation, one which will carry out the intent of the legislators and render them valid and operative, rather than defeat them. In so doing, sections of the Constitution, as well as of the codes, will be harmonized where reasonably possible, in order that all may stand.

[10] It is well settled, also, that a general provision is controlled by one that is special, the latter being treated as an exception to the former. A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates.

Further discussion of the interpretation of article I, section 14 is unnecessary for it cannot but be obvious that it must be regarded as self-enforcing in order to effectuate its evident objects and purposes.

After pointing out that Political Code section 688 permits suits against the state only on express contract or for negligence, defendants cite Pacific G. & E. Co. v. State, 214 Cal. 369, 6 P.2d 78, to the effect that section 688 of the Political Code as it now stands grants permission to sue the state only upon express contract; and further cite United States v. Great Falls Mfg. Co., 112 U.S. 645, 5 S.Ct. 306, 28 L.Ed. 846, 848, and Crescent Wharf, etc. Co. v. City of Los Angeles, 207 Cal. 430, 278 P. 1028, to the effect that a suit such as the one brought herein by the plaintiffs is an action on implied contract, which on the authority of Crescent Wharf, etc., Co. v. City of Los Angeles, supra, may not be instituted under Political Code section 688.

Defendants continue, maintaining that the case last cited holds that rights granted by section 14 of article I of the Constitution are not superior to or in any different category from other property rights, and that a suit to recover damages for an infringement upon said rights, as a consequence, does not stand in any different light than any other class of suit, and may not be brought against the State of California without its express consent.

While we are familiar with the decisions mentioned above we are not entirely in accord with the view that an action in the nature of inverse condemnation, such as the one with which we are herein concerned, is strictly a suit on implied contract. We are more inclined to hold that the constitutional provision itself grants a cause of action—statutory in nature. However, since it has been held that under a self-executing constitutional provision, an action will lie at common-law to recover compensation for private property taken or damaged for public use, we do not find it necessary to rule on that question in order to reach a decision in this case.

We do, however, wish to point out that this court in the Crescent Wharf case, supra, merely declared that the respect in which the right to compensation under constitutional article I, Section 14 is not superior to or in a different category from other property rights is that such a right is not exempt from reasonable statutory regulations or enactments. In said case the regulation was a statute of limitations.

[11] We are entirely in accord with that view. That a constitutional right may be subject to reasonable rules and regulations for the enforcement or protection thereof is elementary. A recent decision of this court in the case of Chesney v. Byram, 15 Cal.2d 460, 101 P.2d 1106, which cites the Crescent Wharf case, has held that a right granted by a constitutional provision may be subject to reasonable regulation and control by the state legislature and at the same time such provision may be self-executing.

[12] It will be noted, however, that in neither of said cases did the court in any way imply that by state legislation or a lack thereof a constitutional right might be taken away or denied altogether, for it is likewise elementary that the legislature by statutory enactment may not abrogate or deny a right granted by the Constitution. Potter v. Ames, 43 Cal. 75; Wilcox v. Engebretsen, 160 Cal. 288, 116 P. 750; Sievers v. Root, 10 Cal.App. 337, 101 P. 925. And it follows as a logical conclusion that a right constitutionally granted cannot be taken away by the failure of the legislature to act.

[13] As stated in the case of State v. Fletcher, 168 Okl. 538, 34 P.2d 595, the constitutional provisions in question were not enacted to protect in any way the sovereign state, but were specifically enacted to protect and preserve the individual rights of the subjects of the sovereign. Certainly, in the absence of provision in the section itself, the framers of the Constitution did not intend to grant a right which the legislature by its refusal or neglect to enact proper remedial machinery therefor might take away or deny.

[14] Defendant has attempted to distinguish suits against agencies of the state from suits against the state itself, contending that though they admittedly may be maintained against the former, they cannot be brought against the latter without its express consent because of its sovereign nature.

This same argument was advanced in the case of Chick Springs Water Co. v. State Highway Department, supra [159 S. C. 481, 157 S.E. 850], and we believe, ably answered in the opinion therein, as follows:

"No valid distinction can be drawn between cities, counties, and other political subdivisions * * * and the state highway * * *. All are agencies of the state, and all derive their immunity from the same source, the state, and upon the ground that, being agencies of the state, they are in effect the state itself. Counties, cities, and other political subdivisions are held liable where they take property, not upon the ground that they are authorized by statute to be sued, but because of the constitutional provision requiring compensation to be made for such taking. This protection is afforded to the humblest citizen by the Constitutions of the state and the United States, and neither government can itself or by any statute or through any agency take property without paying compensation. 'Immunity from suit' cannot avail in this instance, and, if no statute exists, liability still exists, because as to this provision the Constitutions are self-executing.

"To hold otherwise would be to say that the Constitution itself gives a right which the Legislature may deny by failing or refusing to provide a remedy. Such a construction would indeed make the constitutional provision a hollow mockery instead of a safeguard for the rights of citizens.

"No court has ever applied the doctrine of immunity from suit to cases like the one at bar, nor can they, for to do so would absolutely annul the provision of article 1, § 17, of the Constitution."

[15] It is urged by the defendants that inasmuch as plaintiffs in this state can either enjoin or sue for damages in cases such as this (Wilcox v. Engebretsen, supra; Rockridge Place Co. v. Oakland, 61 Cal.App. 791, 216 P. 64), plaintiffs are not entirely without a remedy.

It must be pointed out, however, that in many cases of consequential damage the remedy of injunction alone would be comparable to no remedy at all—for prior to the construction of the improvement which causes the injury it may not be apparent that damage will result, or if it is obvious that damage will result, it may be impossible to ascertain the extent thereof.

[16] We proceed next to a consideration of the question whether or not plaintiffs have sustained a compensable damage

within the meaning of article I, section 14 of the Constitution.

That the owner of property fronting upon a street or highway has as appurtenant thereto certain private easements in the street in front of or adjacent to the lot—distinguished from the public easements therein—which are a part and portion of his property and are the private property of the lot owner as fully as the lot itself, is not open to question.

[17] The nature of this property right is described in Brown v. Board of Supervisors, 124 Cal. 274, at page 280, 57 P. 82, 83, as: "The property which an abutting owner has in the street in front of his land is the right of access and of light and air, and for an infringement of these rights he is entitled to compensation. This right is peculiar and individual to the abutting owner, differing from the right of passing to and fro upon the street, which he enjoys in common with the public, and any infringement thereof gives him a right of action. Dill.Mun.Corp., § 712. In Eachus v. [Los Angeles Cons. El.] Ry. Co., 103 Cal. 614, 37 P. 750 [42 Am.St.Rep. 149], the right which the abutting owner has to the use of the street fronting upon his lot is defined to be an easement therein for the purposes of ingress and egress, which attaches to the lot, and in which he has a right of property as fully as that which he has in the lot itself, and any act of the municipality by which that easement is destroyed or substantially impaired for the benefit of the public is a damage to the lot itself, within the meaning of the constitutional provision, for which he is entitled to compensation." See, also, McCandless v. City of Los Angeles, 214 Cal. 67, 4 P.2d 139; Eachus v. City of Los Angeles, 130 Cal. 492, 62 P. 829, 80 Am.St. Rep. 147; Geurkink v. City of Petaluma, 112 Cal. 306, 44 P. 570; Wilcox v. Engebretsen, supra; Lane v. San Diego Elec. Ry. Co., 208 Cal. 29, 280 P. 109; McQuillan, Municipal Corporations, 2d Ed., vol. 4, pp. 79, 85; Nichols, Eminent Domain, 2d Ed., p. 503; Lewis, Eminent Domain, 3d Ed., p. 177.

[18-20] The abutting owner's easement of access arises as a matter of law (Lewis, supra, p. 186), and its nature and extent have been set forth in the numerous decisions which have considered the question. Thus, it is established that the easement of access is as a matter of law peculiar to the individual owner, and an unreasonable interference with such an easement is an injury necessarily different from the injury suffered by the general public. Brown v. Board, supra, 124 Cal. page 280, 57 P. 82. It is an easement in the public highway upon which his land fronts. Eachus v. Los Angeles, etc., Ry. Co., supra, 103 Cal. page 617, 37 P. 750, 42 Am.St.Rep. 149; Cushing-Wetmore Co. v. Gray, 152 Cal. 118, 122, 92 P. 70, 125 Am.St.Rep. 47; Lane v. San Diego Elec. Ry. Co., supra, 208 Cal. page 33, 280 P. 109; McCandless v. City of Los Angeles, supra. The right extends to a use of the highway for purposes of ingress and egress to his property by such modes of conveyance and travel as are appropriate to the highway and in such manner as is customary or reasonable. See Lewis, Eminent Domain, 3d Ed., p. 190. The application of that rule to the case at bar means that the plaintiffs, as abutting owners on Jackson Street, possess as a matter of law not only the right to the use of the street in common with other members of the public, but also a private right or easement for the purposes of ingress and egress to and from their lot, which right may not be taken away or destroyed or substantially impaired or interfered with for public purposes without just compensation therefor.

Defendants contend that this court should hold as a matter of law that there was no interference with plaintiffs' easement of access or right of ingress and egress in this case, and also that the evidence does not sustain a finding of such interference. The former contention is based upon the theory that plaintiffs' easement merely entitles them to cross from their own property onto the street or highway on which it abuts. It is also claimed by defendants that whatever circuity of travel is caused thereafter is merely an inconvenience suffered after reaching the street or highway. These contentions cannot be sustained as the trial court found in the case at bar that plaintiffs' easement of access or right of ingress and egress was substantially impaired by the construction of the subway, and this finding is amply supported as will be shown by the evidence hereinafter set forth.

[21] It is well settled that where there is evidence to support a finding that substantial and unreasonable interference with the landowner's easement of access or right of ingress and egress has been caused as the result of an obstruction in the street

or highway on which his property abuts, an appellate court will not say as a matter of law that such finding is erroneous. O'Connor v. Southern Pacific R. R. Co., 122 Cal. 681, 55 P. 688; Smith v. Southern Pacific R. R. Co., 146 Cal. 164, 79 P. 868, 106 Am.St.Rep. 17; Fairchild v. Oakland & Bay Shore Ry. Co., 176 Cal. 629, 169 P. 388.

[22] The issues before the trial court in the case at bar were, whether plaintiffs' right of access to Jackson Street was substantially and unreasonably impaired by the construction of the subway, and, if so, the amount of damage suffered as the result of such interference. These matters are for the trier of the facts and only where the evidence does not support a finding of substantial and unreasonable interference should the court decide the issue as a matter of law.

[23] There is sufficient evidence to support the finding of unreasonable interference in the present case. One witness testified that the 14 foot lane for vehicular traffic and the 3.6 foot lane for pedestrians was not capable of supplying the necessary ingress and egress for this type of industrial property, and that because of the non-accessibility the property could not be put to some uses after the construction that it could have been put to before. Other witnesses spoke of the difficulty of gaining access to plaintiffs' property under the present circumstances, and the trial judge himself examined the premises. It was found that the lane provided was too narrow for two vehicles to pass each other if traversing thereon in opposite directions. In the face of this evidence and in view of the fact that the trial judge examined the property, it cannot be said that the finding of interference is unsupported by the evidence.

[24, 25] Defendants urge the doctrine of damnum absque injuria (damage without legal injury) but that doctrine means merely that a person may suffer damages and be without remedy because no legal right or right established by law and possessed by him has been invaded, or the person causing the damage owes no duty known to the law to refrain from doing the act causing the damage. That rule has no application however where the person suffering the damage has a property right, the right of access in this case, and the duty is imposed by the Constitution on the person causing the damage to refrain from causing the same without payment of compensation. The right being fixed by law, the question of whether such right has been injured, and such duty violated, is one of fact.

[26] Defendants attempt to distinguish the McCandless case, asserting that the McCandless property was on a main city thoroughfare, in a commercial zone, whereas plaintiffs' property is on the outskirts of a small town and was used for agricultural and residential purposes. Defendants further compare the public improvements constructed, claiming that a legal distinction exists between the two cases, namely, that in the McCandless case the interference with the right of ingress and egress arose out of the fact that there was difficulty in getting to and from said property into the public street, whereas in the case at bar any inconvenience arises after the public street is reached. These purported distinctions are not convincing. The rights of an abutting owner to access to the street are the same whether his property is situated on a street in the business district of a large city or in the residential district of a small town. The extent of the damage for interference therewith might be different, but the right of access to the street would be the same. It was for interference with the right of access for which damages were awarded both in the McCandless case and the case at bar. The extent of the interference may have been different, but the interference with the right was the basis of the cause of action in both cases.

[27] Defendants contend that even if plaintiffs were damaged, the damaging occurred as the result of the exercise of police power and is damnum absque injuria. This contention is wholly without merit as there is no basis for the application of the police power doctrine to the factual situation in this case.

[28] Generally, it may be said that police power operates in the field of regulation, except possibly in some cases of emergency such as conflagration or flood when private property may be temporarily used or damaged or even destroyed to prevent loss of life or to protect the remaining property of an entire locality. There is obviously no element of regulation involved in the case at bar, and no suggestion of anything in the nature of an emergency. The damage to plaintiffs' property here in-

volved was the result of a public improvement constructed by the state in the exercise of its power of eminent domain.

[29] While it is true that the seeming absolute protection against the taking or damaging of private property for public use provided for in section 14 of article I of our Constitution may be qualified by the police power in the area in which such power operates, it should be obvious that the police power doctrine cannot be invoked in the taking or damaging of private property in the construction of a public improvement where no emergency exists. To hold otherwise would in effect destroy the protection guaranteed by our Constitution against the taking or damaging of private property for a public use without compensation. Gray v. Reclamation Dist. No. 1500, 174 Cal. 622, 163 P. 1024; Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321.

Relying very strongly upon the cases which have held that the closing of a street crossing by the railroad commission is damnum absque injuria as to nonabutting property owners, defendants maintain that plaintiffs certainly cannot complain because they must travel a narrow side lane to reach the main traveled portion of the street when they could not recover if the street were closed entirely.

Briefly, we may observe that recovery has been denied in those cases upon the ground that the injury is one suffered in common with the public, is not special or peculiar to the particular property involved, and the difference in damage is one of degree and not of kind depending upon the property owner's proximity to the closed crossing. Compensation has also been refused on the ground that the landowner's easement of access is not in fact impaired, that convenient and reasonable means of ingress and egress is afforded, although not the quickest and closest route to traveled thoroughfares. We have observed also that a growing number of decisions denying recovery for damages to nonabutting owners of property on closed streets are prompted by the economic factors involved. Since every property owner for a great distance therefrom is somewhat inconvenienced by the closing of a street, the question of where to stop awarding damages is not only difficult to ascertain, but the payment of damages in every case of this character would place a great burden upon the public whenever such closings are ordered.

The cases determining what does and what does not constitute a compensable damage when a street is ordered closed are in considerable confusion, and this decision will not be benefited by a lengthy consideration of the authorities cited by defendants on this proposition. Defendants contend that the case of City of San Mateo v. Railroad Comm., 9 Cal.2d 1, 68 P.2d 713, 718, decides conclusively that the closing of a grade crossing is under the police power and any injury resulting therefrom is damnum absque injuria. The court therein stated that in the absence of facts to the contrary it would assume that none of the plaintiffs' property directly abutted on the area to be closed, and that the private property in question was contiguous to either county or state highways connected by public crossings. The court then held that the nature of abutting owner's right is "an easement in the street fronting upon his lot, for the purposes of ingress and egress," and concluded that no such right had been taken away in the case before it.

In Arcadia Realty Co. v. City of St. Louis, 1930, 326 Mo. 273, 30 S.W.2d 995, 997, the court said: "But if it be assumed that plaintiffs' properties will be stripped of potential uses and their value thereby lessened, and that the streets on which such properties are located will become cul de sacs as plaintiffs claim * * * all as a result of the street vacations in question, still plaintiffs will not by reason thereof suffer injury special or peculiar to them within the meaning of the rule long established in this state. In order for a property owner to sustain an injury special or peculiar to him on account of the vacation of a street, his property or some part of it must abut on the vacated portion, or else the vacation must deprive him of reasonable access to the general system of streets."

We are not here called upon to determine whether a property owner may recover damages in a case where his property is situated on a street created into a cul de sac as the result of the closing of the street on either side of his property without interfering with his right of access to the street on which his property abuts, as this is not such a case.

Our decision to regard the holding in the McCandless case, supra, as controlling with respect to the compensable nature of plaintiffs' damage herein, makes it unnecessary for us to consider this contention. The effect of the McCandless decision was to determine that a damage resulting from a factual situation similar to that with which we are here concerned, is compensable. This result was emphasized in the decision of the District Court of Appeal in the McCandless case, 10 Cal.App.2d 407, 52 P.2d 545, in which a hearing by this court was denied. Said case held that an instruction to the effect that any taking or damaging of the McCandless property was done under the police power and therefore not compensable, was properly refused. The earlier decision in the same case, 47 P.2d 1103, by this court was cited as being authoritative on this point.

In the instant case, the several property owners who claim that their access is impaired by the construction of a subway in the street on which their property fronts, did suffer a damage to their property right, the right of access. That has been decided as a question of fact with ample evidence in support thereof.

The case of Powell v. McKelvey, 56 Idaho 291, 53 P.2d 626, is not in point for the reason that the Idaho Constitution does not grant compensation for a "damaging" as well as a "taking" of private property. Furthermore, the sidelanes in said case were not blind and were as a matter of fact held not to interfere with the lot owner's right of access. Ralph et al. v. Hazen et al., 68 App.D.C. 55, 93 F.2d 68, is not decided under a constitutional provision such as article I, section 14 and, therefore, is likewise not applicable here.

[30] We have examined the findings of the trial court and do not find that they contain inconsistencies or irreconcilable conflicts on any material issues. Defendants contend that the trial court erred in computing the amount of damage to plaintiffs' property on the basis of a 120 foot frontage on Jackson Street when said frontage was in fact only 118 feet as indicated on maps in evidence, which maps were agreed upon by the parties to be accurate. Reference to one of said maps reveals that the said frontage is recorded thereon to be 118 feet "plus or minus." In addition, defendants themselves, in their answer, stated that the frontage of plaintiffs' property measured "not more than 120 feet." Since there is some evidence to support said finding of the trial court, and since if such discrepancy did exist, it is so infinitesimal as to come within the rule of de minimus, we do not feel that the interference of this court is required.

Defendants also complain that the finding of the trial court as to damage,—namely, that the property was damaged to the extent of $35 per front foot, 125 feet deep, and that the remainder had been damaged in the sum of $200—was not supported by the evidence for the reason that all of the valuation testimony was based on the full depth of the property and not upon the basis of a subdivision at a depth of 125 feet.

[31-33] There is little merit in this contention. That the trial judge is not bound by the opinion of the witnesses on market value is well settled. The province of such testimony is only to aid the court in arriving at a conclusion. 10 Cal.Jur. 972. Furthermore, in the instant case the trial judge visited the premises, and the information so obtained "is independent evidence to be taken into consideration by the court in determining the issues of the case." Gibson Properties Co. v. City of Oakland, 12 Cal.2d 291, 297, 83 P.2d 942, 945, (an eminent domain case), and cases cited. In Joint Highway District No. 9 v. Ocean Shore R. R. Company, 128 Cal.App. 743, 18 P.2d 413, 421, the court did not even view the premises, but it was held therein that "The trial court was not obliged to blindly accept the estimate of any witness on market value, and properly made its own determination of the ultimate fact, aided by the testimony of the various witnesses weighed in the light of all of the evidence before the court."

The facts are that plaintiffs' property is admittedly zoned as industrial property and testimony as to its value as such was received; the trial court viewed the premises and reached its own conclusion as to the value of 125 foot front strip of the property and the back portion thereof; and the total amount of the damage awarded was within the scope of the testimony of the valuation witnesses. Joint Highway District No. 9 v. Ocean Shore R. R. Company, supra, 128 Cal.App. page 762, 18 P.2d 413; City of Stockton v. Ellingwood, 96 Cal. App. 708, 718, 275 P. 228. In view of these facts we cannot say that the finding of the trial court was not supported by the evidence.

Defendants contend that prejudicial error was committed by the trial court in the admission of evidence, the denial of its motion to strike certain evidence, and that consideration was given by the trial court in fixing the amount of recovery to elements of damage which are not compensable. Specifically, it is complained that some of the valuation witnesses and the court, in arriving at the amount of the damages suffered, considered as an element thereof the diversion of traffic from the street fronting plaintiffs' property; that is, that one of the elements of damage was that the improvement of the street caused a decrease in the flow of traffic thereon in front of plaintiffs' property. In this connection the record reveals the following: Plaintiffs' valuation witness Woodward, after testifying to the amount the property was damaged, testified as follows on cross-examination:

"Q. You state here that this property has been damaged in the amount you have testified to by reason of the decrease of the utility of the property. Now, just explain to me what the decrease of utility comes from? A. The decrease in utility comes from taking the property off a 66 foot thoroughfare with four lines of traffic in it, as well as to sidewalks of 12 feet in width and putting it on a lane 14 feet wide for vehicular traffic, and 3.6 feet wide for pedestrians. *That is not a frontage that is capable of supporting an industry, any large industry, and not a width of street that is capable of supplying the necessary ingress and egress from such a property.* It is nothing more than an alleyway, *then again it takes away from the property the major portion of the public traffic going to and from Mt. Eden and Hayward.*

"Q. And taking away the traffic you think would contribute to the damage, do you? A. I certainly do.

"Q. How much do you think that part of it would contribute to your damage? A. I could not say in dollars and cents.

"Q. It would be considerable, wouldn't it? A. It would be, yes.

"Q. You think a 3 foot sidewalk would effect that too? A. I certainly do. It would be impossible for two people to walk abreast on a 3 foot sidewalk and let anybody pass without stepping out in the street, or lane, so to speak.

"Q. That contributes to the damage here? A. Surely.

"Q. The fact that traffic won't go by there contributes as well? A. That contributes, then the fact that these lanes that you have put in there are only one way lanes and two trucks could not pass.

"Q. You have not been able to decide in your own mind, Mr. Woodward, how much the taking away of traffic from in front of the property would damage this property? A. I simply considered all of the elements that entered into my mind and arrived at a lump sum of what I believed the damage to be.

"Mr. Reed. If your Honor please, I would like to strike out Mr. Woodward's testimony on the basis that he has considered elements which are not compensable. The cases are uniform in holding that no property owner has a right to have traffic pass his door and that is not a compensable item of damage, and Mr. Woodward's testimony is based upon that basis.

"The Court. It all goes to the weight of the testimony, I believe. (Argument.)

"The Court. That is in so far as traffic is concerned.

"Mr. Wentz. We will stipulate that may go out.

"The Court. He said that was a part, only one of many things, so the testimony stipulated to go out.

"Mr. Reed. Just a moment, your Honor, I don't want to stipulate that may go out now. I brought it out of the witness on cross-examination.

"The Court. Let the objection stand overruled. Go right ahead." (Emphasis added.)

Woodward fixed the damage to the property at $8,040. Plaintiffs' witness, Andrade, fixed the damage at $6,860. It does not appear from the record that he considered the diversion of traffic as an element of damage. The only part of his testimony approaching that subject was as follows:

"It was a question of *accessibility to the property.* By accessibility, I did not mean the ability of traffic on the highway to get in front of the property and park there and do business and get away again. I mean being deprived of one of the main highways, and by putting an alleyway, a blind alleyway at that." (Emphasis added.) It is obvious that when he referred to the deprivation "of one of the main highways" he was referring to the impairment of access, rather than the diversion of traffic, the right of access being over and on the highway as it existed before the improvement. Plaintiffs' witness Leidig placed the damages at $6,200; as far as appears from the record he did not take into consideration the diversion of traffic as an element of damage. The trial court viewed the property. The findings of the court with respect to the damages were as follows: "that since said change of grade and said construction of said alley and sidewalk, plaintiffs' easement and right of egress from said property and ingress to said property from Jackson Street have been substantially impaired and damaged in this, that plaintiffs no longer have free access to and from Jackson Street; that it is impossible for plaintiffs to have access to Jackson Street, except by proceeding north upon said narrow alley to the termination thereof and entering Jackson Street through traffic coming in the same direction. That said lane or alley is too narrow through said underpass for two vehicles to use if traversing thereon in opposite directions."

"That these plaintiffs' right of easement in and upon Jackson Street for egress from plaintiffs' property and ingress onto plaintiffs' property has been substantially impaired by the change of grade hereinabove referred to and by construction of said sidewalk and alley way hereinabove referred to. That plaintiffs' property has depreciated in value by reason thereof to the extent of $40.00 per front foot; that said real property described in paragraph IV hereof, since the changing of said grade hereinabove described, and since the construction of said sidewalk and alley hereinabove described, is not in excess of the value of $35.00 per front foot; for 120 feet frontage on Jackson Street and 125 feet deep, and the remainder of plaintiffs' property has been damaged $200.00. That said property is not worth in excess of the value of forty-two hundred and no/100 ($42.00) dollars; that plaintiffs have been damaged, by said change of grade, the construction of the subway in the manner in which it was constructed, and by said construction of said alley and sidewalk, all of which deprive plaintiffs of any reasonable ingress to or egress from their said property, in the sum of five thousand dollars ($5,000.00)."

[34-37] The damage suffered by plaintiffs is, as we have seen, the interference with their right of access. The diversion of traffic is not a proper element to be considered in computing those damages inasmuch as a landowner has no property right in the continuation or maintenance of the flow of traffic past his property. Courts throughout the country are in substantial agreement as to the measure of damages in cases such as this, but there is a wide variance in the manner of establishing the amount of damage. Although it is wellnigh impossible to reconcile these conflicting decisions, it is believed that certain principles can be deduced therefrom which will serve to clarify the rules applicable in this state. Where private property is taken for a public use, it is universally agreed that the compensation required is to be measured by the market value of the property taken. 2 Lewis, Eminent Domain, 3d Ed., § 685, p. 1175; 1 Nichols, Eminent Domain, 2d Ed., § 217, p. 658; 3 Joyce, Damages, § 2184, p. 2238. Where private property is taken for a public use and damage results to the remaining property of the landowner, compensation for such damage must be awarded which is measured by the diminution in value of that property which remains. 2 Lewis, supra, § 694, p. 1200; 2 Nichols, supra, § 236, p. 721; 3 Joyce, supra, § 2186, p. 2242, et seq. If the state is required to make compensation for damage to private property resulting from a public use, where no property is actually taken, the measure of damages generally applied is also the diminution in the value of the property caused by the public use. 2 Nichols, supra, § 309, p. 822. This is so under the various provisions requiring compensation for damage whether they are constitutional (2 Lewis, supra, § 751, p. 1337) or statutory in nature. 1 Lewis, supra, § 342, p. 618.

Whenever it becomes necessary to estimate the amount of damage inflicted upon private property for the benefit of the public, whether or not there is a taking of property in conjunction with the damage, there is a danger that the decline in market value may be attributable to causes other than those for which the landowner is entitled to recover. Where there is a taking of private property, however, the damage to the remainder is nearly always attributed to that taking. Thus, courts of other states have frequently said that the amount of damage, that is, the depreciation in value of the remainder, may be established by testimony relating to any factor, even though noncompensable in itself, which would make the property less desirable in the eyes of a prospective purchaser. Barnes v. Commonwealth, 305 Mass. 339, 25 N.E.2d 737, 127 A.L.R. 104; Mississippi State Highway Comm. v. Hillman, 189 Miss. 850, 198 So. 565; Texas-Empire Pipe Line Co. v. Stewart, 331 Mo. 525, 55 S.W.2d 283; Louisville, etc., R. R. Co. v. Burnam, 214 Ky. 736, 284 S.W. 391; Ohio Public Service Co. v. Dehring, 34 Ohio App. 532, 172 N.E. 448; Regina v. Monroe County, 319 Pa. 257, 179 A. 36; Sterner v. Nixon, 116 N.J.L. 418, 185 A. 48; Long v. Shirley, 177 Va. 401, 14 S.E.2d 375; Idaho, etc., Ry. Co. v. Coey, 73 Wash. 291, 131 P. 810; 2 Nichols, Eminent Domain, 2d Ed., § 327, p. 896. Such factors do not constitute separate elements of damage for the purpose of recovery but are admitted solely for the purpose of establishing the depreciation in market value. Mississippi Highway Comm. v. Hillman, supra. As will be seen later, this doctrine is not followed in its entirety by certain courts, including those in this state.

[38] Where the necessity for assessing damage to private property arises apart from any taking of property by public authority, the problem of limiting the landowner's recovery to items for which he is legally entitled to recover damages becomes more acute. It is generally said everywhere that he has no right to recover for remote or speculative elements of damage. 3 Joyce, supra, § 2190, p. 2247; 2 Nichols, supra, § 239, p. 736. The English courts which first considered the problem under statutes awarding compensation for private property which was "injuriously affected" in behalf of the public permitted recovery only where the damage was one which would have been actionable as between private individuals. 2 Nichols, supra, § 308, p. 821; 1 Lewis, supra, p. 662; 3 Sedgwick, Damages, 9th Ed., § 1118, p. 2269. In certain eastern states where the problem of awarding such damages has been met by special statute, as in Massachusetts (see 1 Lewis, supra, § 312, et seq.), a broader rule was followed which denied recovery only when the damage suffered could be classified as general, rather than special, in nature and it was not required that the injury be one which would be actionable as between individuals. 2 Nichols, supra, §§ 309, 310, pp. 822 et seq. In other states an even broader right to recover damages resulting from acts of the public has been created. Although the constitutional provision in its standard form requires that compensation be made for property taken or damaged for public use, the courts of these states have extended the principle discussed above which is used for estimating damage where a part of the property is taken for public use and have applied it to cases where property is merely damaged for a public use. In such states it is said that, whether or not a taking of property is involved, the damage to a landowner's property is to be estimated by considering every element of annoyance or disadvantage resulting from the public construction which would tend to depreciate the value of the property in the eyes of a prospective purchaser. City of Omaha v. Kramer, 25 Neb. 489, 41 N.W. 295, 13 Am. St.Rep. 504; Chicago, R. I. & P. R. Co. v. O'Neill, 58 Neb. 239, 78 N.W. 521; cf. State Highway Comm. v. Smith, 146 Okl. 243, 293 P. 1002; Root v. Butte, A. & P. Ry. Co., 20 Mont. 354, 51 P. 155; 3 Sedgwick, supra, p. 2289. These courts have reaffirmed this doctrine in recent cases (Luchsinger v. Loup River, etc., Dist., Neb., 299 N.W. 549; State Highway Comm. v. Smith, supra) and have permitted a consideration of such elements as the diversion of traffic from the property of a landowner in estimating the damage caused by a public improvement. City of Omaha v. McGavock, 47 Neb. 313, 66 N.W. 415; Gillespie v. City of South Omaha, 79 Neb. 441, 112 N.W. 582; Root v. Butte, A. & P. Ry. Co., supra.

[39] In states such as California, where the recovery of damages depends upon the infringement of some right which the owner of land possesses in connection with his property, decisions have clearly indicated that, although the measure of damages is generally the diminution in market value, the evidence relied upon to establish such diminution must be based upon the depreciation flowing from the actionable injury which is the basis for the right to recover damages. Thus, in People v. Gianni, 130 Cal.App. 584, 20 P.2d 87, a small portion of land was taken for public highway purposes. It was contended on behalf of the landowner that because a small portion of land had been taken and because he was entitled to recover for that

injury, the damages to his remaining land should be based upon the total depreciation in the value of his remaining property even though that depreciation was caused primarily by an admittedly noncompensable element of damage, that is, diversion of traffic. The court said, however, that while diminution in market value was ordinarily the test of damage to real property, the damages must be limited to those which accrue *by reason of* the legal injury for which compensation was due. In a similar case, it was held that evidence as to the damage caused by a diversion of traffic by reason of highway construction was properly stricken from the record because the diminution in value resulting therefrom was not caused by any injury for which the landowner was entitled to recover damages. City of Stockton v. Marengo, 137 Cal.App. 760, 764, 31 P.2d 467. It will be noted that this result was reached in California where a taking of property was involved.

A similar conclusion must also be reached where damage alone is involved. Many courts have indicated that the diminution of value in such cases cannot be based upon elements of damage for which the landowner is not entitled to recover. Greer v. City of Texarkana, 201 Ark. 1041, 147 S.W. 2d 1004; City of Chicago v. Spoor, 190 Ill. 340, 60 N.E. 540; Camden Interstate Ry. Co. v. Smiley, 84 S.W. 523, 27 Ky.LawRep. 134; Harrison v. Louisiana Highway Comm., 191 La. 839, 186 So. 354. This is particularly true in so far as diversion of traffic is concerned, even in states where the applicable rules do not correspond to those in this state and in situations where a taking of property is also involved. Greer v. City of Texarkana, supra; State ex rel. Sullivan v. Carrow, Ariz., 114 P.2d 896; Ralph v. Hazen, 68 App.D.C. 55, 93 F.2d 68; City of Chicago v. Spoor, supra; State v. Hoblitt, 87 Mont. 403, 288 P. 181; State Highway Comm. v. Chatham, 173 Miss. 427, 161 So. 674; Heil v. Allegheny Co., 330 Pa. 449, 199 A. 341; City of El Paso v. Sandfelder, Tex.Civ.App., 118 S.W. 2d 950; Nelson v. State Highway Board, 110 Vt. 44, 1 A.2d 689, 118 A.L.R. 915. While a few cases have permitted a consideration of the depreciation caused by diversion of traffic, they are contrary to the weight of authority. See 118 A.L.R. 921 et seq.

The precise question involved here was presented to the court in City of Chicago v. Spoor, supra. In that case the building of a viaduct impaired the adjoining landowners' right of access. In testifying as to damage, the witnesses admitted upon cross-examination that one of the most prominent elements of damage was the altered nature of the traffic after the construction of the viaduct. The trial court refused to strike such testimony and the Supreme Court of Illinois commented (190 Ill. 340, 347, 60 N.E. 540, 541): "It appears * * * that the view of the court was that, while a party could not sue and recover for loss of profits to business on account of a viaduct, yet, if there was an injury to abutting property, there could be a recovery for everything that went to make up the market value of the lots, *whether it was a diversion of traffic* or whatever it might be. This being a suit where access to the property was affected, the court seems to have held that everything resulting from the improvement which affected unfavorably the utility of the property for business purposes was an element of damage."

And at page 350 of 190 Ill., at page 542 of 60 N.E.: "The evidence of damages resulting from diversion of traffic or changing the method of transportation on the street was not legitimate for any purpose, and opinions of witnesses based on depreciation from those causes should have been excluded."

At page 352 of 190 Ill., at page 543 of 60 N.E., the court pointed out: "It could not be said that, if a party should sue for damages on account of a diversion of traffic, he could not recover, because he had no legal right which had been infringed, but, if he sued for damage by cutting off access to his property, he could include damages from diversion of traffic, as to which he had no legal right."

This rule has been followed in later cases. Illinois P. & L. Corp. v. Talbott, 321 Ill. 538, 549, 152 N.E. 486; Illinois P. Co. v. Wieland, 324 Ill. 411, 415, 155 N.E. 272; 18 Am.Jur. 879; 22 A.L.R. 159, 163. We think that the rule laid down in City of Chicago v. Spoor, supra, is the correct one. Damages resulting from an interference with private rights of property must be estimated with reference to the diminution in value caused by that legal injury. The presence of a single compensable injury, such as the impairment of an easement, should not be made the basis for a recovery of the total depreciation in value of a landowner's property where it appears that much of the depreciation is attributable to legally noncompensable factors. This conclusion results inevitably from a consideration of previous decisions in this state and the principles which are controlling in those cases. People v. Gianni, supra; City of Stockton v. Marengo, supra; Wolff v. City of Los Angeles, 49 Cal.App. 400, 193 P. 862; cf. County Sanitation Dist. No. 2 v. Averill, 8 Cal.App.2d 556, 565, 47 P.2d 786; Coast Counties Gas & Elec. Co. v. Miller & Lux, 118 Cal.App. 140, 144, 5 P.2d 34.

[40, 41] Applying the above rules to the case at bar does not, however, necessitate a reversal of the judgment. In the first place it will be noted that defendants' motion was to strike *all* of Woodward's testimony. There was no effort to limit it to his estimate of the damages suffered. He testified concerning other matters which were properly presented in evidence. For illustration, he testified that he was familiar with plaintiffs' property, that the value of the improvements on the property was $1,200, that the property is best adapted to industrial use, that its use for agricultural purposes is not the best use to which it is adapted, that the property is improved with a residence, tank and barn, that the highway improvement interferes with the right of access, and that there is property being used for industrial purposes in the vicinity of plaintiffs' property. Defendants cannot predicate error on the denial of a general motion to strike all of Woodward's testimony, when only portions thereof were inadmissible. A motion to strike must be directed with precision to the matter sought to be stricken. Dietlin v. General American Life Ins. Co., 4 Cal.2d 336, 49 P.2d 590. A motion to strike out inadmissible evidence may be properly denied where it is general and embraces evidence which is admissible as well as that which is inadmissible. Powley v. Swensen, 146 Cal. 471, 80 P. 722; Brown v. Montgomery Ward & Co., 104 Cal.App. 679, 286 P. 474.

[42] In any event, it does not appear from the entire record that the error, if any, was prejudicial. It must be remembered that there is no indication from the findings of the trial court that it took into consideration the diversion of traffic as an element of damage. Plaintiffs had two valuation witnesses in addition to Woodward, and the amount of damages found to have been suffered was considerably less than that appearing from their testimony. The court viewed the premises and arrived at its own judgment as to the extent of the damages suffered. In Joint Highway Dist. No. 9 v. Railroad Co., supra, evidence of value was improperly admitted because elements were considered that should not have been, nevertheless the court held that the error was not prejudicial, stating at page 765 of 128 Cal.App., page 422 of 18 P.2d:

[43] "It may therefore be freely conceded that the above-mentioned evidence and other evidence in the record should have been stricken, but it does not necessarily follow that the action of the trial court in admitting such evidence and thereafter failing to strike the same constituted prejudicial error requiring a reversal. In City of Stockton v. Ellingwood, supra, at page 742 of 96 Cal.App., page 243 of 275 P., the court quotes from Conan v. Ely [City of Ely v. Conan], 91 Minn. 127, 97 N.W. 737, as follows: 'Ordinarily, the admission or exclusion of opinion evidence, where it is not of a determinative character, is not regarded as sufficient to justify a reversal.' This is more particularly true where, as in the present case, the cause was tried by the court sitting without a jury and it does not appear that the trial court's determination of market value was in any way influenced by the testimony erroneously admitted. While the objectionable testimony contained figures in excess of the highest estimates found in the competent testimony on market value, the trial court fixed the awards at figures far below the lowest estimates of market value found in any of the testimony, competent or incompetent, offered by respondents. It is quite apparent that the trial court made its own determination of the market value of the land, using the opinions on this subject merely as an aid for that purpose and giving to such opinions only the weight to which they appeared to be entitled. This was entirely proper and we find no prejudicial error in the admission of the incompetent testimony referred to or in the refusal to strike out said testimony." It was held in Reclamation Dist. No. 730 v. Inglin, 31 Cal.App. 495, 160 P. 1098, that a denial of a motion to strike valuation evidence was not prejudicial error although based on improper considerations, inasmuch as the jury's verdict was not in excess of the amount fixed

by that evidence. Injury will not be presumed from error. The appellant has the burden of showing wherein it was injured. This it has failed to do. Valid and admissible evidence amply supports the judgment, and we cannot say the result would have been different, if defendants' motion had been granted. The amount of the judgment, $5,000, indicates that the court did not base its decision on Woodward's testimony of damages amounting to $8,040. There is sufficient variance between the two figures to indicate that the judgment was based on the competent testimony of Andrade and Leidig, and the court's view of the premises and the other evidence in the record. The fact that the trial court denied the motion to strike does not necessarily show that its judgment was based on Woodward's erroneous presumption of the compensable elements involved. If it did, practically every case involving the improper admission of evidence would be reversed because of prejudicial error.

Other contentions raised by both parties do not require further discussion for they have been examined and found to be without merit.

For the reasons and upon the authorities contained herein, the judgment of the trial court is affirmed.

SHENK and CURTIS, JJ., concur.

HOUSER, Justice (concurring).

I concur in the judgment of affirmance, but I do not agree with that portion of the majority opinion which holds that damage suffered as the result of diversion of travel is not compensable.

GIBSON, Chief Justice (dissenting).

I dissent. The judgment in this case awards damages based upon non-compensable elements of injury and it should therefore be reversed for a new trial.

The principles of law upon which the court is in agreement may be stated as follows:

1. Article I, section 14, of the California Constitution is self-executing, and a cause of action may be stated under it without the necessity of express legislative sanction therefor.

2. An action may be maintained under article I, section 14, by the owner of property abutting upon a public highway for any substantial impairment of his easement of access to and from the highway caused by a public improvement.

3. Where the evidence shows, as in the present case, that the construction of a public improvement in the highway, although not immediately adjacent to the property line, interferes substantially with the landowner's means of ingress and egress, he is entitled to damages therefor.

4. The damages recoverable in such an action are those which flow from the impairment of the landowner's easement of access, and the evidence concerning the damage should be confined to matters bearing upon such impairment.

5. In this action the trial court committed error in permitting witnesses to base their testimony upon non-compensable items of damage, such as the diversion of public traffic from the highway upon which the property abutted. (The concurring opinion of Justice HOUSER indicates that he disagrees with this conclusion.)

The majority opinion, however, goes on to hold that the trial court's refusal to strike testimony based upon improper elements of damage was not error, or if it was error, was not prejudicial. I do not agree with this conclusion.

In California, and in certain other states, a liberal policy has been adopted in the admission of opinion evidence concerning damage to real property. In part, this policy has been justified on the ground that the basis for the opinion of the witness can be explored upon cross-examination. Razzo v. Varni, 81 Cal. 289, 22 P. 848; 86 A.L.R. 1449, 1450, 1459, 1460; 20 Am.Jur. 1001. As held by the majority opinion, the testimony of witnesses concerning damage to property in cases such as this must be confined to the diminution in value resulting from lawful elements of damage. City of Chicago v. Spoor, 190 Ill. 340, 60 N.E. 540; City of Stockton v. Marengo, 137 Cal.App. 760, 31 P.2d 467. Where cross-examination indicates that the opinion of a witness as to diminution in the value of property is based partially upon non-compensable items of damage which he is unable to segregate from the lawful elements of damage, a motion to strike his testimony should be granted. City of Chicago v. Spoor, supra; Hohmann v. Chicago, 140 Ill. 226, 29 N.E. 671; Illinois L. & P. Corp. v. Talbott, 321 Ill. 538, 152 N.E. 486; City of Kankakee v. Illinois Cent. R. Co., 263 Ill. 589, 105 N.E. 731; cf. San Diego Land, etc., Co. v. Neale, 88 Cal. 50, 63, 25 P. 977, 11 L.R.A. 604; City of Stockton v. Ellingwood, 96 Cal. App. 708, 716, 275 P. 228. Under these cases the opinion of such a witness should be stricken because if he is unable to segregate the proper from the improper elements involved in his estimate of damage, it is impossible for anyone to determine what part of his estimate is based upon proper elements. Since the opposing party is entitled to a proper estimate, the erroneous opinion should be stricken from the record to be replaced, if possible, with an estimate based upon lawful elements of damage. It is, of course, the general rule that a motion to strike should be directed specifically to the objectionable portion of a witness' testimony. But here the testimony was in the form of the witness' opinion which cross-examination disclosed to be based upon improper elements of damage. The witness was unable to state what part of his estimate rested upon the non-compensable items which he acknowledged formed part of the basis for his opinion. Since the foundation of his testimony was in part erroneous and since that part of his opinion which was due to improper elements could not be ascertained, the erroneous estimate of damage was unquestionably the proper subject of a motion to strike. If the erroneous estimate is stricken, nothing of value remains in his testimony. The grounds for the motion were clearly stated and are supported by the rules of law announced in the majority opinion. The trial court erred therefore in denying the motion to strike the testimony of the witness Woodward.

The mere presence of error does not authorize a reversal of the judgment below unless it appears that a miscarriage of justice has resulted. Constitution, art. VI, sec. 4½; Etienne v. Kendall, 202 Cal. 251, 257, 259 P. 752. It has been held in an action tried without a jury that the admission of erroneous opinion testimony as to value does not require a reversal of the judgment where the court fixed its award below the estimates of damage given by the witnesses and where it does not appear that the trial judge was influenced by the opinion evidence erroneously admitted. Joint Highway Dist. No. 9 v. Ocean Shore Railroad Co., 128 Cal.App. 743, 765, 18 P. 2d 413. In the present case, however, the record shows clearly that the trial judge did not realize that it would be improper for him to consider the testimony challenged by defendant's motion to strike. The motion was twice presented by defendant and denied by the trial court with the comment that the use of non-compensable items by the witness in reaching his estimate of the damage went only to the weight to be given his testimony. It is apparent, therefore, that the trial court did not apply the correct principles of law in assessing the damages which plaintiffs were entitled to recover. The majority opinion states there was other proper evidence which furnishes support for the award of damages made by the trial court, and that any error with regard to Woodward's testimony cannot be held prejudicial. It does not appear that the testimony of the plaintiffs' other two witnesses was challenged by a motion to strike upon the ground that they considered improper elements of damage in reaching their estimates. The record indicates, however, that these witnesses also used non-compensable factors as the basis for their opinions.

The witness Andrade in his testimony as to the inaccessibility of the property stated that he meant "being deprived of one of the main highways." He also considered the fact that, in proceeding in a southerly direction after leaving the Rose premises, it is now necessary to go a block to the north in order to turn and go south. A similar situation results when a highway is divided by a center island to prevent traffic accidents, and it certainly cannot be said that an abutting landowner's easement of access has thereby been impaired. At most, it is a matter of inconvenience. The witness also took into consideration as an element of damage the difficulty in gaining access, not to the highway, but to the existing spur track of the intersecting railroad which is located on private property across the highway from the Rose property. Plaintiffs' easement, however, is one of access to the highway itself and the damages must be limited to the impairment thereof. Similarly, the plaintiffs' third witness, Leidig, said that whatever value the property had for industrial purposes, upon which he based his estimate, resulted from the possibility of combining highway and railroad accessibility. The major damage caused by the subway construction, however, appears from his testimony to have resulted from the difficulty in gaining access to the railroad's existing spur track.

Considering the complete intermingling by all witnesses of the damages caused by non-compensable elements with those caused by the impairment of the plaintiffs' easement of access, and the indications that the trial judge had an erroneous view of what evidence was to be considered in awarding the damages, it is apparent that the judgment necessarily rests upon a misapplication of the law and awards substantial damages thereunder. This is reversible error under any theory.

The judgment should therefore be reversed for a new trial upon the issue of damages in accord with the principles which have been stated.

EDMONDS and TRAYNOR, JJ., concur.

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19 Cal.2d 876

BETTENCOURT v. STATE.

S. F. 16036.

Supreme Court of California.

March 4, 1942.

Rehearing Denied April 2, 1942.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

On rehearing.

Prior opinions, 94 P.2d 1066, and 105 P.2d 316.

Rehearing denied; GIBSON, C. J., and TRAYNOR, J., dissenting.

C. C. Carleton, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, all of Sacramento, for appellant.

John J. O'Toole, City Atty., and Henry Heidelberg and Albert F. Skelly, Deputy City Attys., all of San Francisco, and Ray L. Chesebro, City Atty., William H. Neal and Leon T. David, Asst. City Attys., and Arthur W. Nordstrom, Deputy City Atty., all of Los Angeles, amici curiae on behalf of appellant.

E. H. Christian and Eugene K. Sturgis, both of Oakland, for respondent.

Holbrook & Tarr, Leslie R. Tarr, Hill, Morgan & Bledsoe, Stanley S. Burrill, Charles P. McCarthy, Kenneth K. Wright, and Meserve, Mumper & Hughes, all of Los Angeles, amici curiae, on behalf of respondent.

CARTER, Justice.

This is one of several appeals from judgments entered in actions for damages arising out of highway construction work. In each instance, the facts are substantially the same, although the extent of the injury varies.

The amount awarded for damage in this particular case was the sum of $3,500. All material legal points here presented are disposed of in a decision this day filed in the case of Rose et. al. v. State of California et al., Cal.Sup., 123 P.2d 505. Upon the grounds and for the reasons there given, the judgment herein is affirmed.

SHENK, CURTIS, and HOUSER, JJ., concur.

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19 Cal.2d 877

BRANDON v. STATE.

S. F. 16037.

Supreme Court of California.

March 4, 1942.

Rehearing Denied April 2, 1942.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

On rehearing.

Prior opinions, 94 P.2d 1066, and 105 P.2d 316.

Rehearing denied; GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting.

C. C. Carleton, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, all of Sacramento, for appellant.

John J. O'Toole, City Atty., and Henry Heidelberg and Albert F. Skelly, Deputy City Attys., all of San Francisco, and Ray L. Chesebro, City Atty., William H. Neal and Leon T. David, Asst. City Attys., and Arthur W. Nordstrom, Deputy City Atty., all of Los Angeles, amici curiae on behalf of appellant.

E. H. Christian and Eugene K. Sturgis, both of Oakland, for respondent.

Holbrook & Tarr, Leslie R. Tarr, Hill, Morgan & Bledsoe, Stanley S. Burrill, Charles P. McCarthy, Kenneth K. Wright, and Meserve, Mumper & Hughes, all of Los Angeles, amici curiae on behalf of respondent.

CARTER, Justice.

This is one of several cases in which an appeal has been taken by the defendant from a judgment rendered against it for damages allegedly sustained by the plaintiff as the result of the construction of an improvement in the street or highway fronting the plaintiff's property. The facts in each case are substantially the same, although the amount of damage in each instance varies. For the injury to his property, plaintiff herein was awarded the sum of $750. All material legal questions here presented are determined by our decision this day filed in the case of Rose et al. v. State of California et al., 123 P.2d 505. Upon the authority of and for the reasons set forth therein the judgment appealed from herein is affirmed.

SHENK, CURTIS, and HOUSER, JJ., concur.

19 Cal.2d 874

JONES et al. v. STATE.

S. F. 16038.

Supreme Court of California.

March 4, 1942.

Rehearing Denied April 2, 1942.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

On rehearing.

Prior opinions, 94 P.2d 1066, and 105 P. 2d 317.

Rehearing denied; GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting.

C. C. Carleton, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, all of Sacramento, for appellant.

John J. O'Toole, City Atty., and Henry Heidelberg and Albert F. Skelly, Deputy City Attys., all of San Francisco, and Ray L. Chesebro, City Atty., William H. Neal and Leon T. David, Asst. City Attys., and Arthur W. Nordstrom, Deputy City Atty., all of Los Angeles, amici curiae on behalf of appellant.

E. H. Christian and Eugene K. Sturgis, both of Oakland, for respondents.

Holbrook & Tarr, Leslie R. Tarr, Hill, Morgan & Bledsoe, Stanley S. Burrill, Charles P. McCarthy, Kenneth K. Wright, and Meserve, Mumper & Hughes, all of Los Angeles, amici curiae on behalf of respondents.

CARTER, Justice.

This is an appeal by the defendant from a judgment for plaintiffs in an action for damages sustained as the result of the construction of a subway in the street fronting plaintiffs' property. The facts are substantially the same as those presented in several similar cases this day decided, the amount of the award in the instant case being $6,000. All material legal questions here presented have been determined in our decision filed this day in the case of Rose et al. v. State of California et al., 123 P.2d 505. Upon the authority of and for the reasons set forth therein, the judgment appealed from is hereby affirmed.

SHENK, CURTIS, and HOUSER, JJ., concur.

19 Cal.2d 875

LAUGHLIN v. STATE.

S. F. 16039.

Supreme Court of California.

March 4, 1942.

Rehearing Denied April 2, 1942.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

On rehearing.

Prior opinions, 94 P.2d 1067, and 105 P. 2d 317.

Rehearing denied; GIBSON, C. J., and EDMONDS and TRAYNOR, JJ., dissenting.

C. C. Carleton, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, all of Sacramento, for appellant.

John J. O'Toole, City Atty., and Henry Heidelberg and Albert F. Skelly, Deputy City Attys., all of San Francisco, and Ray L. Chesebro, City Atty., William H. Neal and Leon T. David, Asst. City Attys., and Arthur W. Nordstrom, Deputy City Atty., all of Los Angeles, amici curiae on behalf of appellant.

Louis J. Trabucco and Eugene K. Sturgis, both of Oakland, for respondent.

Holbrook & Tarr, Leslie R. Tarr, Hill, Morgan & Bledsoe, Stanley S. Burrill, Charles P. McCarthy, Kenneth K. Wright, and Meserve, Mumper & Hughes, all of Los Angeles, amici curiae on behalf of respondent.

CARTER, Justice.

Defendant herein appeals from a judgment of the Superior Court of Alameda County in favor of plaintiff, awarding $7,500 for the damages allegedly sustained by plaintiff as the result of the construction of a subway in the street fronting her property. This is one of a series of similar cases in which the facts, rights and liabilities, are substantially the same. All material legal questions here presented are disposed of in a decision this day filed in the case of Rose et al. v. State of California et al., Cal.Sup., 123 P.2d 505. Upon the authorities there cited and for the reasons there given, the judgment herein is affirmed.

SHENK, CURTIS, and HOUSER, JJ., concur.

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50 Cal.App.2d 545

GRACELAND et al. v. PEEBLER et al.

Civ. 13413.

District Court of Appeal, Second District, Division 2, California.
March 18, 1942.

Corporations ⚿599, 619

Surviving directors of a domestic corporation whose charter was suspended for nonpayment of franchise tax were not entitled to maintain an action in behalf of stockholders and creditors to quiet title to realty on the ground that under the second license tax act enacted in 1917, the corporation's charter was forfeited by its failure to pay its franchise tax involving a dissolution of the corporation so as to vest the directors with the authority sought for, since under the act the corporation's rights and privileges were only suspended by failure to pay the tax and were not forfeited, the words "suspended" or "forfeited" not being used interchangeably. St.1905, p. 493; St.1906, Ex.Sess., p. 22, § 10a; St.1917, p. 371; p. 376, § 9; Civ.Code, §§ 399a, 400.

See Words and Phrases, Permanent Edition, for all other definitions of "Suspend" and "Forfeit".

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Graceland, a corporation, and others against Byron Peebler and others to quiet title to real property. From a judgment on the pleadings for the defendants, plaintiffs appeal.

Affirmed.

J. M. Danziger and H. A. Andrews, both of Los Angeles, in pro. per. for appellants.

Roland Maxwell, of Pasadena, for respondents.

HANSON, Justice pro tem.

The sole question presented for decision is whether the surviving directors of a California corporation, whose charter was suspended in 1926 for nonpayment of its franchise tax, may now maintain an action in behalf of its stockholders and creditors to quiet title to realty. The trial court was of the view that the action could not be maintained and so sustained a motion of the defendants for judgment on the pleadings. In so holding we think the court was correct.

While the appellant directors concede that neither the corporation nor they, in its behalf, may maintain the action, as the statutes applicable bar a corporation which has failed to make timely payment of its franchise tax from exercising any corporate powers, rights or privileges (with exceptions not here material), they contend they may do so as its surviving directors. Their right so to do is rested upon the theory that the second license tax act, enacted in 1917, St.1917, p. 371—the provisions of which are here controlling—was, like the first license tax act of 1905, St.1905, p. 493, a "forfeiture" act and not a "suspension" act. Accordingly, they argue that when the corporation in 1926 failed to pay its franchise tax its charter was forfeited and not merely suspended, and that this involved a dissolution of the corporation. If their premise that the corporation was dissolved is correct it follows, as they contend, that Civil Code section 400 as it then existed—and as it is continued in substance in Civil Code section 399a—is sufficiently expansive to vest them with the authority for which they contend. However, we think that the premise is false and that the cases upon which they rely show it to be false.

As originally enacted in 1905 the first license tax act not only specifically provided that a domestic corporation's charter should be forfeited for nonpayment of its license or franchise tax, but it made no provision for a revivor thereof or for settling the affairs or disposing of the property of the corporation. On the following day the legislature cured this defect in part by amending Civil Code section 400 so as to give the surviving directors the power to settle the affairs of the corporation and to dispose of its property. But no provision was made to enable a revivor of the corporation if it chose to pay the tax liability which had accrued against it. In 1907 the legislature not only provided for such a revivor but amended the statute, St.1906, Ex.Sess., p. 22, section 10a, so as to give express power to the directors to settle the corporation's affairs and dispose of the property for the stockholders but not for the creditors. However, the rights of the latter were similarly provided for by Civil Code section 400. Hanson v. Choynski, 180 Cal. 275, 180 P. 816. This being the effect of the 1905 act, it remains only to determine whether the second license tax act, passed in 1917, changed the situation so as to result merely in the suspension of a corporation's activities under its charter rather than a forfeiture of its rights.

In arguing that no change in this respect was effectuated by the second license tax act appellants point to the fact that section 9 contains the phrase " 'suspended' or 'forfeited' corporation," and so they say the words "suspended" and "forfeited" are used interchangeably. But it is plain from a reading of the statute as a whole that the words were not used interchangeably. The language of the statute is that the corporate rights, privileges and powers of every *domestic* corporation which fails to pay its tax shall be *suspended,* and that the rights and privileges of every *foreign* corporation which fails to pay its tax shall be *forfeited.* Hence the phrase "forfeited," as used in section 9, refers alone to foreign corporations, and "suspended" to domestic corporations. Nowhere in the act is there any language indicating that the charter of a domestic corporation should be forfeited for nonpayment of its franchise tax. Not only does "suspension" not involve a dissolution of the corporation, but the second license tax act under which the instant corporation was suspended for nonpayment of its franchise tax specifically provides that such a corporation shall not be dissolved by any court until it has paid all taxes and penalties due under the act. Necessarily there could be no voluntary dissolution, as proceedings looking thereto would involve the exercise of corporate rights, privileges and powers. Accordingly, Civil Code section 400, as it existed at the time of the suspension, upon which the directors here rely for their right to maintain the action, is not applicable, as it deals only with corporations which are dissolved.

Cases cited by appellants, such as Rossi v. Caire, 186 Cal. 544, 199 P. 1042; Anthony v. Janssen, 183 Cal. 329, 191 P. 538; Brandon v. Umpqua Lumber, etc., Co., 166 Cal. 322, 136 P. 62, and Hanson v. Choynski, 180 Cal. 275, 180 P. 816, involve the first license tax act of 1905, while Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P. 335; Havemeyer v. Superior Court, 84 Cal. 327, 24 P. 121, 10 L.R.A. 627, 18 Am.St.Rep. 192, and Henderson v. Palmer Union Oil Co., 29 Cal. App. 451, 156 P. 65, involve merely the effect of Civil Code section 400 prior to the passage of the second license tax act in 1917. None of them contains a single ruling favoring the contention here made by appellants. On the contrary, such of the cases as touch on the point here involved interpret the 1917 act as we do. Moreover, another case not cited by appellants, Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 205 P. 446, while it does not touch directly on some of the points raised by appellants here, supports our holding. See, also, Smith v. Lewis, 211 Cal. 294, 295 P. 37.

For the reasons indicated the judgment is affirmed.

W. J. WOOD, Acting P. J., and McCOMB, J., concurred.

50 Cal.App.2d 612

NICOLA et al. v. PACIFIC GAS & ELECTRIC CO. et al.

Civ. 13164.

District Court of Appeal, Second District, Division 3, California.

March 20, 1942.

Rehearing Denied April 16, 1942.

Hearing Denied May 18, 1942.

1. Appeal and error 🔑1012(1)

The weight of evidence was for trial court sitting without jury.

2. Negligence 🔑44

The right of a proprietor of a place of business to wax a floor which customers are expected to use is not superior to his duty to use ordinary prudence and caution to avoid injury to those who come to his premises by invitation.

3. Negligence 🔑44

If wax or soap is applied to a floor in a place of business, it must be in such manner as to afford reasonably safe conditions for proprietor's invitees, and if such compounds cannot be used on a particular type of floor material without violation of duty to exercise ordinary care for safety of invitees, by reason of dangerous conditions they create, they should not be used at all.

4. Negligence 🔑44, 136(22)

That a floor is slippery does not necessarily result that it is dangerous to walk upon as respects liability to an invitee for injuries and it is the degree of slipperiness that determines whether condition is reasonably safe, which is a "question of fact".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

5. Negligence 🔑134(5, 7)

Evidence warranted recovery for injuries to invitee who slipped and fell on electric company's office floor which was covered with a composition material on ground that floor was slippery and that company had knowledge thereof.

6. Appeal and error 🔑1011(1)

Trial court's findings of fact based on conflicting evidence are conclusive on the appellate court.

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Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Action by Orazio Nicola and Teresina Nicola against the Pacific Gas & Electric Company and others to recover for injuries when last-named plaintiff fell on the floor of defendants' office. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Thos. J. Straub, W. H. Spaulding, and John J. Briare, all of San Francisco, for appellants.

Nelson & Castro, of San Luis Obispo, for respondents.

SHINN, Justice.

Plaintiff Teresina Nicola slipped and fell on the floor of defendants' ground floor office which she had visted on September 8, 1939, as an invitee seeking information regarding certain electrical appliances in her home for which defendants were furnishing electric power. Her husband joined with her in an action for damages, in which it was alleged and the court found that the floor of the office room was negligently maintained by defendants in a slippery and unsafe condition, of which defendants had notice and knowledge. The court found that plaintiff was not guilty of contributory negligence. Upon the appeal defendants challenge the sufficiency of the evidence to support the finding of negligence.

There was substantial evidence given at the trial to support the finding that the floor was slippery and that defendants had knowledge of it. The room in question was a large one with doors opening from the street. The floor of this room, including some 16 or 18 feet of space between the entry door and the quarters behind which defendants' employees worked, was covered with a composition material known as "asrock." This floor had been laid shortly prior to January 1, 1938, on which date defendants moved into the quarters. Upon its completion it was waxed but before occupying the room defendants required the contractor to remove the wax. Two women, witnesses for plaintiffs, testified that they slipped on the floor in January, 1938. One of them testified that she slipped about half way between the door and the counter; that the floor was shiny and appeared to be very slippery; that she visited the office once each month thereafter and that the floor on each occasion appeared to be the same except during the time when defendants had rubber mats on the floor. Another witness testified that she had visited the office regularly from the time it was opened until the end of 1939; that the floor was very slippery and very difficult to stand or walk on; that on each occasion when she visited the office she found the floor in a slippery condition. Defendants had knowledge that two people had fallen on the floor in January, 1938, and their district manager told the agent of the building that at times they would have trouble with the slippery floor inside the entrance door. Thereafter the floor was waxed from time to time, how frequently does not appear, the portions between the counter and the front windows receiving one-half gallon of wax diluted with water, and between waxings it was mopped with warm soap suds and every day it was "mopped up." It does not appear when, with reference to Mrs. Nicola's accident, warm suds and water had been used on the floor. While appellants' janitor testified that he had not used wax on the floor within six weeks before the accident, there was other evidence from which it could have been inferred that the slippery condition of the floor on the day of the accident was due to wax or perhaps soap that had been used on it. It was also in evidence that defendants' janitor had been cautioned a number of times by his superiors not to allow the floor to become slippery. The evidence was that the wax was not polished after being applied. A few days before plaintiff fell on the floor another woman had slipped and fallen. She testified that the floor was slippery and appeared as if it had been highly polished. This witness had fallen between the door and the cashier's window and testified that her feet slipped out from under her, that the floor was very slick. Another witness slipped on the floor on the day plaintiff fell and while plaintiff was still in the office. She likewise testified to the slippery condition of the floor, which she examined after she had slipped. Plaintiff on the day of the accident, on her first visit to the office, had traveled but a few feet inside the door when her right foot slipped and she fell heavily to the floor. She, also, testified that the floor was shiny and slippery. There was no evidence that any of these witnesses slipped or fell because of any foreign substance on the floor such as water, oil or grease or because of anything that was on their shoes or that at the respective times when they slipped or fell the floor was in other than its usual condition, although one witness testified that at the time she fell the floor appeared to have been recently polished.

[1] Opposed to this evidence was the testimony of defendants' employees that the floor was not slippery and the testimony of many witnesses that they visited defendants' office on the day of plaintiff's accident and did not slip or fall or observe any slippery condition of the floor. Much of appellants' argument is devoted to a discussion of the weight of the evidence such as properly would have been and no doubt was addressed to the trial court. It is unavailing in so far as it is addressed to the finding that the floor was slippery, as this finding is supported by the evidence noted. It is not contended that appellants were without knowledge of the condition of the floor at all times.

Appellants' argument goes further to assail the finding that the floor was maintained by defendants in a negligent manner, and they rely upon a rule, which has been followed by some courts in other jurisdictions, that the duty of an owner to exercise ordinary care is not violated by merely oiling or waxing and polishing a floor in the usual way although the floor is rendered slippery thereby. Bonawitt v. Sisters of Charity of St. Vincent's Hospital, 1932, 43 Ohio App. 347, 182 N.E. 661; Smith v. Union & New Haven Trust Co., 1936, 121 Conn. 369, 185 A. 81. This is contrary to the settled law as announced by our own courts.

[2-6] In Rothschild v. Fourth and Market St. R. Co., 1934, 139 Cal.App. 625, 628, 34 P.2d 734, it was held that evidence that a floor of a hallway maintained by the owner of a building for use by invitees of tenants of the building had been rendered slippery by the application of wax was sufficient to support a finding of negligence. This decision was in accord with those in Williamson v. Hardy, 1920, 47 Cal.App. 377, 190 P. 646; Lamb v. Purity Stores, Inc., 1932, 119 Cal.App. 690, 7 P.2d 197; Brinkworth v. Sam Seelig Co., 1921, 51 Cal.App. 668, 197 P. 427; and Brown v. Holzwasser, Inc., 1930, 108 Cal.App. 483, 291 P. 661. It has been followed in principle in Winsby v. Kertell, 1935, 10 Cal.App.2d 61, 50 P.2d 1075; De Verdi v. Weiss, 1936, 16 Cal.App.2d 439, 60 P.2d 879; Tuttle v. Crawford, 1936, 8 Cal.2d 126, 63 P.2d 1128, and Stoddard v. Roberts Public Markets, Inc., 1938, 27 Cal.App.2d 166, 80 P.2d 519. The

right of a proprietor of a place of business to wax a floor which the customers are expected to use is not one which upon any reasonable theory can be held to be superior to his duty to use ordinary prudence and caution to avoid injury to those who come to his premises by invitation. If wax or, as in the present case, both wax and soft soap, are applied to the floor, it must be in such manner as to afford reasonably safe conditions for the proprietor's invitees, and if such compounds cannot be used on a particular type of floor material without violation of the duty to exercise ordinary care for the safety of invitees, by reason of the dangerous conditions they create, they should not be used at all. Of course slipperiness is an elastic term. From the fact that a floor is slippery it does not necessarily result that it is dangerous to walk upon. It is the degree of slipperiness that determines whether the condition is reasonably safe. This is a question of fact. The trial judge could well have believed from the evidence that the surface of the floor was sufficiently hard and smooth to become unsafe with the application of wax or soft soap and water as they were used by appellants. In fact, if full credence was given to the testimony of plaintiff and her witnesses, and if it was believed that they had slipped and in some instances had fallen while walking across the floor in a careful manner, the trial judge could scarcely have believed that the floor was maintained in a wholly safe condition. And if the condition was as described by these witnesses it was for the trial judge to determine, as a fact, whether the condition was one which afforded reasonable safety to defendants' patrons or, in other words, whether defendants had exercised ordinary care with respect to the condition of the floor. Perhaps it would have been an entirely justifiable conclusion that the floor, although slippery, was reasonably safe for public use or that defendants used ordinary care with respect to its condition, but those questions of fact have been decided to the contrary upon substantial evidence, and we could not, even if we were so inclined, substitute our judgment for that of the trial judge. (See cases cited above.)

After the argument appellants, without leave of court, presented a supplemental brief which subsequently was allowed to be filed and respondents were given time to reply. In this brief appellants for the first time raised the point that plaintiff and one of her witnesses were erroneously allowed to state their opinions as to the condition of the floor. The circumstances called for an application under rule I section 5, for permission to file the supplemental brief. Nevertheless we have considered the point and find it to be devoid of merit. The trial judge on several occasions sruck out statements of conclusions and exhibited no little interest in confining the testimony to matters of fact.

The judgment is affirmed.

SCHAUER, P. J., and PARKER WOOD, J., concurred.

50 Cal.App.2d 494

WEINBERGER v. MANNING.

Civ. 13404.

District Court of Appeal, Second District, Division 2, California.

March 17, 1942.

1. Judgment ⇨153(2)

A default judgment may be set aside on satisfactory showing of the judgment debtor that his default was due to mistake, inadvertence, surprise, or excusable neglect, where motion for such relief is made within a reasonable time in no case exceeding six months after such judgment, order, or proceeding was taken. Code Civ.Proc. § 473.

2. Judgment ⇨143(2)

A judgment debtor was not entitled to have default judgment set aside unless it was the result of mistake, inadvertence, surprise, or excusable neglect on the part of the judgment debtor, notwithstanding any showing of merit in support of the motion to set aside judgment. Code Civ.Proc. § 473.

3. Judgment ⇨162(2)

The burden of proving that default judgment was due to excusable neglect as a basis for setting aside such judgment was on judgment debtor, who was required to establish such claim by a preponderance of the evidence. Code Civ.Proc. § 473.

4. Judgment 🔑143(3)

Courts are generous in relieving litigants of their defaults resulting from inadvertence or excusable neglect, but are not required to act as guardians for persons who are grossly careless as to their own affairs. Code Civ.Proc. § 473.

5. Judgment 🔑139

The decision upon a motion to open a default judgment is primarily within the discretion of the trial court, but such discretion may not be exercised arbitrarily but must be an impartial discretion guided and controlled in its operation by fixed legal principles. Code Civ.Proc. § 473.

6. Judgment 🔑143(2)

Trial court abused its discretion in setting aside a default judgment and recalling an execution after the lapse of 82 days from service of the summons and complaint, where no excusable neglect on the part of judgment debtor was shown. Code Civ.Proc. § 473.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Grace L. Weinberger against Kathleen Manning for an eviction and for conversion. From an order setting aside a default judgment in favor of plaintiff and recalling an execution, the plaintiff appeals.

Order reversed.

E. R. Simon, of Los Angeles, for appellant.

Willedd Andrews of Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for determination in this case is whether it is an abuse of discretion on the part of a trial judge to set aside a default judgment and recall an execution after the lapse of 82 days from service of the summons and complaint when no excusable neglect on the part of defendant is shown.

In order fairly to appraise the conduct of defendant we first present a succinct resume of the undisputed occurrences commencing with the filing of the action by plaintiff.

April 22, 1941: Action for damages for eviction and for conversion filed.

May 1: Summons and complaint served. Defendant is advised by attorney Seay, an office associate of Mr. Simon, attorney for plaintiff, that a written answer in form prescribed by court rules must be filed; that it should be prepared by her attorney; that she must pay a filing fee of $2. She then stated to attorney Seay "the whole thing is a joke to me and I don't intend to get a lawyer. * * * I don't intend to do anything about the matter."

May 9: Defendant wired the superior court "received summons #463430 * * * she was not evicted or dispossessed * * * notify me when and where to appear." On the same day she wired plaintiff's counsel that plaintiff had "jumped $517 rent by moving last August 20 * * * was neither evicted or dispossessed * * *"

May 10: The county clerk wrote defendant "complaint filed April 22, 1941, * * * no further proceeding appears of record. * * * If you wish to contest this action, we suggest that you consult an attorney."

May 13: Order for default filed by plaintiff's counsel.

May 31: Defendant exhibited complaint to a lay friend who advised her to consult counsel; he made an appointment with attorney Maddox for her.

June 2: Maddox advised defendant that no sufficient answer was on file; that she should immediately engage counsel to protect her rights; that her telegram to the county clerk was not a sufficient answer; that she was not protected; that nothing would prevent plaintiff from obtaining judgment against her; that her answer must be in writing in form prescribed by court rules and verified; that she should file a proper answer; that she might file the answer herself if she knew how to prepare same. Only her default had then been entered. She thanked him and left.

June 5: Default judgment for plaintiff was signed and filed. This was 23 days after entry of default.

June 6: Judgment entered.

June 17: Plaintiff's judgment against defendant garnished under execution issued out of municipal court, case No. 577778.

June 20: Defendant first consults her attorney, Carey, who advises her of the entry of the judgment. This was 50 days after service of summons on her.

June 28: Plaintiff's judgment levied upon under judgment of the municipal court in action No. 587322.

July 1: Attorney Carey writes Mr. Simon, plaintiff's attorney of his intention to move to vacate the default judgment and requests him to defer proceedings until disposition of the motion.

July 8: Abstract of judgment issued and recorded; execution issued and delivered to the sheriff.

July 9: Execution served on head office of the Security First National Bank.

July 16: Execution served on same bank, 7th and Grand and Hollywood and Cahuenga branches.

July 18: Execution served on Douglas Aircraft.

July 18: Carey requests attorney Simon to stipulate that all property held by garnishees be held in statu quo until disposition of his motion to open the case.

July 18: Sheriff demands payment to him of moneys garnished in the Hollywood Cahuenga branch of the bank, payment refused.

July 18: Order staying execution signed.

July 19: Order served on sheriff.

July 21: 7th and Grand branch of garnisheed bank answers garnishment.

July 22: Notice of motion to set aside default and to recall execution served on plaintiff's counsel together with supporting affidavits.

August 5, 1941: Trial court granted motion and entered order recalling execution, setting aside default and judgment and allowing defendant to answer.

[1] A default judgment may be set aside upon satisfactory showing of the judgment debtor that his default was due to mistake, inadvertence, surprise or excusable neglect. The motion for such relief "must be made within a reasonable time, in no case exceeding six months, after such judgment, order or proceeding was taken." C.C.P. sec. 473.

[2-5] The first question for determination under the cited section is whether or not there was a mistake, inadvertence, surprise or excusable neglect on the part of defendant. If there was not then she is not entitled to relief, notwithstanding any showing of merits "in support of her motion." Bond v. Karma-Ajax Consol. Min. Co., 15 Cal.App. 469, 472, 115 P. 254. The burden of proof in such a matter is upon defendant and she was required to establish her claim of excusable neglect by a preponderance of the evidence. Bruskey v. Bruskey, 4 Cal.App.2d 472, 41 P.2d 203. While courts are generous in relieving litigants of their defaults resulting from inadvertence or excusable neglect yet they are not required to act as guardians for persons who are grossly careless as to their own affairs. Gillingham v. Lawrence, 11 Cal.App. 231, 233, 104 P. 584. All persons in possession of their normal faculties, capable of engaging in business transactions must conform with, and be guided by, the rules and regulations of legal procedure. Ibid. While the decision upon a motion to open a default is primarily within the discretion of the trial court, at the same time such discretion may not be exercised arbitrarily; it must be an "impartial discretion guided and controlled in its exercise by fixed legal principles." Brill v. Fox, 211 Cal. 739, 297 P. 25, 26.

[6] The excuses and explanations given by defendant for her failure to file her answer are not adequate. They do not present a showing of that species of inadvertence or neglect which ordinarily characterizes the behavior of a suppliant for relief from a default judgment. Her indifference to the reply received to her telegraphic communication to the superior court eight days after service of summons is a demonstration of her desire to let time and tide dissolve her troubles. Her indisposition to move was again disclosed by her disregard of the advice of attorney Seay courteously given before the time for pleading had expired. Her reluctance was magnified by her indifference to the advice of her loyal lay friend who thirty days after service admonished her to retain counsel to protect her rights. Her neglect turned into contempt of judicial process by her inaction throughout the month of June after attorney Maddox had forcefully remonstrated with her to place her cause in the hands of legal counsel. Not one act of defendant in relation to her law suit should warrant a court in yielding to her persuasions. Redding, etc., Mining Co. v. National Surety Co., 18 Cal.App. 488, 123 P. 544; Durbrow v. Chesley, 24 Cal.App. 416, 141 P. 631. She hearkened neither to the suggestion of a cautious friend, the admonition of the county clerk nor to the sound advice of responsible attorneys. Not until she was electrified by the service of a writ of garnishment issued out of a different court did she finally move to open the default on the second day of June

when she consulted attorney Maddox. This was three days before the court took evidence and rendered judgment. Within that period she could have prepared and presented her answer to the court before the rendition of judgment with a request for relief under section 473. The record shows that she is a woman of considerable wealth and that for some time she had retained counsel for legal advice concerning her properties. In view of the repeated admonitions to employ counsel to file her answer, her behavior is more reprehensible than that of one who is guilty of gross negligence only. See Garroway v. Jennings, 189 Cal. 97, 99, 207 P. 554. The diligence required of a reasonably prudent person would not only have taken defendant to the office of her counsel instructing him to institute proceedings to set aside the default but it would have led her to file her answer within the time prescribed by law, notice of which appeared on the face of the summons served on her. After she had maintained an attitude of contemptuous disregard for legal process, to grant her request to set aside the order of her default would be to encourage trifling with the courts.

Our conclusion is fortified by a review of a number of persuasive authorities. In the case of Fink & Schindler Co. v. Gavros, 72 Cal.App. 688, 692, 237 P. 1083, the negligence of Gavros was far less reprehensible than the conduct of defendant Manning. He was apparently of foreign origin and might readily have believed that the employment of counsel by his codefendant would prevent judgment against himself. However, the order vacating the default of Gavros was reversed.

In the case of W. J. Wallace & Co. v. Growers Security Bank, 13 Cal.App.2d 743, 57 P.2d 998, the negligence of the defendant did not in the slightest degree exceed in culpability that of Mrs. Manning but the refusal to vacate the default was affirmed. The conduct of the officials of the bank in the Wallace case could be characterized by nothing more than inexcusable negligence.

Numerous orders denying relief under section 473, C.C.P., for failure to appear within the time designated by the summons have been affirmed because of a lack of sufficient excuse. Gillingham v. Lawrence, 11 Cal.App. 231, 233, 104 P. 584; Coleman v. Rankin, 37 Cal. 247. We see nothing in respondent's conduct to warrant her relief.

Order reversed.

W. J. WOOD and McCOMB, JJ., concurred.

50 Cal.App.2d 617

CHRISTIAN et al. v. RICE GROWERS ASS'N OF CALIFORNIA.

Civ. 6742.

District Court of Appeal, Third District, California.

March 20, 1942.

1. Agriculture 🔑6

Evidence sustained finding that licensed agent of the Rice Growers Association of California, whose duties involved contacting producers and seeing that rice was harvested and warehoused, was not the "general agent" of the Association and was not clothed with "actual authority" to bind the Association to pay for sacks and twine delivered at agent's request to rice growers whose crops were handled by the association. St.1937, p. 715, § 1261.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Authority" and "General Agent".

2. Appeal and error 🔑1008(1)

Whether the licensed agent of the Rice Growers Association of California, whose duties involved keeping in contact with rice growers and seeing that crop was harvested and warehoused, had ostensible authority to bind the Association to pay for sacks and twine delivered at the request of such agent to certain rice growers, whose crops the Association handled, was a "question of fact" for the trial court. Civ.Code, § 2317; St. 1937, p. 715, § 1261.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

3. Principal and agent 🔑99

"Ostensible authority" must be established through the acts or declarations of the principal and not through the acts or declarations of the agent. Civ.Code, § 2317.

See Words and Phrases, Permanent Edition, for all other definitions of "Ostensible Authority".

Appeal from Superior Court, Colusa County; Ben R. Ragain, Judge.

Action by Henry J. Christian and others against Rice Growers Association of California, a corporation, to recover for sacks and twine delivered by plaintiffs to certain rice growers allegedly at the request of the defendant. From a judgment in favor of defendant, plaintiffs appeal.

Judgment affirmed.

Fontaine Johnson, of Sacramento, for appellants.

George R. Freeman and Elmer Laine, both of Willows, for respondent.

TUTTLE, Justice.

This is an action brought by Christian Bros., a copartnership, as plaintiffs and appellants, against the Rice Growers Association of California, a domestic corporation, as defendant and respondent, under the common counts, for goods, wares and merchandise sold and delivered, to wit, sacks and twine delivered by the plaintiffs and appellants to Herman Kalfsbeek and Ray C. Tolson, at the request of the defendant and respondent Rice Growers Association of California. Findings were made in favor of defendant upon all issues, and it was adjudged that plaintiff take nothing by said action. The appeal is from the judgment.

The chief contention made by appellants is that the evidence is insufficient to support a finding to the effect that one L. L. Hyde had no authority to bind respondent in the matter of the payment for bags, sacks and twine furnished by appellants.

The evidence shows that Hyde was a licensed agent for respondent under section 1261 of the Agricultural Code, St. 1937, p. 715, which reads as follows:

"The term 'agent' means any person who, on behalf of any commission merchant, or dealer, or broker receives contracts for or solicits *any farm products* from a producer thereof or who negotiates the consignment or purchase of *any farm product* on behalf of any commission merchant, dealer or broker." (Italics ours—respondent's.)

The undisputed facts show that the appellants for some time had supplied bags, sacks and twine to Kalfsbeek and Tolson who were engaged in growing rice, and had become apprehensive about being paid for the merchandise. About October 27, 1937, meeting L. L. Hyde, a representative of the respondent, George Christian, one of the appellants, advised Hyde of the situation. Hyde requested Christian to deliver the sacks to Kalfsbeek and Tolson. At the same time Hyde presented Christian with what Hyde referred to as an "order." Christian never read this document, but following Hyde's advice he took it to Tolson who signed it. Thereupon appellants delivered the merchandise. On February 7, 1938, several months later, appellant wrote to the respondent requesting payment and was informed on February 24, 1938, for the first time, both orally and by letter, that the respondent did not consider itself responsible for the obligation. In the latter part of January or the early part of February, 1938, appellants received a draft from the respondent in the sum of $30, with a notation "in full payment of amount to be applied on account of Kalfsbeek and Tolson, 1937 crop." This draft was never cashed. The respondent had advanced money from time to time to Kalfsbeek and Tolson for the purchase of seed, and was handling their crop. Respondent paid warehouse, hauling and drying charges. The rice crop was delivered to respondent. The merchandise was delivered by appellants to Kalfsbeek and Tolson and was used by them in handling the rice crop delivered to respondent. This delivery was made after the conversation between Hyde and appellant Christian, and after Christian had refused to deliver any sacks to the account of Kalfsbeek and Tolson. The merchandise was of the value of $1,180.40. The appellants called no witnesses on the issue of Hyde's authority, other than Hyde himself, and his testimony in reference to his duties and authority is sufficient to sustain the findings. Hyde testified:

"Mr. Freeman. Q. Were you authorized by anybody in the Rice Growers Association to buy any sacks? A. No.

"Q. And as a field man, Mr. Hyde, what were your duties? A. My duties were to contact members of the Association and independent growers, to assist members of the Association in obtaining seed and carrying information between the Association office and the members themselves.

"Q. Were you ever at any time authorized by the Rice Growers Association of California to furnish any sacks to Tolson and Kalfsbeek? A. No.

"Q. Did you ever purchase any sacks from Mr. Christian, the plaintiff in this case? A. No.

"Q. Did you ever agree to pay for any sacks? A. No.

"Q. Did you ever at any time tell Mr. Christian that the Rice Growers Association would pay for those sacks, regardless of the outcome of the crop? A. No.

"Q. Were you ever authorized by anybody in the Rice Growers Association to make any such statement as that? A. No.

"Q. Did you handle any of the finances at all of the Rice Growers Association? A. No, never did.

"Q. Did you do any buying for the Rice Growers Association? A. No.

"Q. Were you ever authorized by the Rice Growers Association to guarantee the payment to anybody for supplies furnished to any grower? A. No.

"Q. And did you as a fact in this case ever guarantee the payment of this bill for sacks? A. No."

George R. Freeman, general counsel and assistant to the president of the association, testified as a witness for the respondent as follows.

"Mr. Laine. Q. What are the duties Mr. Freeman of the field representative? A. The field representative goes out in the field—

"Mr. Miller. I am going to object to this testimony, your Honor, unless it is made specific.

"The Court. Objection overruled. A. The field man is supposed to go out and keep in contact with the members of the Association and to do anything else required by the officers, to get the number of sacks of rice warehoused, and see how the harvest is carried on, to be of assistance to our own growers; in the event we purchase rice, to see that the rice goes into the trucks, or if by rail, into the cars, and to report to the Association. That is generally their duties. They haven't any other duties than those things, to do what they are told to.

"Q. Mr. Laine. Do they have any authority to buy on behalf of the Association any supplies, sacks or supplies of any kind * * *? A. They have not."

[1, 2] The provisions of the Agricultural Code have no application in this case. The code does not prescribe the authority of an "agent" within the meaning of the act, and furthermore, the transaction involved does not involve a contract for, or solicitation of, "any farm products from a producer thereof" or the negotiation of the consignment or purchase of "any farm product on behalf of any commission merchant, dealer or broker." Sacks and twine are obviously not "farm products." We think that there was sufficient evidence to sustain the finding under the theory that Hyde was not the general agent of respondent, and clothed with the actual authority to bind it. Neither do we hold that the record, as a matter of law, shows that the agent had ostensible authority to bind respondents. It is provided in section 2317 of the Civil Code that "ostensible agency is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Whether or not Hyde was the agent of respondent was a question of fact for the trial court. Willey v. Clements, 146 Cal. 91, 79 P. 850.

[3] The law is well settled that ostensible authority must be established through the acts or declarations of the *principal* and *not* through the acts or declarations of the *agent*. In Hansen v. Farmers' Auto. Inter-Ins. Exch., 139 Cal.App. 388, at page 393, 34 P.2d 188, at page 190, the court states: "* * * It is well settled that apparent or ostensible authority of an agent can arise by implication only from the words, act or conduct of the principal and not from anything said or done by the agent."

In Wiley B. Allen Co. v. Wood, 32 Cal. App. 76, at page 84, 162 P. 121, at page 124, the court states: "The application of the rule of ostensible agency or authority depends primarily upon the acts or conduct or words of the principal, and not upon the acts or conduct or words of the agent. The rule is that a principal will be bound by those acts of his agent which he has given other persons reason to suppose are done by his authority, but, as suggested, such authority arises by implication, and can only spring from the words, acts, or conduct of the principal."

The record in the present case shows that Hyde at no time did any buying of supplies for the account of the association, in fact, Hyde did not handle any of the finances of the association. There is no evidence that the association or any of its officers had any notice or knowledge of any claim that Hyde had attempted to bind the association to pay for the sacks and twine furnished by the appellants to Kalfsbeek and Tolson, and there is no evidence of any acts or declarations of the association or any of its officers which in any way could have led the appellants to believe that Hyde had any authority to bind the association by the purported purchase of sacks and twine for the use of a rice grower.

In reference to the issue of ostensible authority, the trial court properly held that: "* * * there is no evidence that Rice Growers Association knew Mr. Hyde acted in excess of authority, and the first proof of notice of Christian Bros.' claim against the Rice Growers Association, to the Rice Growers Association, was the letter written by Mr. Christian on February 7, 1938, three months after delivery of the bags and twine."

The judgment is affirmed.

THOMPSON, Acting P. J., and STEEL, J., pro tem., concurred.

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50 Cal.App.2d 637

UNITED STATES GUARANTEE CO. v. MATSON NAV. CO.

Civ. 11782.

District Court of Appeal, First District, Division 2, California.

March 23, 1942.

Hearing Denied May 21, 1942.

1. Maritime liens 🔑73

Where attachment issued against a vessel to secure full amount prayed for as against both defendants in action to recover for work and materials furnished for vessel's benefit, such amount constituted the "demand in suit" within statute providing that after an attachment is levied on a vessel its owner may have attachment discharged upon giving to sheriff an undertaking in an amount sufficient to satisfy the demand in suit. Code Civ.Proc. § 822.

See Words and Phrases, Permanent Edition, for all other definitions of "Demand in Suit".

2. Maritime liens 🔑73

Where an attachment was issued against a vessel to secure full amount prayed for as against both defendants in action to recover for work and materials furnished for vessel's benefit, an undertaking by a surety, to release vessel from attachment, to pay amount of whatever judgment might be recovered in the action amounted to no more than an agreement to pay the demand in suit or any part of it in case of recovery of judgment by plaintiffs, and hence the undertaking was no broader than requirement of statute. Code Civ.Proc. §§ 813, 815, 817–820, 822.

3. Maritime liens 🔑73

Where an attachment was levied on a vessel in connection with an action to recover for work and materials furnished for vessel's benefit, and owner gave an undertaking as provided by statute to obtain release of vessel from attachment instead of proceeding by a motion for discharge of attachment, in subsequent action against owner by surety on undertaking for reimbursement for sums paid by surety in settlement of an action by plaintiffs in attachment proceedings the owner was "estopped" from questioning sufficiency of complaint in original action to support issuance of writ of attachment and from urging that the demand in suit was not secured by a lien upon vessel. Code Civ. Proc. §§ 813, 815, 817–820, 822.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

◆

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by the United States Guarantee Company, a corporation, against the Matson Navigation Company, a corporation, for reimbursement for sums spent by plaintiff in settlement of a prior action. From a judgment for plaintiff, defendant appeals. Affirmed.

Brobeck, Phleger & Harrison and M. B. Plant, all of San Francisco, for appellant.

Ackerman, Wayland & Mathews, Lloyd S. Ackerman, and George H. Johnston, all of San Francisco, for respondent.

DOOLING, Justice pro tem.

On December 6, 1936, Steffgen and Barclay commenced an action in the Superior Court of San Diego County against Matson Navigation Company and Showboat Hotels, Inc., for the recovery of $4,959.90 for "work, labor, materials, equipment, supplies and repairs" alleged to have been furnished at the special instance and request of the defendants "for the benefit of the steamer or vessel" "City of Los Angeles." The complaint alleged that the vessel was owned by Matson Navigation Company and that "the plaintiffs have and claim a lien upon the said vessel, or boat, with its tackle, apparel, and furniture, under the provisions of Chapter VI, of Part II of Title X of the Code of Civil Procedure of the State of California" for the amount sued for. The prayer asked for a personal judgment against both defendants, that a writ of attachment be issued for the attachment of the "City of Los Angeles" with its tackle, apparel and furniture and that the same be decreed to be sold to satisfy the plaintiffs' claim. The complaint was verified as required by section 815, Code of Civil Procedure, and the plaintiffs Steffgen and Barclay having furnished the undertaking required by section 818, a writ of attachment issued against the vessel and it was attached by the sheriff all pursuant to sections 817 to 820, Code of Civil Procedure.

The writ of attachment recited the commencement of an action "to enforce a maritime lien" against the "City of Los Angeles" and commanded the sheriff to attach the vessel and "to keep the same in your custody until discharged in due course of law, unless said defendants give you security, by giving to you the undertaking mentioned in section 822 of the Code of Civil Procedure." Thereafter Matson Navigation Company in San Francisco requested United States Guarantee Company as surety to execute and deliver an undertaking to release the vessel from this attachment and United States Guarantee Company through its San Diego agents using a printed form executed and delivered an undertaking, in the sum of $6,000, which was approved by a judge of the superior court and upon its delivery to the sheriff he released the vessel. The printed form of undertaking furnished and used was the form for the release of an ordinary attachment and its recitals were not patterned on the special provisions of part II, title X, chapter VI (secs. 813-827) of the Code of Civil Procedure. It bound the surety to pay "the amount of whatever judgment may be recovered in said action."

Thereafter Steffgen and Barclay in that action recovered judgment against Matson Navigation Company for $2,750 which Matson Navigation Company paid, and against Showboat Hotels, Inc., for $2,200 with certain interest and costs. The trial court found as to the amounts of both recoveries that they were not lienable under section 813, Code of Civil Procedure. After demand on United States Guarantee Company by Steffgen and Barclay to pay the amount of their judgment against Showboat Hotels, Inc., Steffgen and Barclay commenced an action on the undertaking and United States Guarantee Company paid to Steffgen and Barclay the sum of $2,429.55 in settlement of that action.

United States Guarantee Company then brought the present action against Matson Navigation Company for reimbursement and from a judgment for plaintiff Matson Navigation Company prosecutes this appeal.

Appellant argues that the undertaking furnished was broader in its obligations than required and that it should have been limited either to the payment of any judgment which was decreed to be a lien upon the attached vessel or at most to the payment of any judgment recovered against Matson Navigation Company. The decision of this question depends upon the construction to be placed upon the relevant sections of the Code of Civil Procedure and the allegations of the verified complaint filed by Steffgen and Barclay in the original action which resulted in the issuance of the attachment.

Section 813, Code of Civil Procedure, provides, so far as here material:

"All steamers, vessels, and boats are liable:

"1. For services rendered on board at the request of, or on contract with, their respective owners, masters, agents, or consignees.

"2. For supplies furnished in this state for their use, at the request of their respective owners, masters, agents, or consignees.

"3. For work done or materials furnished in this state for their construction, repair, or equipment."

Subdivisions 1 and 2 make the liability of the boat (the creation of a lien upon it) dependent both upon the rendering of services on board or the furnishing of supplies for its use and the request of or contract for such supplies or services by the owner, master, agent or consignee. Subdivision 3 makes the boat liable for work done or material furnished for its construction, repair or equipment without qualification. The complaint counted on "work, labor, materials, equipment, supplies and repairs for the benefit of said vessel" furnished "at the special instance and request of the defendants" and alleged the existence of a lien on the vessel therefor. It is obvious that if Showboat Hotels, Inc., was the agent or consignee within the meaning of subdivisions 1 and 2 or, as to equipment and repairs to the vessel, without regard to the status of Showboat Hotels, Inc., debts contracted by it would constitute liens on the vessel if they otherwise fell within the definitions of the first three subdivisions of the section. The verified complaint, which under the pertinent provisions of the Code of Civil Procedure takes the place of an affidavit in support of the attachment, asserted a lien against the vessel for the entire amount in suit. Whether its allegations were sufficient to support the issuance of the writ, if directly attacked upon motion to discharge the attachment, we need not pause to inquire, in view of the well settled rule of estoppel upon which the judgment in this case in our opinion was properly grounded.

The undertaking in this case was given under section 822, Code of Civil Procedure which reads: "After the attachment is levied, the owner, or the master, agent, or consignee of the steamer, vessel, or boat, may, in behalf of the owner, have the attachment discharged, upon giving to the sheriff an undertaking * * * in an amount sufficient to satisfy the demand in suit * * *."

[1, 2] In view of the fact that the attachment issued to secure the full amount prayed as against both defendants that constituted "the demand in suit" within the meaning of the section, and the undertaking to pay "the amount of whatever judgment may be recovered in said action" amounted to no more than an agreement to pay "the demand in suit" or any part of it in case of the recovery of a judgment by plaintiffs. It therefore was no broader than the requirement of section 822.

It is to be noted in this connection that after the levy of the writ of attachment appellant had two courses open to it to release its vessel. It could furnish the undertaking under section 822, which it elected to do in this case; or it could proceed under section 823 which reads: "After the appearance in the action of the owner, the attachment may, on motion, also be discharged in the same manner, and on like terms and conditions, as attachments in other cases * * *."

If appellant had elected to proceed under section 823 it could have attacked the sufficiency of the allegations of the complaint (which in this special type of attachment takes the place of an affidavit) to support the issuance of the writ of attachment (Anaheim National Bank v. Kraemer, 120 Cal.App. 63, 7 P.2d 765; O'Connell v. Walker, 12 Cal.App. 694, 108 P. 668) or by counter proof it could have established that no lien existed on the vessel to secure all or any part of the demand in suit. Fisk v. French, 114 Cal. 400, 46 P. 161; Barbieri v. Ramelli, 84 Cal. 174, 24 P. 113; Gessner v. Palmateer, 89 Cal. 89, 24 P. 608, 26 P. 789, 13 L.R.A. 187; Sparks v. Bell, 137 Cal. 415, 70 P. 281.

[3] Having elected to give the undertaking provided for in section 822, instead of proceeding by motion to discharge as provided in section 823, appellant under an unbroken line of authority is estopped to question the sufficiency of the complaint to support the issuance of the writ or to urge now that all or any part of the "demand in suit" was not secured by a lien upon the vessel. McMillan v. Dana, 18 Cal. 339, 349; McCormick v. National Surety Co., 134 Cal. 510, 511, 66 P. 741; McCutcheon v. Weston, 65 Cal. 37, 2 P. 727; Passow & Sons v. United States F. & G. Co., 177 Cal. 31, 170 P. 1124; Koehler v. Serr, 216 Cal. 143, 13 P.2d 673, 89 A.L.R. 262. The authorities are exhaustively reviewed in Passow & Sons v. United States F. & G. Co., supra, and again in Koehler v. Serr, supra. In the Passow case the court said at pages 37, 38 of 177 Cal., at page 1127 of 170 P.:

"No attack was made upon the attachment by Bowman in the main action. Instead of moving that it be dissolved on the ground that the affidavit that the debt was not secured by a lien was false, he procured the exemption of his property from the levy by giving the undertaking here sued on. In this condition of affairs the present defendant executed the undertaking sued on. It must be presumed to have accepted the conditions then existing as the measure of its rights, and to have executed the undertaking with that understanding. The principle is settled in this state that a surety upon an undertaking given under section 540 to release an attachment cannot interpose the objection, in a suit upon such undertaking, that the property attached, if any, was not subject to levy, or that the attachment was irregularly issued because of a false affidavit filed by the plaintiff to procure it. In McMillan v. Dana, 18 Cal. [339], 349, the court said of such an undertaking that: The sureties promise, 'in consideration of the release of the property from the attachment, that in the event of a recovery of the judgment by the plaintiff, they will pay the amount of the judgment. * * * The object of giving the undertaking was to procure this release, and this release was had in consequence of the undertaking; and the consideration of the undertaking therefore is the release so procured. In consideration of this release, the obligors agree to pay the judgment. Whether the property was redelivered to Vischer or not was wholly immaterial. * * * Nor does it matter whether the property was subject to attachment or not. That matter cannot be tried in this collateral way. It is enough that the plaintiff had this property levied on as subject to his debt, and that these sureties procured its release upon the stipulation that, in consideration of such release, they would pay the amount of the judgment to be recovered by the plaintiff in the attachment suit.' "

In Koehler v. Serr, supra, the court after quoting from the Passow case said at page 148 of 216 Cal., at page 675 of 13 P.2d, 89 A.L.R. 262: "If, on collateral attack, the fact that the affidavit is false as to the unsecured status of the debt is no defense, then the falsity of the affidavit as to the true character of the plaintiff's cause of action as disclosed by the proof can be no defense, where, as here, the allegations of the complaint and the averments of the affidavit are prima facie sufficient."

The foregoing disposes of all points urged for reversal. Under the authority of the cases last cited, including those quoted from, appellant having elected to secure the release of the vessel by furnishing the undertaking required by section 822 cannot now raise any question going to the nature of the cause of action as actually proved and found in the suit in which the attachment issued, but is bound by an estoppel to deny that the entire demand in that action was secured by a lien upon the vessel as alleged in the verified complaint upon the allegations of which the writ was issued.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

50 Cal.App.2d 503

RILCOFF v. SUPERIOR COURT OF LOS ANGELES COUNTY.

Civ. 13507.

District Court of Appeal, Second District, Division 2, California.

March 17, 1942.

1. Abatement and revival 🔑8(1)

Where superior court of one county has once acquired jurisdiction of a cause of action, so long as it is there pending, a plea in abatement will lie in another court where an action between the same parties involving the same subject matter is also pending. Code Civ.Proc. § 430.

2. Abatement and revival 🔑8(1)
Prohibition 🔑10(2)

Where wife's divorce action was transferred from Los Angeles County Superior Court to Kern County Superior Court, judgment of dismissal was entered, and wife appealed, but, before filing notice of appeal, filed action for separate maintenance in Los Angeles County Superior Court without alleging any facts occurring subsequent to commencement of divorce suit, Los Angeles County Superior Court had no jurisdiction of subject matter of action for separate maintenance because divorce action was "pending", and prohibition lay to restrain such court from enforcing order entered in action for separate maintenance. Code Civ. Proc. § 430.

See Words and Phrases, Permanent Edition, for all other definitions of "Pending".

3. Equity ⚷51(1)

Equity abhors a multiplicity of actions, and it is the policy of the law to reduce to the minimum the number of actions which may subsist between the same parties.

4. Judgment ⚷622(2)

A defendant against whom an action is pending may not institute other proceedings relating to or depending upon the transaction involved in the pending cause, but must plead the facts for his affirmative relief in such pending cause, and if he fails to set up a counterclaim, neither he nor his assignee can thereafter maintain an action against the plaintiff. Code Civ.Proc. §§ 439, 442.

5. Prohibition ⚷3(3)

Where Los Angeles County Superior Court entered order directing certain payments by husband in wife's separate maintenance action although court had no jurisdiction of subject-matter of action because of pendency of wife's divorce action in Kern County Superior Court, appeal from such order was not an "adequate remedy at law" which would bar prohibition to restrain enforcement of order. Code Civ.Proc. § 430.

See Words and Phrases, Permanent Edition, for all other definitions of "Adequate Remedy at Law".

6. Action ⚷64, 71

An action is "pending" from the time of filing the complaint until its final determination on appeal.

7. Abatement and revival ⚷8(1)
Prohibition ⚷5(3)

Where action for divorce and action for separate maintenance are pending between the same parties, plea in abatement or writ of prohibition is a proper remedy. Code Civ. Proc. § 430.

◆

Prohibition by Nicolai N. Rilcoff to restrain the Superior Court of Los Angeles County from enforcing a certain order.

Peremptory writ granted.

Harvey, Johnston & Baker, of Bakersfield, for petitioner.

Barry Sullivan, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Petitioner was granted an alternative writ of prohibition upon which a hearing was had. The question presented by the pleadings and the briefs is whether or not the respondent court has jurisdiction to order payments of alimony, costs and attorney fees in a separate maintenance action after the filing of an action for divorce of the same parties, involving no facts other than those which occurred prior to the institution of the divorce action.

Inasmuch as petitioner is defendant in two separate actions, in both of which his wife Mary is the plaintiff, we shall refer to them hereafter respectively as defendant and plaintiff.

On August 23, 1941, plaintiff filed her action for divorce in the Superior Court of Los Angeles County. On the 19th of September respondent court ordered defendant to pay plaintiff $75 monthly as alimony, $250 attorney fees and $25 costs. On the 29th day of September the case was transferred to the Superior Court of Kern County on the motion of defendant based upon his residence in that county. After the matter had been docketed the latter court modified the order theretofore made in the Los Angeles court by striking therefrom the monthly alimony payments. Following a hearing the general demurrer to the complaint was sustained. Plaintiff having failed to amend within the time allowed, after the lapse of three weeks, a judgment dismissing the action was entered. From such judgment plaintiff took her appeal and presented a bill of exceptions to the judge. The time for settling the bill was fixed for January 8th at which time the court ordered to be included certain documents consisting of parts of the record, which order was ignored by plaintiff's counsel.

Before filing her notice of appeal from the judgment in Kern County, plaintiff filed her action No. D-215178 for separate maintenance in the Superior Court of Los Angeles County on December 15, 1941. Her complaint stated no facts that had occurred subsequent to the date of the commencement of her action for divorce. From affidavits and the clerk's certificate before us it is clear that the action for separate maintenance involves no party or cause of action other than those contained in the action for divorce. At the time of filing her new action, she procured an order requiring defendant to show cause before respondent court on the 21st day of

January why he should not be required to pay alimony, costs and attorney fees in that action. On that day the court made an order that defendant pay plaintiff $15 per week, $150 attorney fees and $15 costs. At the time of the hearing upon the order, the court had before it the affidavit of defendant setting forth the origin, pendency, transfer and appeal of the divorce action in Kern County. Respondent court declined to order the transfer for the reason that defendant had not made the payments ordered on the 21st day of January. On the contrary, the court announced that defendant was in contempt and ordered defendant's motion for change of venue to be dropped from the calendar until he should be purged. On the following day a writ of execution was issued from respondent court to the sheriff of Kern County, directing that officer to levy upon defendant's salary in the hands of his employer. Such levy was made. Thereafter defendant was served with an order to show cause, in re contempt, requiring defendant to appear on a day certain to show cause why he should not be punished for disobeying the order of January 21st.

[1, 2] When the superior court of one county has once acquired jurisdiction of a cause of action, so long as it is there pending, a plea in abatement will lie in another court where an action between the same parties and the same subject matter is also pending. Dungan v. Superior Court, 149 Cal. 98, 84 P. 767, 117 Am.St.Rep. 119; Lee v. Superior Court, 191 Cal. 46, 214 P. 972; Gorman v. Superior Court, 23 Cal.App.2d 173, 72 P.2d 774; Chase v. Superior Court, 154 Cal. 789, 99 P. 355; Karst v. Seller, 45 Cal.App. 623, 188 P. 298; Plum v. Forgay Lumber Co., 118 Cal.App. 76, 4 P.2d 804. From this it follows that respondent court was divested of jurisdiction of all matters appertaining to the marital rights and obligations of plaintiff and defendant immediately upon the transfer of the divorce action to Kern County.

[3, 4] In the event the action now pending before respondent court should proceed by the application of all of the remedies available to plaintiff, defendant would be required to comply with the order of January 21st in addition to all of the things adjudged in the divorce action in Kern County. An order is pending in the latter court for the payment of costs and attorney fees. The order of January 21st was in the process of enforcement when our alternative writ issued. If the prosecution of the action now pending before the respondent court is proper, there is no reason why plaintiff cannot move into the several counties of the state and successively procure like orders from the superior courts of all the counties. Equity abhors a multiplicity of actions. It is the policy of the law to reduce to the minimum the number of actions which may subsist between the same parties. The legislature has made it impossible for a defendant in search of affirmative relief to go outside of the action pending against him already and institute other proceedings relating to or depending upon the transaction involved in the pending cause. He must in such case plead the facts for his affirmative relief. Code Civ.Proc., §§ 439, 442. If a defendant fail to set up his counter claim, neither he nor his assignee can thereafter maintain an action against the plaintiff.

[5] Defendant has no adequate remedy at law to prevent the oppression to which he would be subjected unless respondent court be prohibited from enforcing the order of January 21st. Although he might appeal from the order directing the payment of the sums ordered, such appeal would require the execution of an undertaking in double the amount accruing during the pendency of the appeal. Miller v. Superior Court, 9 Cal.2d 733, 72 P.2d 868. In addition thereto, plaintiff would be at liberty to show her dire poverty and to demand a supplemental order for attorney fees for prosecuting the appeal and for additional alimony during its pendency. Bohnert v. Bohnert, 91 Cal. 428, 27 P. 732; Coleman v. Coleman, 23 Cal.App. 423, 138 P. 362.

[6, 7] An action is pending from the time of filing the complaint until its final determination on appeal. Ex parte Joutsen, 154 Cal. 540, 98 P. 391. Where an action for divorce and also an action for separate maintenance are pending between the same parties, a plea in abatement or a writ of prohibition is a proper remedy. Code Civ.Proc. § 430; Fresno Planing Mill Co. v. Manning, 20 Cal.App. 766, 130 P. 196. Also, see Helpling v. Helpling, 50 Cal. App. 676, 195 P. 715; Cardinale v. Cardinale, 8 Cal.2d 762, 767, 68 P.2d 351; Greer v. Greer, 142 Cal. 519, 77 P. 1106.

Let the peremptory writ issue as prayed.

W. J. WOOD and McCOMB, JJ., concurred.

50 Cal.App.2d 634

WHITE v. ANDERSON et al.

Civ. 3009.

District Court of Appeal, Fourth District, California.

March 20, 1942.

Rehearing Denied April 16, 1942.

1. Venue ⚷41

A defendant is not entitled to have an action removed to county of his residence unless it appears that none of the other defendants are residents of county where action is brought. Code Civ.Proc. § 395.

2. Venue ⚷41

Even when all of defendants join in a demand for or consent to a change of venue, the cause will be retained if complaint attempts in apparent good faith to state a cause of action against a defendant who resides in county where action was commenced. Code Civ.Proc. § 395.

3. Venue ⚷41

When a defendant who resides in county in which action is brought is a necessary and proper party defendant, it is immaterial that another and the principal defendant resides in another county. Code Civ.Proc. § 395.

4. Appeal and error ⚷863

On appeal from order denying one defendant a change of venue to county of such defendant's residence, the question is whether a good cause of action has been alleged against another defendant who resides in county in which action was begun or whether in good faith there has been an attempt to allege such cause of action, and in that connection the possibility of amendment is always material. Code Civ.Proc. § 395.

5. Venue ⚷41

In action to recover property or value thereof brought in the county where original defendant resided, as against whom a good cause of action was stated, a defendant who was a resident of another county and was added as a party by an amendment to complaint was not entitled as of right to a change of venue to county of his residence on ground that complaint was deficient as to him and that he was therefore an improper party in view of the Code section providing that if any person is improperly joined as a defendant, his residence must not be considered in determining venue. Code Civ.Proc. §§ 395–399.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by L. C. White against Charles J. Anderson and Alex Highiet to recover property or the value thereof, wherein last named defendant filed a demurrer and a motion and demand for a change of venue. From an order refusing to grant the motion and demand for change of venue, the last named defendant appeals.

Affirmed.

Edward T. Taylor, of Modesto, for appellant.

Ralph Robinson and Clyde E. Cate, both of Fresno, for respondent.

BARNARD, Presiding Justice.

This is an appeal from an order refusing to grant a motion and demand for a change of venue.

In the original complaint Anderson, a resident of Fresno County, was named as sole defendant. It was alleged that he stole certain property from plaintiff's assignor and that he had refused to return the property or pay the value thereof although demand had been duly made. In an amended complaint Highiet was added as a party defendant and the stated value of the property taken was increased. It was there alleged that property of the value of $20,000 was taken, that thereafter a portion of the property, being of the value of $18,000, came into possession of the defendant Highiet, and that demand had been made on both defendants for a return of the goods. The property taken was described but it was not alleged which particular articles had come into possession of Highiet. The prayer was for the return of the property or its value in case the same could not be returned.

The defendant Highiet, who was a resident of Stanislaus County, filed a demurrer to the amended complaint and also filed a motion and demand for a change of venue, demanding that "the place of trial of the above entitled action be transferred" to the superior court of Stanislaus County, together with an affidavit in the usual form. After a hearing the court entered an order denying the motion and demand for a change of venue, and the defendant Highiet has appealed.

The appellant contends that the amended complaint does not sufficiently allege a cause of action as against him for the reason that it fails to allege any sort of joint action or joint relationship between him and the other defendant, that the allegations of the complaint present a situation which can only be tried or remedied by separate actions against the two defendants, and that he is, therefore, entitled to a change of venue as a matter of right under sections 395–399 of the Code of Civil Procedure. He concedes that a good cause of action is alleged as against Anderson, but contends that the complaint is deficient in this respect as against him. In effect it is claimed that two causes of action are alleged or attempted to be alleged and that the one against the appellant should have been brought in Stanislaus County. It thus appears that the real contention is that the appellant was an improper party in and to the action brought in Fresno County. While this situation, if true, could have been reached in another way, it does not furnish a sufficient reason for transferring the entire action to the other county. Section 395 of the Code of Civil Procedure provides, among other things: "If any person is improperly joined as a defendant * * * his residence must not be considered in determining the proper place for the trial of the action."

[1-3] A defendant is not entitled to have an action removed to the county of his residence unless it appears that none of the other defendants are residents of the county where the action is brought. Donohoe v. Wooster, 163 Cal. 114, 124 P. 730. Even when all of the defendants join in a demand for or consent to a change of venue the cause will be retained if the complaint attempts in apparent good faith to state a cause of action against a defendant who resides in the county where the action was commenced. McClung v. Watt, 190 Cal. 155, 211 P. 17. When a defendant who resides in the county in which an action is brought is a necessary and proper party defendant it is immaterial that another and the principal defendant resides in another county. Hellman v. Logan, 148 Cal. 58, 82 P. 848.

[4] The appellant argues entirely with respect to whether a good cause of action was alleged against him when the real question on such an appeal as this is as to whether a good cause of action has been alleged against a defendant who resides in the county in which the action is begun, or whether in good faith there has been an attempt to allege such a cause of action. In that connection the possibility of amendment is always material. McClung v. Watt, supra; Richmond Terminal Corp. v. Parr Terminal Co., 96 Cal.App. 152, 273 P. 845.

[5] Whether the amended complaint was sufficient to allege a good cause of action as against this appellant is another question which we are not here called upon to decide. The appellant, in his briefs, seems to contend both that he was entitled to have the entire action removed to the other county and that the order should be reversed only insofar as it affects him. He applied for a change of the place of trial of the entire action, the order appealed from is one refusing a change of venue with respect to the entire action, and the correctness of that order is the only question before us.

The order appealed from is affirmed.

MARKS and GRIFFIN, JJ., concurred.

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50 Cal.App.2d 486

PIERCE v. PATERSON.

Civ. 11779.

District Court of Appeal, First District,
Division 1, California.

March 17, 1942.

Hearing Denied May 14, 1942.

1. Appeal and error 🔑933(4)

In the absence of a statement in order granting new trial that new trial was granted on ground of insufficiency of evidence to justify verdict, the presumption is that it was not made on that ground.

2. Appeal and error 🔑854(6)

Where order granting new trial does not state that new trial was granted on ground of insufficiency of evidence, appellate court may not disturb the order if it can be upheld on any other ground.

3. Physicians and surgeons 🔑14(1)

A physician cannot be held to guarantee the result of his professional services, but in undertaking treatment of a patient a physician impliedly contracts and represents not only that he possesses the reasonable degree of skill and learning possessed by others of his profession in the locality, but that he will use reasonable and ordinary skill in the application of such knowledge to accomplish the purpose for which he is employed.

4. Physicians and surgeons ⚷14(1)

If injury is caused by want of reasonable and ordinary skill and care on part of physician, he is liable for the consequences.

5. Negligence ⚷134(2)

In the trial of civil cases, it is not necessary that circumstances shall establish the negligence of defendant as a proximate cause of injury with such absolute certainty as to exclude every other conclusion, and it is sufficient if there is substantial evidence upon which to reasonably support the judgment.

6. Physicians and surgeons ⚷18(9)

In malpractice action, where the evidence presented tends to show that the negligence alleged resulted in infection producing death it presents a case for the jury.

7. New trial ⚷39
Trial ⚷253(4)

In malpractice action against physician who treated crushed finger of patient who died from tetanus infection, where it was reasonable inference to be drawn from the testimony of expert witnesses and other evidence that the infection would not have occurred if wound had been properly cleansed and antisepticized, the giving of an instruction which excluded from consideration of jury all issues of negligence except failure to administer tetanus antitoxin was error and justified order granting new trial.

8. Appeal and error ⚷1066

An instruction is prejudicially erroneous which excludes an issue that is supported by evidence.

9. Evidence ⚷538

In malpractice action in Alameda county against physician who treated crushed finger of patient who died from tetanus infection, witness who graduated from university in 1897, was admitted to practice medicine in California in 1899, spent some time in post-graduate work in Chicago, New York, Vienna, Austria, and Berne, Switzerland, practiced for about five years in Portland, Ore., and from 1910 to 1920 was on railroad staff but in 1920 commenced practicing in Alameda county and became familiar with standard of care and skill ordinarily used by physicians, practicing in that county, in their treatment of wounds and of tetanus infection, was competent to testify as an expert witness.

10. Evidence ⚷351, 370(4)

In malpractice action against physician who treated crushed finger of patient who died from tetanus infection, exclusion of hospital records kept in connection with admission of the patient and treatment administered to him was not error, where it was not shown that any of the records excluded were required to be kept by law, and no proper foundation was laid for their introduction.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Malpractice action by Frances R. Pierce against Adam Paterson. A verdict was returned for defendant. From an order granting a new trial, defendant appeals.

Affirmed.

Hadsell, Sweet, Ingalls & Lamb and Hadsell, Sweet, Ingalls & Carroll, all of San Francisco, for appellant.

Lercara & Nelle, Lewis E. Lercara, and Clifford W. Nelle, all of Oakland, for respondent.

B. C. JONES, Justice pro tem.

This appeal is from an order granting a new trial in a malpractice action against a physician and surgeon. Willis Pierce, a boy of ten years, sustained a crushing of the middle finger of his right hand by getting it caught in the door of his bath room. His mother, the respondent, promptly summoned the defendant to treat the injury. On account of another emergency call he instructed her over the telephone to place the finger in an ice pack to stop the bleeding. This she did after replacing the nail which had been torn loose. Within about half an hour the defendant arrived. Considerable blood had flowed from the wound and clotted about the finger. It also developed later that the bone in the finger was crushed. Without any other preparation or cleansing, the defendant lifted the nail slightly and squeezed some tincture of merthiolate underneath it and then packed the finger in metanic jelly and bandaged it. Treatment in substantially this same manner was continued for several days when the boy developed symptoms of a tetanus infection. Another physician was immediately called and the patient taken to the Alameda County Hospital. Tetanus antitoxin was immediately administered but he failed to respond and died of the infection the following day. The case was tried before a jury which returned a verdict for the defendant. The plaintiff thereupon moved for a new trial which was granted, and it is from this order granting a new trial that the appeal is taken.

[1, 2] The order granting the motion for a new trial does not specify the grounds upon which it was granted. In the absence of a statement in the order that the new trial was granted upon the ground of the insufficiency of the evidence to justify the verdict, the presumption is that it was not made on that ground. We may not, however, disturb the order if it can be upheld on any other ground. Phillips v. Powell, 210 Cal. 39, 290 P. 441. It is urged in support of the order, however, that the court erred in instructing the jury and in sustaining an objection to the admission of the records of the Alameda County Hospital pertaining to the treatment of the decedent in evidence. The position of the appellant is that the hospital records were properly excluded, and that there was not sufficient evidence to take the case to the jury thus rendering any error in instructing the jury of no consequence.

[3, 4] As the court said in Sim v. Weeks, 7 Cal.App.2d 28, 45 P.2d 350, 352: "It is well settled that a physician and surgeon cannot be held to guarantee the results of his professional services. 'However, it is equally well settled that in undertaking a treatment of a patient the practitioner impliedly contracts and represents, not only that he possesses the reasonable degree of skill and learning possessed by others of his profession in the locality, but that he will use reasonable and ordinary care and skill in the application of such knowledge to accomplish the purpose for which he is employed; and that, if injury is caused by a want of such skill or care on his part, he is liable for the consequences which follow. Houghton v. Dickson, 29 Cal.App. 321, 155 P. 128; Nelson v. Painless Parker, 104 Cal.App. 770, 286 P. 1078; Perkins v. Trueblood, 180 Cal. 437, 181 P. 642; Hesler v. California Hospital Co., 178 Cal. 764, 174 P. 654; Ley v. Bishopp, 88 Cal.App. 313, 263 P. 369; Patterson v. Marcus, 203 Cal. 550, 265 P. 222.' "

The contention here made is not that the defendant was not possessed of the requisite knowledge and skill but that he was negligent in the treatment of the injury. In this connection it is urged that there was no proper examination of the wound; no cleansing; no proper sterilization; and that the application of metanic jelly without cleansing and sterilization operated to seal in any bacilli that were present and directly induced the infection from which the boy died. In response to the question from plaintiff's counsel, "When you put the metanic jelly on this wound did you seal the wound?" and the defendant replied, "That was the purpose of putting it on".

[5, 6] Dr. Ruedy, a physician and surgeon called by the plaintiff, testified that under the circumstances of the case "the use of reasonable medical care and skill by the attending physician demanded a thorough cleaning of the sutured finger and to give the finger free access to the air to overcome any anaerobic tetanic germs". Several physicians and surgeons of established reputations called as witnesses by the defendant testified that in the case of such a wound as is here presented ordinary care would demand a thorough cleansing and the application of an antiseptic. Within eight or nine days after treatment of the wound by the defendant commenced the infection developed to the point that it became manifest. It is a reasonable inference to be drawn from the testimony of the expert witnesses and the other evidence that the infection would not have occurred if the wound had been properly cleansed and antisepticized. As is said in Barham v. Widing, 210 Cal. 206, 291 P. 173, 177: "It is not necessary in the trial of civil cases that the circumstances shall establish the negligence of the defendant as the proximate cause of injury with such absolute certainty as to exclude every other conclusion. It is sufficient if there is substantial evidence upon which to reasonably support the judgment. Ley v. Bishopp, 88 Cal.App. 313, 316, 263 P. 369." Where the evidence presented tends to show that the negligence alleged resulted in the infection producing the death it

presents a case for the jury. Sim v. Weeks, supra; Swanson v. Hood, 99 Wash. 506, 170 P. 135.

[7, 8] In instructing the jury the court gave the following instruction: "The charge of negligence against the defendant, Doctor Adam Paterson, is that he was negligent in not administering tetanus antitoxin to the deceased minor, Willis Pierce. If you find from the evidence that in deciding not to administer said serum, the defendant doctor possessed and exercised the degree of skill, learning and care ordinarily possessed and exercised by physicians in the same line of practice in San Leandro, or similar localities, then your verdict will be against the plaintiff and in favor of the defendant."

The vice in this instruction is immediately apparent. It limits the jury in their consideration to the decision of Dr. Paterson to not administer tetanus antitoxin and reserves from their consideration all of the other alleged negligent acts to which evidence was addressed. All issues of negligence except failure to administer tetanus antitoxin were excluded from the consideration of the jury by the instruction. It in effect instructed the jury to return a verdict for the defendant if it appeared that there was no negligence in failing only to administer antitoxin serum. The jury in effect was told to disregard all facts bearing upon the failure of the defendant to cleanse and sterilize the wound. It is not open to question that an instruction is prejudicially erroneous which excluded an issue that is supported by evidence. Galloway v. United Railroads, 69 Cal.App. 770, 232 P. 491; Pierce v. United Gas & Electric Co., 161 Cal. 176, 118 P. 700; Starr v. Los Angeles Railway Corp., 187 Cal. 270, 201 P. 599. The existence of such compels the granting of a new trial.

[9] Another contention of the appellant is that there is no expert testimony in support of plaintiff's case and that it falls for this reason. In this connection it is urged that Dr. Ruedy, the only physician called by the plaintiff, did not qualify as an expert. This witness testified that he graduated from the University of Oregon in 1897, and was admitted to practice in California in 1898. He spent some time in post-graduate work in Chicago and New York, and in Vienna, Austria, and Berne, Switzerland. After completing his post-graduate work he practiced for about five years in Portland, Oregon, and from 1910 to 1920 was on the staff of the Spokane, Portland and Seattle Railroad at Spokane, Washington. In 1920 he removed to Oakland, in Alameda County, and has practiced his profession at said place ever since. He further testified that during all of the period of his practice in Alameda County he was familiar with the standard of care and skill ordinarily used, possessed and exercised, by physicians and surgeons practicing in Alameda County and in their treatment of wounds such as was suffered by the decedent, and of tetanus infections. Under well established rules these qualifications of Dr. Ruedy rendered him competent to testify as an expert witness. Hutter v. Hommel, 213 Cal. 677, 3 P.2d 554; Warnock v. Kraft, 30 Cal.App.2d 1, 85 P.2d 505; Valdez v. Percy, 35 Cal.App.2d 485, 96 P. 2d 142.

[10] The plaintiff produced and offered as original evidence the records of the Alameda County Hospital kept in connection with the admission of the decedent and the treatment administered to him. These records consist of the Admission Record, History Record, Treatment Record, Progress Record, Pathological Report, Clinical Chart, Report of Autopsy Surgeon and General Summary. Objection was made to the introduction of these records on the ground that no proper foundation had been laid for their introduction, and that they were hearsay. Even though it be assumed that they were admissible, a point we do not decide, no error was here made in excluding them, as no proper foundation was laid for their introduction. No proper showing was made that any of the records mentioned were required to be kept by any law.

We are of the opinion that the giving of the erroneous instruction complained of constituted sufficient grounds for the granting of a new trial.

The order appealed from is affirmed.

PETERS, P. J., and KNIGHT, J., concurred.

50 Cal.App.2d 516

TOMAIER v. TOMAIER.

Civ. 3011.

District Court of Appeal, Fourth District, California.

March 17, 1942.

1. Divorce ⚿184(6)

Whether the acts and conduct of wife inflicted grievous mental suffering upon husband so as to entitle him to a divorce on the ground of extreme cruelty was a question of fact for determination of the trial court from all the facts and circumstances in the case.

2. Divorce ⚿130

Evidence supported trial court's conclusion that husband was entitled to a divorce on the ground of extreme cruelty.

3. Divorce ⚿249(3)

In divorce action, trial court had no power to divide real property, standing in the names of husband and wife as joint tenants, as though it were in fact community property.

4. Husband and wife ⚿14(3)

As between husband and wife a community estate and a joint tenancy cannot exist at the same time in the same property.

5. Joint tenancy ⚿6

The chief incident of "joint tenancy" is right of survivorship.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Tenancy".

6. Husband and wife ⚿14(3)

A "joint tenancy" is one estate and in it the rights of the spouses are identical and coextensive.

7. Husband and wife ⚿14(3)

A joint tenancy, the evidence of which the law requires to be on the face of the conveyance creating it, is of necessity an expression of the intention of husband and wife to hold property otherwise than as community property and the equal interest of the spouses must therefore be classed as their separate but joint estate in property. Civ. Code, § 164.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Charles Tomaier against Mildred Tomaier for a divorce on the ground of extreme cruelty, wherein defendant filed a cross-complaint seeking a divorce on the ground of desertion. From a judgment granting plaintiff a divorce and making a division of the property of the parties, defendant appeals.

Affirmed in part and reversed in part.

Edward M. Selby, of Los Angeles, for appellant.

Alfred Siemon and Bennett Siemon, both of Bakersfield, for respondent.

SCHOTTKY, Justice pro tem.

Appellant wife appeals from a judgment granting respondent husband a divorce upon the ground of extreme cruelty, and making a division of the property of the parties. Appellant contends that the evidence is insufficient to support the finding of cruelty on her part, and that she was entitled to a divorce on her cross-complaint on the ground of desertion.

[1, 2] No useful purpose would be served by setting forth the somewhat sordid evidence in the case on the charges of cruelty and on the counter charges of desertion. No hard and fast rule of law can be laid down as to what particular facts must be proved in order to justify a finding that a spouse has undergone grievous mental suffering. A correct decision must depend upon the sound sense and judgment of the trial court. Therefore, in the case at bar, whether or not the acts and conduct of appellant inflicted grievous mental suffering upon respondent was a question of fact for the determination of the trial court from all the facts and circumstances in the case (Barnes v. Barnes, 95 Cal. 171, 30 P. 298, 16 L.R.A. 660; Hansen v. Hansen, 86 Cal.App. 744, 261 P. 503; Shaw v. Shaw, 122 Cal.App. 172, 9 P.2d 876) and a careful reading of the entire record convinces us that there is ample evidence to support the conclusion that respondent was entitled to a divorce upon the ground of extreme cruelty.

The trial court found that respondent and appellant were the owners of the following property: Parcel 1. Lots 17 to 21, in Block 99, in the town of Mohave, leased to the Safeway Company and subject to an encumbrance in the sum of $5,000. Parcel 2. A residence in Kansas City, Missouri. Parcel 3. Money in escrow in the Bank of America, being the proceeds from the sale of Lot 5, Block 100, in the town of Mohave. Parcel 4. A Dodge, 1939 automobile coupe, house trailer, household furniture and furnishings in possession of respondent at Mohave.

The trial court further found that parcels 1, 2 and 3, stood of record in the name of appellant and respondent as joint tenants; and

"That the parties acquired said properties during their marriage and that it was not the intention of the plaintiff or of the parties that the defendant should be vested with or become the owner of any interest in either of said properties as her separate property; that said properties and each of them were acquired with separate funds of plaintiff and with community funds of plaintiff and defendant and not with any separate funds of the defendant; that plaintiff never at any time intended to make any gift to the defendant of any right, title or interest in or to any of said properties of either of them; that the interest in said properties which these parties now own was acquired by them with the purpose and intention that the same should be and become their community property; that the parties agreed to encumber and did encumber said properties for the improvement of the same for their common benefit and they agreed that the community income should be applied to the improvement and development of said properties for their common use and benefit and that they never had any intention that said properties or any of the same should be improved or developed or acquired for the benefit of the separate estate of the defendant; and that the property referred to as parcel 4 is personal property and the community property of the parties hereto."

The trial court then decreed that all of said property was community property and awarded parcels 1 and 4 to respondent, parcel 2 to appellant, awarded appellant $1,000 out of parcel 3, and respondent the balance of parcel 3, and awarded appellant $1,850, to be paid by respondent at the rate of $50 per month, commencing at the entry of the final decree, without interest.

Appellant contends that the trial court erred in finding that parcels 1, 2 and 3 were community property, and argues that because said real property stood in the names of appellant and respondent as joint tenants, this finding cannot be sustained.

[3-7] We must agree with this contention and hold that the trial court had no power to divide the property held in joint tenancy as though it were in fact community property. This is clearly held by our Supreme Court in Siberell v. Siberell, 214 Cal. 767, at page 773, 7 P.2d 1003, at page 1005, there the court said:

"First, from the very nature of the estate, as between husband and wife, a community estate and a joint tenancy cannot exist at the same time in the same property. The use of community funds to purchase the property and the taking of title thereto in the name of the spouses as joint tenants is tantamount to a binding agreement between them that the same shall not thereafter be held as community property, but instead as a joint tenancy with all the characteristics of such an estate. It would be manifestly inequitable and a subversion of the rights of both husband and wife to have them in good faith enter into a valid engagement of this character, and following the demise of either, to have a contention made that his or her share in the property was held for the community, thus bringing into operation the law of descent, administration, rights of creditors, and other complications which would defeat the right of survivorship, the chief incident of the law of joint tenancy. A joint tenancy is one estate and in it the rights of the spouses are identical and coextensive.

"Second, on its face section 164 has no application to a case where 'a different intention is expressed in the instrument,' and it seems to us to be clear, as already pointed out above, that a joint tenancy, the evidence of which the law requires to be on the face of the conveyance creating it, is of necessity an expression of the intention to hold the property otherwise than as community property, and that the equal interest of the spouses must therefore be classed as their separate but joint estate in property." See, Estate of Harris, 9 Cal.2d 649, 72 P.2d 873.

Futhermore, we deem it proper to state that there is no evidence in the record that it was the intention of the parties that the property should be held other than in joint tenancy, so even if it were proper in such a case to show that there was such an intention, which we do not hold, there is no evidence to support it.

In view of the foregoing, that part of the judgment granting respondent an interlocutory decree of divorce upon the ground of extreme cruelty is affirmed, and that part of the judgment as to the division of the property is reversed. Costs of appeal to be borne by each party.

BARNARD, P. J., and MARKS, J., concurred.

50 Cal.App.2d 653

POLK v. POLK.

Civ. 13270.

District Court of Appeal, Second District, Division 1, California.

March 23, 1942.

Hearing Denied May 22, 1942.

1. Divorce ⚷6

A court is not authorized to deny a divorce where evidence of plaintiff, adequately corroborated, establishes the truth of allegations of complaint stating a cause for divorce on ground of extreme cruelty. Civ. Code, § 94.

2. Divorce ⚷184(10)

In action for divorce on ground of extreme cruelty, every intendment is in favor of finding made by trial court and on appeal such finding is not to be overthrown unless to the appellate tribunal it is very plain that the conclusion reached cannot be supported by any rational view of the testimony. Civ.Code, § 94.

3. Divorce ⚷184(10)

In action for divorce for extreme cruelty, considerable latitude is allowed to the court in determining whether acts complained of constituted extreme cruelty of the kind and nature as to make mandatory a severance of the marital bonds. Civ.Code, §§ 55, 94.

4. Divorce ⚷147

In action for divorce for extreme cruelty, whether conduct of one of the spouses is such as to wrongfully inflict upon the other party to the marriage the grievous bodily injury or grievous mental suffering necessary to authorize divorce is a "question of fact" to be deduced from all the circumstances of each particular case. Civ.Code, § 94.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

5. Divorce ⚷130

Evidence sustained judgment denying divorce sought by husband on ground of extreme cruelty. Civ.Code, § 94.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action for divorce by Luther A. Polk against Mary Alma Polk. From an adverse judgment, plaintiff appeals.

Affirmed.

Hearing denied; CURTIS and CARTER, JJ., and PETERS, J. pro tem., dissenting.

Don Lake, of Los Angeles, for appellant.

Robert W. Kenny and Robert O. Curran, both of Los Angeles, for respondent.

WHITE, Justice.

This is an action for divorce wherein plaintiff sought dissolution of his marriage to defendant upon the ground of extreme cruelty. Civ.Code, sec. 94. An answer was filed admitting all the allegations contained in the complaint save and except the one which charged the wrongful infliction of grievous mental suffering upon plaintiff by the answering spouse. At the trial plaintiff introduced evidence of his marriage on January 19, 1910; that the parties thereto separated May 10, 1939; that three children were born as the issue of said marriage, all of whom have reached their majority. The plaintiff testified, and was corroborated in his testimony, that on an occasion in 1937, while traveling on a railroad train, plaintiff was standing in the aisle assisting two ladies with their baggage, when his wife, without saying a word, struck him in the face, in the presence of many passengers in the car. He further testified that his occupation was that of motorman, and that constantly upon his return home from his duties his wife would charge him with infidelity. He further testified that defendant never prepared meals for him, and upon returning home after working all night it was necessary for him to prepare them himself. Another incident testified to by the plaintiff occurred during a visit of his sister. On the last day of his sister's visit, while she and her family were at the home of plaintiff and defendant, he desired to spend the last day of his sister's visit with her, but his wife insisted that he take her out and compelled him to remain away from home until about thirty minutes before his sister and her family were required to leave. Plaintiff testified to a severe injury inflicted upon him by his wife on another occasion in the early part of 1938, from which injury he suffered for about six months. In explanation of why he continued to remain at the family home during the course of what he termed "many years" of alleged cruel and inhuman treatment, plaintiff testified that he did so "solely for the purpose of continuing the education of my children and until my son graduated from college, never at any time forgiving her for any of her acts, but only for the purpose of doing that which I could for the welfare of my children, and as soon as my son finished college I left the house and continued separate and apart since that time."

At the conclusion of plaintiff's case defendant made a motion for a nonsuit, which was denied. In presenting her defense, the defendant was the sole witness in her behalf. She testified: "The testimony of my husband was true, but I was in a nervous and excited condition at the time each of the matters complained of by him occurred; that he never forgave me for any of my actions, and on the 17th of April, 1940, I wrote him to forgive me and come home." Upon being shown a letter, the defendant wife identified it as the letter referred to in her testimony, and the same was admitted in evidence. It reads: "Dear Luther: Please call off that divorce suit and come home as we all love you and don't want to lose you or fight you. Forgive me of all I said or done. Anna."

After taking the case under submission, the court on May 9, 1940, rendered its decision denying plaintiff a divorce. Thereafter a motion for a new trial was argued, submitted, and by the court denied. This appeal is by the plaintiff from the judgment.

Appellant contends that under the evidence adduced on behalf of the plaintiff as to the treatment received by him at the hands of his wife, the truth of which was admitted by the latter, the court was bound to find that the allegations in the complaint of cruel and inhuman treatment were true; that a contrary finding as made cannot be sustained by the evidence, and that a judgment predicated upon such unsupported finding must be reversed.

[1-3] True, it is the law that the court is not authorized to deny a divorce where the evidence of the plaintiff, adequately corroborated, establishes the truth of the allegations of the complaint. Kirkpatrick v. Kirkpatrick, 152 Cal. 316, 92 P. 853; Benkert v. Benkert, 32 Cal. 467. The court is not invested with any arbitrary power to grant or refuse the relief, where a case has been made out. However, in every action for divorce the court is called upon to determine whether the evidence before it does establish the truth of the charge made in the complaint. As in other cases, every intendment is in favor of the finding made. On appeal such finding is not to be overthrown unless to the appellate tribunal it is very plain that the conclusion reached cannot be supported upon any rational view of the testimony. As has been so often said, the state itself is a party to every marriage contract and seeks to protect the family in its constitution and laws as the necessary basis of the social order and as indispensable to the welfare of the nation and the state. True, marriage under the law is a civil contract, Civ.Code, sec. 55, but out of such contract, as declared by statute, there arises a personal relation between the parties. In consonance with what we have just said, it follows that although it be admitted that the defendant's acts were wrong and unjustifiable, nevertheless considerable latitude is allowed to the court in determining whether such acts constituted extreme cruelty of the nature and kind as to make mandatory a severance of the marital bonds.

[4, 5] The trial court doubtless took into account the many years the parties to the instant litigation had lived together, the physical and mental infirmities with which the wife testified she was afflicted, and her protestations of love and affection for her husband as contained in the letter addressed to him and introduced in evidence, coupled with the fact that to her husband she had borne three children. Considerable latitude was allowed for the exercise of discretion in the trial court in determining whether under the facts and circumstances here present the conduct of the defendant constituted extreme cruelty. Moreover, in deciding that the conduct of the defendant in this case did not amount to extreme cruelty which warranted a divorce, the trial court was aided by the opportunity, not afforded us, of having the witnesses before it, of observing their temperament, demeanor, candor and truthfulness. Whether in a given case the conduct of one of the spouses was such as to

wrongfully inflict upon the other party to the marriage the "grievous bodily injury" or "grievous mental suffering" referred to in the statute, is a pure question of fact, to be deduced from all the circumstances of each particular case, and as stated in Van Camp v. Van Camp, 53 Cal.App. 17, 199 P. 885, 887, "no arbitrary rule of law as to what particular probative facts shall exist in order to justify a finding of the ultimate facts of its existence can be given." Having in mind the policy of the law concerning the nature and character of the contract of marriage, coupled with the facts and circumstances herein narrated, we cannot say that the conclusion arrived at by the trial court should be disturbed on appeal.

The judgment denying a decree of divorce is affirmed.

YORK, P. J., and DORAN, J., concurred.

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50 Cal.App.2d 538

THOMAS v. STUDIO AMUSEMENTS, Inc., et al.

Civ. 12799.

District Court of Appeal, Second District, Division 1, California.

March 18, 1942.

1. Appeal and error 🔑934(1)

On appeal from a judgment notwithstanding a verdict, the evidence must be viewed in the light most favorable to the appellant, and every reasonable inference in her favor must be drawn therefrom.

2. Theaters and shows 🔑6

A roller skating rink patron does not "assume the risk" created by reckless action of other skaters capable of being prevented by guards who are stationed upon the rink for the protection of patrons.

See Words and Phrases, Permanent Edition, for all other definitions of "Assume the Risk".

3. Theaters and shows 🔑6

The operator of a roller skating rink is not an "insurer" of his patrons' safety, but he owes a duty to protect the patrons from risks other than those normally incident to the sport.

See Words and Phrases, Permanent Edition, for all other definitions of "Insurer".

4. Theaters and shows 🔑6

In action for injuries sustained in fall by patron on roller skating rink during period reserved for ladies only, evidence from which it could be inferred that the patron's fall was caused by a speedy blond skater who was ducking in and out among other skaters and who cut across the path of some of the skaters, whether the blond skater's actions caused the patron's fall, and whether the blond skater's actions were of such nature and extent that the operator's employees should have seen them in time to have prevented the accident was for the jury.

5. Appeal and error 🔑1001(1)

In action by patron of roller skating rink for injuries sustained in a fall, where evidence presented a question regarding liability of operator of the skating rink, the jury was the final arbiter of that question, and their conclusion could not be disturbed where supported by substantial evidence.

6. Negligence 🔑136(25)

Where roller skating rink patron fell and sustained a broken hip, in action for negligence in improperly handling the patron in first-aid room at rink after accident, which improper handling allegedly aggravated injury, and where evidence indicated that defendant falsely represented himself to the patron as a medical doctor, and that he stretched, pulled and rubbed the patron's leg and pounded her thigh and informed her that her injury was not serious, evidence was sufficient for jury on question whether the defendant's act aggravated the injury.

7. Negligence 🔑8

A layman assuming role and duties of a doctor and negligently causing aggravation of injury cannot avail himself of defense of having used standard of skill and care usually possessed or rendered by physicians in the locality, since such a defense is peculiarly the privilege of the medical profession.

8. Negligence 🔑8

A defense based on the use of standard of skill and care usually possessed or rendered by physicians in the locality is peculiarly the privilege of the medical profession.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Personal injury action by Zelma Thomas against Studio Amusements, Inc., and others. From judgment for defendants, notwithstanding verdict for plaintiff, plaintiff appeals.

Reversed and new trial ordered.

Randall J. Hood, of Los Angeles, for appellant.

Fred O. Reed, Richard L. Kirtland, and W. H. Abrams, all of Los Angeles, for respondents.

DORAN, Justice.

[1] This is an appeal from separate judgments, notwithstanding the verdict of a jury in favor of plaintiff in an action for damages for injuries sustained in a fall on roller skating rink. The complaint contained two separate causes of action, the first based on the alleged negligence of respondent Studio Amusements, Inc., in failing, as the proprietor of the rink, to properly supervise the skaters thereon, and the second based on the alleged negligence of respondent Berman in improperly handling plaintiff in the first aid room at the rink after the accident, which improper handling was alleged to have aggravated plaintiff's injuries. Upon her information and belief plaintiff alleged that respondent Berman was employed by respondent Studio Amusements, Inc. At the opening of plaintiff's case the plaintiff conceded that the first count of the complaint did not state a cause of action against respondent Berman and the court sustained the objection of respondent Studio Amusements, Inc. (hereinafter for convenience referred to as respondent corporation), to the second count as not stating a cause of action against the latter respondent. The two causes of action were thus separated and the trial proceeded as a joint trial of two separate cases. Defendants moved for a nonsuit at the close of plaintiff's case and for a directed verdict after both sides had rested. Both motions were denied and the cause was submitted to the jury, which rendered its verdict in favor of plaintiff and against both defendants. Thereupon the motions of defendants for judgment notwithstanding the verdict were granted and such a judgment was entered in favor of each defendant. In accordance with the settled rule on an appeal from a judgment notwithstanding a verdict, the evidence must be viewed in the light most favorable to the appellant and every reasonable inference in her favor must be drawn therefrom. Respondents do not contend otherwise, but argue that there is no substantial evidence in appellant's favor.

The first cause of action of appellant's complaint charged respondent corporation with negligence in failing to control reckless and speedy skating on respondent's roller skating rink, and that, "as a proximate result of said great speed, one of said skaters collided with plaintiff," thereby knocking plaintiff (appellant) to the floor of the rink and causing the injuries complained of. The second cause of action charged respondent Berman with falsely representing himself to appellant as a medical doctor and thereupon handling appellant in a negligent manner in the first aid room adjoining the rink, and in representing to appellant that she had only suffered a slight injury, when in fact she had sustained a fractured hip; all of which, appellant in effect alleged, had aggravated her injuries. Evidence introduced upon each count was admitted only against the respondent to which it applied.

Appellant, in company with two friends, man and wife, visited the roller skating rink maintained by respondent corporation. The man accompanying appellant did not skate but sat in one of the loge boxes at the side of the rink, while his wife and appellant skated. Appellant sustained her fall during a period when ladies only were permitted to skate. When appellant fell, this skating period for ladies only had been going on for an undetermined time, possibly three minutes. The evidence as to the cause of her fall is not conclusive, but it may fairly be inferred therefrom that appellant's fall was caused by a speedy blond skater who was ducking in and out among the other skaters and who cut across the path of some of the other skaters. This blond woman's skate was seen to strike that of another skater, causing the latter skater to fall, thus precipitating the fall of three other skaters, appellant among them. Respondent corporation argues at length against drawing such a conclusion from the evidence, contending that the testimony of the witnesses reveals no connection between the blond skater's actions and appellant's fall; but the evidence is at least reasonably subject to the interpretation here given, and such an interpretation in appellant's favor must be adopted. During the skating period when appellant fell, some of the skaters were skating normally, others were skating fast, about half of the skaters were skating twice as fast as appellant. Some of the skaters were two-stepping or "rexing." There were probably 500 persons skating at the rink that evening, though it does not appear how many were skating during the period when appellant fell. The dimensions of the rink floor are approximately 100 by 200 feet. At the time of appellant's fall there was a skating instructor stationed at each of the four corners of the rink, and the skaters skated around on the outside of those four instructors. There were also two lady instructors on the floor. In addition there were four other instructors spaced around the rink. These latter instructors were in uniform and skated backwards around the rink in the direction of the skaters. The manager of the rink was out in the middle of the floor at the time. The guards or instructors were instructed that if they saw anyone skating "at such a speed or in such a manner that the other skaters would be in danger, beyond the normal risk of skating, to stop them or to slow them down as the necessity of the situation seemed to require." It was stipulated at the trial that these instructors, if called to the stand, would testify that on the evening in question they did not see the blond woman skater and could not recall any incident that occurred prior to appellant's accident. The gentleman who accompanied appellant to the rink, and who was sitting in the loge box, had his attention drawn to the blond skater because of her manner of skating; and he then watched this blond skater until her skate struck that of another skater as above mentioned. The length of time this witness observed this blond skater was not determined, though there is some evidence of the approximate distance over which she traveled during the time she was thus observed. After her fall appellant was unable to rise and she was picked up from the floor by two instructors, who put her on her feet and rolled her on her skates off the floor to the first aid room, where appellant was laid down on a table. Here respondent Berman, who was dressed in a white coat or jacket, told appellant he was a doctor, in answer to appellant's question to that effect. Berman stretched, pulled and rubbed appellant's leg and "pounded" her thigh with his open hand. He informed appellant that her injury was not serious and that she would be able to go to work the next day. He then assisted appellant to her feet and to walk out of the rink to a waiting car. Appellant was unable to get into the car and sat sideways on the running board, from which position Berman pulled appellant into the car and assisted her to the seat.

The extent of appellant's injuries is not disputed. She suffered a cervical fracture of the femur of the left leg, commonly designated as a broken hip. Appellant was operated upon twice, the second operation being necessitated because of a definite non-union of the bones. There had been a bad disturbance of the circulation through the blood vessels of the bone, these blood vessels having been ruptured so that circulation could not cross the fracture line. A shortening of the leg has taken place through absorption of the bone. A third operation is in prospect wherein a section of bone from the leg below the knee will be transplanted to the fracture line in the hip. Appellant's leg has thus been shortened about an inch and appellant will never again be in a normal condition with regard to the use of this leg. Appellant's physician, testifying as an expert in her behalf, stated that under the circumstances appellant should not have been moved from the spot where she fell until splints or a suitable substitute had been applied to the fracture to prevent movement between the broken fragments of bone. The physician's testimony indicates that the rupture of the blood vessels, which was responsible for the absorption of the bone fragments and consequent non-union of the bone, would be apt to be caused the first time weight was put upon the fractured hip; which of course was when the rink attendants first lifted appellant to her feet and rolled her to the first aid room, and before respondent Berman had anything to do with her. The doctor stated that "practically all the damage would be done the first time." However, he also indicated that the rest of her handling would be cumulative. It is to be noted that respondent corporation was not charged with negligence in improperly handling appellant after her fall. Respondent Berman contends that the expert testimony definitely established that Berman's actions and advice did not aggravate or add to appellant's injuries or cause her damage. However, the testimony referred to is by no means positive and unequivocal and the statements on the question are all qualified.

Upon this state of the record the question here to be determined is whether there was sufficient evidence to submit the question of the liability of the respective respondents to the jury. If so, the trial court must be held to have abused its discretion in granting judgment notwithstanding the verdict of the jury.

[2-5] Upon the pleadings and the evidence in support thereof, the liability of respondent corporation is necessarily predicated upon a theory that the blond skater's actions were of such a nature and extent that, under the circumstances, the respondent's employees should have seen the same in time to have prevented a continuance thereof. One of respondent corporation's defenses was the assumption by appellant of the risks incident to skating upon such a rink; but it cannot be argued that one of the normal risks involved is the reckless action of other skaters capable of being prevented by guards who are stationed upon the rink for the protection of patrons. While the operator of a skating rink is not an insurer of his patrons' safety, nevertheless, he owes a duty to protect them from risks other than those normally incident to the sport. From the evidence presented the jury might properly infer that the blond skater's actions caused appellant's fall; that the blond's actions were reckless; and from the description of those actions as given by the witness it could be inferred that the skater's actions had continued for a longer time than the period she was observed. The witness was sitting in a loge box, and as the skaters passed before him his attention was attracted to the blond skater by the manner in which she was skating. There is nothing to show that her speed and her actions were the result of a sudden spurt. On the contrary, the evidence tends more reasonably to support an inference that the blond skater's actions had continued during the time she was upon the rink. The skating period in question had been in progress for approximately three minutes when appellant's accident occurred. There is no evidence to show when the blond skater came upon the skating floor, but from the points marked by the witness on the chart in evidence, indicating where the witness observed the blond skater, it might reasonably be inferred that the blond had not just entered upon the rink. In fact, the markings upon the chart in this respect would support an inference that the skater in question had traveled over a considerable portion of the length of the rink. From the evidence, and from the ordinary course of the events thereby revealed, the jury might reasonably infer that the rink floor, during the skating period reserved for ladies only, was not as crowded as it would be during a period open to all skaters. Respondent corporation admits that at the time of the accident there were ten attendants, and the manager of the rink, upon the skating floor, and that the attendants were charged with the duty of supervising the conduct of the skaters. While, upon the foregoing evidence, a jury might decide the case either for or against appellant, it cannot be said that the conclusion reached was necessarily the result of pure surmise or conjecture. The evidence presented a question of fact as to respondent corporation's liability, and upon that question, the jury was the final arbiter, and their conclusion cannot be disturbed when supported by substantial evidence, however conflicting.

[6-8] A like situation is presented in respect to the case against respondent Berman. As already pointed out, the testimony of the experts did not definitely establish that respondent Berman's handling of appellant did not or could not cause aggravation of her injuries. The effect of this expert testimony was to indicate that the removal of appellant from the rink floor in the first instance was apt to be the principal cause of aggravation. This testimony by no means eliminated Berman's actions as a possible cause of aggravation. The question was left open for the jury to decide upon all the evidence presented. Respondent Berman calls attention to the testimony of a doctor, called as a witness in Berman's behalf, to the effect that a physician would have done approximately the same as Berman. Such testimony is of no avail. It is not a question of what a qualified medical practitioner would have done under the circumstances, but is rather a question of whether Berman under like circumstances should have assumed the role and duties of a doctor. If he did assume such a role and negligently caused aggravation of appellant's injuries thereby, manifestly, he could not avail himself of the defense of having used the standard of skill and care usually

possessed or rendered by physicians in the locality. Such a defense is peculiarly the privilege of the medical profession.

Respondent Berman cites Owl Drug Co. v. Crandall, 52 Ariz. 322, 80 P.2d 952, 120 A.L.R. 1521, but the case is not in point. In that case the evidence showed that the plaintiff's injuries may have resulted from one of several causes, and that only one of the causes could be attributed to plaintiff's negligence. Here the question is whether Berman's acts aggravated appellant's injuries, regardless of what the cause of appellant's injuries was and regardless of what else was done to appellant. Upon this question there was sufficient evidence to submit to the jury. In both instances the trial court abused its discretion in granting judgments in favor of respondents notwithstanding the verdict.

The judgments appealed from are reversed and the trial court is ordered to enter judgments in accordance with the verdict of the jury.

YORK, P. J., and WHITE, J., concurred.

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50 Cal.App.2d 610

PEOPLE v. BROOKS.

Cr. 3533.

District Court of Appeal, Second District, Division 1, California.

March 20, 1942.

1. Indictment and Information ⚷189(2)

The crime of assault is a lesser offense included in charge of crime of assault with a deadly weapon.

2. Criminal law ⚷157

Where information charging crime of assault with a deadly weapon was filed within less than a month after date on which it was alleged the crime was committed, even though verdict finding defendant guilty of assault was not returned within statutory time of one year after commission of the offense, the Superior Court had authority to pronounce judgment against defendant, since she was convicted of an offense within the scope of the information. Pen.Code, §§ 801, 1426a.

Appeal from Superior Court, Los Angeles County; Vaughn N. Thompson, Judge Assigned.

June Brooks was convicted of the crime of assault, and she appeals.

Affirmed.

William G. Kenney, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

WHITE, Justice.

[1] In an information filed by the District Attorney of Los Angeles County, the defendant was accused of the crime of assault with a deadly weapon, to which charge she entered a plea of not guilty. Upon a first trial of the cause defendant was convicted of the offense charged against her, but a new trial was granted in the superior court. Upon the second trial the jury disagreed. Following a third trial the jury returned a verdict finding the defendant guilty of the crime of assault, a misdemeanor, a lesser offense necessarily included in the charge set forth in the information. Defendant's motion for a new trial was denied, and she was sentenced to six months in the county jail, the execution of which sentence was suspended and the defendant placed on probation for the term of two years. From the judgment of conviction and the order denying her motion for a new trial, defendant prosecutes this appeal.

[2] The sole ground for reversal urged by appellant is that the trial court erred in denying her motion for a new trial for the asserted reason that "the verdict is contrary to law, in that the court had lost jurisdiction to impose sentence upon the verdict returned by the jury, in that the statute of limitations had run with respect to the crime designated by the verdict." In other words, as we understand appellant's argument, it is that even though a complaint, indictment or information charging a misdemeanor is filed within the statutory time of one year after the commission of the offense, Pen. Code, §§ 801, 1426a, nevertheless the court is without power to pronounce judgment where a guilty verdict is rendered or a plea taken after the expiration of the aforesaid statu-

tory time. This claim is without merit. The information herein was filed less than a month after the date on which it was alleged the crime was committed. While the offense of which the defendant was informed against was of a higher grade than that of which she was convicted, nevertheless the offense of which she was found guilty is one necessarily included in the crime charged against her. She was therefore convicted of an offense within the scope of the information; and the last-named pleading having been filed within one year after the commission of the offense of which defendant was found guilty, the superior court was empowered and had authority to pronounce the judgment against her. Ex parte Donahue, 65 Cal. 474, 475, 4 P. 449.

The cases of People v. Picetti, 124 Cal. 361, 57 P. 156, and People v. Angelo, 24 Cal.App.2d 626, 75 P.2d 614, earnestly relied upon by appellant, do not aid her, for the reason that in both the cited cases, although the defendant was charged with a felony and convicted of a misdemeanor, the same being a lesser offense included in the greater one charged, as was the case here, the offenses therein charged had been committed more than a year prior to the return of the indictment or filing of the information. As heretofore noted, in the case at bar the information was filed within less than a month after the date when the offense charged was alleged to have been committed.

The judgment and the order denying defendant's motion for a new trial are, and each is, affirmed.

YORK, P. J., and DORAN, J., concurred.

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50 Cal.App.2d 592

PEOPLE v. COLEMAN.

Cr. 1785.

District Court of Appeal, Third District, California.

March 19, 1942.

1. Homicide 🔑253(1)

Evidence warranted conviction of first degree murder of divorced wife.

2. Homicide 🔑163(1)

In murder prosecution, question propounded to mother of defendant as to where defendant had lived all his life, save during his married life, was properly excluded, as against contention that information sought was relevant as bearing on character and disposition of defendant as well as his physical and mental condition, since the subject matter was immaterial to the main issue of defendant's guilt of murder.

3. Criminal law 🔑1178

Where complaint was made of the giving and refusal to give certain requested instructions, but no argument was made and no authorities were cited in support of the objections so made to many of such questioned instructions, District Court of Appeal would consider only such as were attacked by argument or authority.

4. Homicide 🔑11

"Malice aforethought", either express or implied, is manifested by the doing of an unlawful and felonious act intentionally, deliberately and without legal cause or excuse, and does not imply a pre-existing hatred or enmity toward the individual injured.

See Words and Phrases, Permanent Edition, for all other definitions of "Malice Aforethought".

5. Criminal law 🔑438

In homicide prosecution, photograph of deceased should not be introduced in evidence where photograph was unnecessary.

6. Criminal law 🔑438

In homicide prosecution, photographs of deceased were competent to show head injuries which were inflicted by butt of pistol and which defendant denied, and to corroborate physician's testimony of bullet holes fired from close range, and admission of photographs was not prejudicial where there was nothing about the pictures which was shocking, obscene or inflammatory.

7. Criminal law 🔑741(4)

In homicide prosecution against defendant entering plea of not guilty and not guilty by way of insanity, weight, effect and value of opinions of experts were matters for jury to determine, and jury had a right to weigh such evidence in conjunction with all the circumstances in determining whether insanity of defendant was shown by preponderance of evidence.

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

William Coleman was convicted of murder in the first degree, and he appeals.

Affirmed.

O. F. Meldon, of Sacramento, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

STEEL, Justice pro tem.

The defendant here was charged by information with the murder of Cretie Coleman, from whom he had secured an interlocutory decree of divorce. He entered a plea of not guilty and not guilty by reason of insanity. After a trial by jury upon the pleas so entered he was found guilty of murder in the first degree, with recommendation of imprisonment for life, and on the trial of the second plea was found sane at the time of the commission of the offense. Judgment was thereafter pronounced, and a motion for a new trial was denied. This appeal followed.

The crime was alleged to have been committed in July, 1937, and at the time set for trial in October, 1937, the question of the then present sanity of the defendant arose, and after a hearing thereon it was determined that he was then insane, whereupon the trial was continued until such time as the defendant shall have been restored to sanity. He was committed to the State Hospital for the Insane at Stockton, and in 1941 he was declared sane. Thereupon the instant trial proceeded, resulting in his conviction.

The facts of the case as shown by the evidence are substantially as follows: The defendant had been engaged in the linen supply business in Sacramento, and the decedent, after their divorce, was working for one Samuel Cassinelli, who was engaged in the business of repairing typewriters and furnishing office supplies in Sacramento. In the evening of July 20, 1937, after closing the shop, Mrs. Coleman and Cassinelli drove out to William Land Park in the city, to have a picnic lunch. After parking their car they walked over some forty feet and sat down on the lawn, and as they started to partake of their food Cassinelli saw defendant approaching them, and asked the defendant, "what is the idea of following people around" to which the defendant responded, "I will show you, you little trouble maker," and at that the defendant pulled out his gun and started shooting. Cassinelli ran through the shrubbery to his car to obtain a policeman's club which he had, while Mrs. Coleman, pursued by the defendant, ran in another direction to where a Mr. and Mrs. Stam were also having a picnic. When Cassinelli returned from his car with the club, he testified, "the next thing I saw, when I come back, before I got to the spot where Mr. and Mrs. Coleman were, Mr. Coleman was standing over Mrs. Coleman hitting her over the head with the pistol he had in his hand,—she was crumpled to the ground which was right next to an automobile."

Mrs. Stam testified in part as follows:

"Q. What did you do after you heard the gun shots? A. Well, just in a few minutes she ran around.

"Q. Who? A. Mrs. Coleman, ran around and she hung on to my shoulder, so he ran around after her,—

"Q. (Interposing) Who did? A. Mr. Coleman.

"Q. The defendant? A. And, told me to get out of the way, so I dropped to the ground, and crawled,—I crawled a few feet into the road, then she went over and hung on to our car. * * *

"Q. Now you saw Mrs. Coleman then go to your car, and what did she do when she got to your car, if you noticed? A. She just hung on to the door; the car door was open, and she hung on to the car.

* * *

"Q. And slumped down,—what happened after that, if anything, that you saw? A. The next I heard, she said, 'Oh, someone help me.'

"Q. Was Coleman there then? A. Yes; he wouldn't allow any one to help her.

"Q. What did he do? A. He was swinging the gun, and he told everyone to move, get away from her."

This testimony was corroborated by her husband, Mr. Stam, who testified as follows:

"Q. What happened after you saw them? A. The lady came to my wife and she clinched my wife, then my wife shaken her off,—

"Q. Your wife did what? A. My wife shakened her off,—she wants to get away, she doesn't want to have anything to do with it.

"Q. Then what happened? A. Then she run to the car, to the door of the car, then she hung on to the door of the car, then this person was right back of her with the gun and he emptied the gun in her body.

"Q. How many shots? A. Oh, maybe two or three, I don't know; and one went through the windshield, and then his gun clicked, then he hit her over the head with the gun.

"Q. Do you know which end of the gun he hit her with? A. He turned it around, hit her with the butt.

"Q. Then what happened to the lady? A. What lady?

"Q. That he shot? A. She let go and she went up to the tree and she was hanging on there, then went down.

"Q. And the man who did that shooting, Mr. Stam, you identify as this defendant, Coleman, is that right? A. Yes, sir."

Two other witnesses who were driving by testified as to seeing the defendant waving his gun and warning them to stay away.

An autopsy surgeon testified that decedent died from hemorrhages; that she had two bullet wounds in her back and a laceration on her scalp, and also on her upper lip, which is also shown by photographs admitted as exhibits in evidence.

The defendant testified that he had had trouble with his wife over the matter of payment to her of alimony and that she had been urged to keep after him by Cassinelli; that he went out to the park by prearrangement, to have a talk with her about the question of alimony, and that as he approached them, Cassinelli called him a foul name and reached for his pocket, whereupon defendant started shooting, his wife running between the two of them, and the bullets hit her unintentionally.

[1] The defendant, appellant herein, first contends that the evidence is insufficient to support a verdict of murder in the first degree in that there was no evidence of premeditation or deliberation upon the part of the appellant to take his wife's life, but at best it would justify a verdict of manslaughter only. We find no merit in this contention. The evidence discloses that appellant went to the park armed with a loaded revolver; that he carried it in the front compartment of his automobile, and that when he got out of his car he removed the gun and took it with him. What happened thereafter was entirely for the jury to determine, and we find no evidence which would warrant the conclusion that the crime was committed in the heat of passion or upon sudden impulse. There were no threats made against appellant, nor did he see any gun or weapon in the hands of his wife or Cassinelli. When Cassinelli ran to his car, appellant chased the deceased and fired two or three shots into her body and then struck her upon the head with the butt of his revolver. This, of course, could not have been accidental but rather appears to have been deliberately planned.

The act of killing may follow the intent to kill as quickly as follow the successive thoughts of the mind. People v. French, 12 Cal.2d 720, 87 P.2d 1014; People v. Blackwood, 35 Cal.App.2d 728, 96 P.2d 982; People v. Aranda, 12 Cal.2d 307, 83 P.2d 928.

[2] Appellant next complains of the ruling of the trial court in sustaining an objection by the prosecution to a question propounded to the mother of appellant as to where appellant had lived all his life, save during his married life. It is argued that the information sought was relevant as bearing upon the character and disposition of the appellant as well as his physical and mental condition. While the subject matter may have had some bearing upon the issue of insanity and proper to be brought out upon the later trial, it obviously was immaterial to the main issue then before the court and jury.

[3] Complaint is made of the giving and refusal to give of certain requested instructions, but no argument is made and no authorities are cited in support of the objections so made to many of such questioned instructions, therefore we will consider only such as have been attacked by argument or authority.

[4] The court instructed the jury fully upon the subject of murder in all its degrees as well as manslaughter, and upon the subject of "malice aforethought," to which instruction our attention is directed by appellant. The instruction given is as follows: "Malice aforethought, either express or implied, is manifested by the doing of an unlawful and felonious act intentionally, deliberately and without legal cause or excuse. It does not imply a preexisting hatred or enmity towards the individual injured."

It is the last portion to which exception is taken. It is argued that there was no evidence of hatred or enmity toward the decedent and therefore its absence should be considered as a circumstance negativing the existence of this necessary element of "malice aforethought."

The given instruction is a correct statement of the law and is invariably given in all homicide cases. People v. Fallon, 149 Cal. 287, 86 P. 689; People v. Balkwell, 143 Cal. 259, 76 P. 1017.

We have examined the record and find the instructions given to be adequately full and complete.

[5, 6] Certain photographs of the decedent were received in evidence to which complaint is made as prejudicial error. While it is true that the introduction of such evidence in cases where it is unnecessary should be disapproved (People v. Burkhart, 211 Cal. 726, 297 P. 11), however, in the instant case the photographs were competent to show the head injuries inflicted by the butt of the pistol and which appellant denied, and also as corroborating the doctor's testimony showing definitely the two bullet holes fired from close range.

There is nothing about the pictures which is shocking, obscene or inflammatory, and no prejudice resulted to the defendant in that regard. People v. Magsaysay, 210 Cal. 301, 291 P. 582; People v. Sisson, 1 Cal.2d 510, 36 P.2d 116; People v. French, supra.

[7] The appellant finally contends that since there was a period of some four years which had elapsed from the date the offense was committed until the trial thereof, during which period appellant was an inmate of the State Hospital, a presumption, or at least a strong inference, arises that he was insane at the time of the commission of the crime. However that may be, it appears that the same jury which tried the main issue of not guilty was retained to try the issue of insanity, and in their deliberations they no doubt gave due consideration to all of the evidence which was introduced insofar as it had any bearing upon the question of the sanity or insanity of the appellant at the time the homicide occurred. Several expert witnesses testified on the issue of insanity, and while there is some conflict in the evidence regarding whether appellant knew right from wrong at the time of the homicide, the record nevertheless contains evidence of a substantial character amply sufficient to sustain the jury's verdict. The weight, effect and value of the opinions of the experts were matters for the jury to determine, and they have the right and it was their duty to weigh such evidence in conjunction with all the facts and circumstances in determining whether or not the sanity of the defendant was shown by a preponderance of the evidence.

We find no prejudicial error in the record which would warrant a reversal, and the judgment and order appealed from are therefore affirmed.

THOMPSON, Acting P. J., and TUTTLE, J., concur.

50 Cal.App.2d 598

HEATH v. FRUZIA.

Civ. 2678.

District Court of Appeal, Fourth District, California.

March 19, 1942.

Rehearing Denied April 16, 1942.

Hearing Denied May 14, 1942.

1. Animals 🔑70

Generally, the owner of a dangerous or vicious animal who has knowledge that it is such an animal is liable for any injury it may inflict upon another unless injured person voluntarily or consciously does something which brings the injury upon himself.

2. Animals 🔑70

The liability of the owner of a dangerous or vicious animal, who has knowledge that it is such an animal, for injuries inflicted by the animal upon another is absolute, and owner is bound to keep animal secure, or he must suffer penalty for his failure to do so, unless it can be shown that injured person voluntarily or consciously did something to bring about injury.

3. Animals 🔑70

The gist of an action against the owner of a dangerous or vicious animal for injuries inflicted by the animal is not the manner of keeping animal but the keeping him at all with knowledge of vicious propensities.

4. Animals 🔑70

The owner of a dangerous or vicious animal, who has knowledge that it is such an animal, is an "insurer" against acts of animal to one who is injured by animal without fault, and question of owner's negligence is immaterial.

See Words and Phrases, Permanent Edition, for all other definitions of "Insurer".

5. Animals 🔑74(8)

In action for injuries sustained when plaintiff was kicked by defendant's stallion, whether stallion was a vicious or dangerous animal was for jury.

6. Animals 🔑74(5)

In action for injuries sustained when plaintiff was kicked by defendant's stallion, evidence supported jury's implied findings that stallion was a dangerous or vicious animal and that defendant knew of the vicious or dangerous trait which caused injuries.

7. Animals 🔑70

That defendant's stallion, in most of the prior incidents wherein stallion had displayed vicious propensities, had attacked people or animals by using his front feet rather than by kicking did not relieve defendant from liability in action for injuries sustained when plaintiff was kicked by stallion.

8. Animals 🔑74(8)

In action for injuries sustained when plaintiff was kicked by defendant's stallion, whether plaintiff was guilty of contributory negligence was for jury.

9. Trial 🔑260(8)

In action for injuries sustained when plaintiff was kicked by defendant's stallion, instructing that where an injury is caused by a vicious animal which is known by its owner to be vicious, the owner is liable as an insurer unless injured person voluntarily does something to bring about injury and that question of negligence of owner is immaterial and refusal of instructions offered by defendant upon question of contributory negligence was not reversible error on theory that jury was told that negligence of plaintiff had no bearing upon his right to recover, in view of other given instructions.

10. Trial 🔑260(1)

Refusal of requested instructions was not reversible error where matters contained in refused instructions were covered by given instructions.

11. Trial 🔑243

In action for injuries sustained when plaintiff was kicked by defendant's stallion, instructions that where an injury is caused by a vicious animal which is known by its owner to be vicious, the owner is liable as an insurer unless injured person voluntarily does something to bring about injury and that plaintiff was bound to exercise that degree of care which an ordinarily prudent person in plaintiff's position and with his knowledge would have exercised were not conflicting.

12. Appeal and error 🔑882(12)

Where defendant asked for an instruction in trial court, defendant could not object to the instruction on appeal.

◆

Appeal from Superior Court, Kern County; Pat R. Parker, Judge.

Action by Harold Heath against Jack Fruzia and another for injuries suffered by plaintiff as a result of being kicked by a horse. From a judgment for plaintiff, Jack Fruzia appeals.

Affirmed.

Calvin H. Conron, Jr., of Bakersfield, for appellant.

West & Vizzard, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action for damages on account of injuries suffered by the plaintiff as a result of being kicked by a horse owned by the defendant Fruzia. The complaint originally contained two counts, the first based upon the theory that this horse was vicious and dangerous which fact was known to the owner, and the second based upon the theory of negligence on the part of the defendant Mahaffey, who was in direct charge of the animal at the time. The defendant's motion for a nonsuit was granted as to the second cause of action and the matter was submitted to a jury upon the issues raised by the first cause of action and the answer. A verdict was returned in favor of the plaintiff and against the defendant Fruzia and he has appealed from the judgment which followed.

The horse in question was a stallion named "Duke." On this occasion Mahaffey was riding "Duke." Heath was riding another horse, and Fruzia was riding a third horse and leading a mare. They stopped at a cross-road store and ordered coca colas, a bottle being handed to each rider by the storekeeper. Mahaffey had dismounted and was holding "Duke" by the reins, with the reins wrapped around his arm while he was getting the money from his pocket with which to pay for the drinks. Heath, who had come to the scene after the others were there, at first rode his horse in near to where Mahaffey was standing at "Duke's" head and then backed his horse a few steps and moved around so that his horse was standing at the edge of the traveled portion of the road and parallel with "Duke," but facing in the opposite direction and about 16 feet away from "Duke." While he was in this position and drinking his coca cola, and while Mahaffey was trying to get his money out of his pocket, "Duke" suddenly and without warning whirled around, backed up a few paces and kicked, striking respondent and breaking his leg.

[1-4] The well-established general rule is that the owner of a dangerous or vicious animal who has knowledge that it is such an animal is liable for any injuries it may inflict upon another unless such other person voluntarily or consciously does something which brings the injury upon himself. In Opelt v. Al. G. Barnes Co., 41 Cal.App. 776, 183 P. 241, 242, the rule is thus stated: "The liability of the owner is absolute, in such cases, and he is bound to keep the animal secure, or he must suffer the penalty for his failure to do so, in making compensation for the mischief done, unless it can be shown that the person injured voluntarily, or consciously, did something to bring about the injury. Molloy v. Starin, 191 N.Y. 21, 83 N.E. 588, 16 L.R.A.,N.S., 445, 14 Ann.Cas. 57. The gist of the action is not the manner of keeping the vicious animal, but the keeping him at all with knowledge of the vicious propensities. Hammond v. Melton, 42 Ill.App. 186. In such instances the owner is an insurer against the acts of the animal, to one who is injured without fault, and the question of the owner's negligence is not in the case. Laverone v. Mangianti, 41 Cal. 138, 10 Am.Rep. 269; Clowdis v. Fresno Flume, etc., Co., supra [118 Cal. 315, 321, 50 P. 373, 62 Am.St.Rep. 238.]"

The appellant first contends that the evidence is not sufficient to sustain either the implied finding of the jury that "Duke" was a dangerous or vicious animal or the further implied finding that the appellant knew of the vicious or dangerous trait which caused this injury. It appears without contradiction, that on this occasion "Duke" wheeled around, pulled back and kicked suddenly and without warning. Mahaffey testified that he knew of no provocation to cause "Duke" to do this, that he was absorbed at the time in getting out his money and "I didn't know that the horse was going to kick." There was evidence that when "Duke" was about a year old a small boy started across a pasture in which "Duke" was confined, on his way to school, and that when he was about 200 yards away "Duke" took after him and knocked him down, breaking his leg. On another occasion, about two years before the time of the trial, while several men were riding along together "Duke," who was then being ridden by the appellant, suddenly reared and struck one of the other riders with one of his front feet, knocking the man half way out of his saddle. At another time, about a year before the trial, while several men, including the respondent and the appellant, were riding together "Duke" suddenly reared and the respondent seeing "Duke's" hoofs over his head "spurred my horse out and he came down on her hips." Shortly before the trial, "Duke" attempted to kick another horse which was being loaded into a two-horse trailer with him. One of appellant's witnesses testified with respect to "Duke," "I don't think he is exactly vicious, but so far as dangerous, I would want to stay out of his way. As far as that goes I wouldn't want to get too close to him." Another of appellant's witnesses testified: "Well, he is not, I don't believe he would hurt any human being but he would kick another horse or fight another horse." Both of these witnesses had seen "Duke" on many occasions.

[5-7] In view of this evidence it must be held that the question as to whether "Duke" was a vicious or dangerous animal was one of fact for the jury and not one which may here be determined as a matter of law. The evidence, with inferences which might reasonably be drawn therefrom, sufficiently supports the jury's finding in this regard. This being true, it follows that the finding that the appellant had knowledge of "Duke's" vicious or dangerous tendencies is also supported since the appellant was himself present on each of the occasions above referred to with the exception of the one where the boy was attacked in the pasture, and it is admitted that he was informed of that incident a few minutes after it occurred. There is no

merit in appellant's contention that in most of the prior incidents referred to "Duke" attacked people or animals by using his front feet rather than by kicking. The question involved is the trait, disposition or characteristics of the animal rather than the exact manner in which previous attacks have been made. All of the attacks had been made without provocation and they were not so dissimilar to the one in question as to be immaterial or without evidentiary value.

[8] The appellant next argues that the evidence conclusively shows that the respondent negligently, voluntarily and consciously placed himself in a position of peril and thus brought about his own injury. It is argued that as an experienced horseman the respondent should have known that any horse might kick sometime, that "the most dangerous place about an animal is to be in the vicinity of its full stretch," and that by stopping the horse he was riding at that particular place the respondent did something which a prudent horseman would not have done and thereby "not only provoked the kicking, but also he made possible its serious consequences." It appears from the evidence that the respondent, after approaching the point where "Duke's" rider was standing, near "Duke's" head, backed his horse away, rode him over to one side where he was parallel to "Duke" but about 16 feet away, and as close to the road as he could get without standing on the traveled portion thereof. He was about twice a horse's length away from "Duke" and it cannot be said as a matter of law that he was then in a place of danger or that he should have anticipated that "Duke" would be so held by his rider as to permit him to wheel over and back up several paces where his heels would be within reach of the respondent. This question was also one of fact for the jury.

Appellant's final contention is that the court erred in giving instructions to the general effect that where an injury is caused by a vicious animal which is known by its owner to be vicious, the owner is liable as an insurer unless the injured person voluntarily or consciously does something to bring about the injury and the question of negligence on the part of the owner is immaterial, and in refusing certain instructions offered by the appellant upon the question of negligence and relating particularly to contributory negligence on the part of the respondent.

[9] The instructions, which were thus given, were in accordance with the general rules applicable in such cases as this, as well established in this state, and it is not contended that these instructions were incorrect in themselves. It is contended, however, that by giving these instructions and by refusing to give the other instructions relating to negligence on the part of the respondent, the jury was in fact told that the negligence of the respondent had no bearing whatever upon his right to recover in this case, and that this was erroneous. Assuming that the question of respondent's negligence might have had a bearing upon the real question in issue in this connection, as to whether the respondent voluntarily or consciously did something to bring about his injury, and further assuming that there was any evidence of such negligence on the part of the respondent, the contention here made is without merit since the jury was sufficiently instructed in this regard, if any instruction was necessary. The court, at the request of the appellant, gave this instruction: "Harold Heath, the plaintiff, during the entire period of time involving the accident of which he here complains, was under a duty to exercise that degree of care and prudence which an ordinarily prudent person in his position and with his knowledge would have exercised, and if you find that he did not exercise such care for his own safety and that such failure contributed to the injuries of which he complains, then the defendant is not liable."

And in another instruction, also requested by the appellant, the jury was told: "If you find from the evidence that at the time of the accident Harold Heath was fully aware of the character of the stallion in question, then in determining whether Heath was at fault you are charged that it is your duty to consider his conduct in the light of that knowledge."

[10] The instructions just quoted not only sufficiently covered all of the matters contained in the refused instructions, but clearly and directly submitted to the jury the very question which the appellant now contends should have been presented to it. Without going into the question raised as to the place of contributory negligence in an action of this kind, as having a possible effect upon the question of whether an injured party has voluntarily or consciously done something to bring about his injury, it clearly appears here that the jury was

fully instructed even under the appellant's theory in that regard and no reversible error appears.

[11, 12] In this same connection it is suggested that, at best, these instructions were conflicting in that the jury was told that it was the duty of the respondent to refrain from voluntarily or consciously doing something to bring about his own injury, and, on the other hand, was told that the respondent should act as an ordinarily prudent person. Not only was any possible conflict introduced at the request of the appellant but it sufficiently appears that these two points of view are merely complementary and not conflicting. The jury was told that the respondent could not recover if he voluntarily or consciously had done anything to bring about his injury, and then was told that he could not recover if he failed to exercise the care and prudence which an ordinarily prudent person in his position and with his knowledge would have exercised, and if the failure to exercise such ordinary care contributed to his injuries. These were not so inconsistent as to be in any way misleading and any possible error in the latter instruction was in favor of the appellant and, having asked for it, he is in no position to object thereto.

For the reasons given the judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.

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50 Cal.App.2d 581

WOOD v. POWERS et al.

Civ. 12897.

District Court of Appeal, Second District, Division 2, California.

March 19, 1942.

1. Appeal and error 🔑854(5)

On appeal from judgment of dismissal after granting of defendant's motion for nonsuit, such ruling will be sustained, if motion might have been granted on any ground, whether actually made a ground thereof or not.

2. Licenses 🔑39

In action to recover money paid as purchase price of corporate stock on ground that transaction was in violation of Corporate Securities Act and securities void, burden was on plaintiff to prove such violation and presence of all elements necessary under act to render securities void. St.1917, p. 673, as amended.

3. Licenses 🔑39

In action to recover money paid as purchase price of corporate stock on ground of violation of Corporate Securities Act, defendant's motion for nonsuit was properly granted, in absence of proof by plaintiff that one from whom plaintiff's assignor purchased stock was private owner thereof or bona fide owner disposing of his own property for his own account or that sales were made directly or indirectly for benefit of issuer or underwriter of securities or for direct or indirect promotion of any scheme or enterprise with intent to violate or evade any provision of such act. St.1917, p. 673, § 2(c) (3), as amended by St.1933, p. 2312.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by Verne Wood against Frank W. Powers, Roger Averill, and others, to recover money paid as the purchase price of corporate stock. From a judgment of dismissal after granting of defendant Averill's motion for nonsuit, plaintiff appeals.

Affirmed.

Wilbert C. Hamilton, John F. Hoornaert, and Walter Gould Lincoln, all of Los Angeles, for appellant.

Neice & Crane, of Los Angeles, for respondent.

JESS E. STEPHENS, Justice pro tem.

This is an action to recover money paid as the purchase price for corporate stock. Defendant Averill alone answered and he will be hereinafter referred to as defendant.

The complaint was, in form, for money had and received, and upon the trial before the court without a jury it appeared that plaintiff's assignor in December, 1934, purchased certain stock of the Monarch Gold Mining Company, a corporation organized under the laws of the state of Nevada. Plaintiff's assignor, Miss Beale, was a secretary in the office of one of her present counsel, who at that time represented defendant (but not the corporation) herein. Defendant was a stockholder in the above named corporation and frequently discussed with Miss Beale and the attorney the prospects of the mine belonging to the corporation and located in California. Both became interested in it and visited the mine, and eventually purchased stock in the corporation. Defendant, although active in taking numerous persons to see the mine and extolling its possibilities, was not an officer or agent of the corporation, or, so far as appears, connected with it in any manner other than as a stockholder.

Called as a witness by plaintiff under Section 2055 of the Code of Civil Procedure, defendant testified that perhaps 40 people purchased stock as a result of his taking them to see the mine; that none of this stock was his own; that he was interested only as a stockholder in the success of the mine. In answer to the question, "Did you sell him [meaning a specific purchaser] any shares of the Nevada Monarch stock?" defendant replied: "I sold him some shares that belonged to Mr. F. W. Powers." Similar reply was given to at least one other such question. Upon cross-examination defendant was asked by his own counsel: "This stock that you testified on examination by Mr. Lincoln was sold to them, was that stock that was owned by Mr. Powers?" and he answered, "Yes." Objection to the question was afterward made by plaintiff's counsel, but no motion to strike the answer was made and no direct ruling made upon the objection; although when later defendant's counsel asked him, "Was that stock that had previously been issued to Mr. Powers?" objection was made by plaintiff's counsel and sustained.

There was no other evidence presented as to the ownership of any of the stock that was sold through the activities of defendant, whether it was or was not privately owned by Mr. Powers. No evidence whatever was offered as to the ownership of the specific stock purchased by Miss Beale, plaintiff's assignor, or whether if it was the privately owned stock of Mr. Powers he was a bona fide owner disposing of his own property for his own account or whether such sales were made directly or indirectly for the benefit of the issuer or an underwriter of such securities. No evidence was presented throwing any light upon the reason for the organization of the corporation in Nevada, and no evidence was offered indicating that this or any sale was made for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of the Corporate Securities Act, St. 1917, p. 673, as amended.

[1] At the conclusion of plaintiff's testimony defendant made a motion for nonsuit and this motion was granted. In granting the motion the court did not state the grounds upon which it was granted. The appeal is from the judgment of dismissal which followed the granting of the motion. It is well settled that upon such appeal the action of the trial court will be sustained if the motion might have been granted upon any ground, whether made a ground of the motion or not. Balian v. Balian's Market, 48 Cal.App.2d 150, 119 P.(2d) 426; Anchester v. Keck, 214 Cal. 207, 213, 4 P.2d 934.

[2, 3] At the time of the transaction complained of (December, 1934) the portion of the Corporate Securities Act with which we are here particularly concerned provided as follows (sec. 2[c], 3): "Except as herein expressly provided, the provisions of this act shall not apply to the sale of any security in any of the following transactions: * * * 3. The sale of securities when made by or on behalf of a vendor not the issuer or underwriter thereof who, being a bona fide owner of such securities, disposes of his own property for his own account, and such sale is not made, directly or indirectly, for the benefit of the issuer or an underwriter of such security, or for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of this act." Amendment approved June 12, 1933; Stats. 1933, p. 2309. Plaintiff's cause of action is based upon the claim that the transaction was in violation of the Corporate Securities Act, and that the securities were therefore void and plaintiff was entitled to the return of the money paid. The burden was of course upon plaintiff to prove that there was a violation and that there were present all of the elements which, under the act, were necessary in order to render the securities void. As clearly indicated by the recital hereinabove, plaintiff failed to make such necessary proof. The motion for nonsuit was therefore properly granted.

Counsel devote considerable discussion to the question of whether or not plaintiff's action was barred under the statute of limitations, but in view of what has already been said it will not be necessary to pass upon this question.

Judgment affirmed.

W. J. WOOD, Acting P. J., and McCOMB, J., concurred.

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50 Cal.App.2d 499

CROWN BODY CORPORATION, LIMITED v. CITY OF LOS ANGELES et al.

Civ. 13483.

District Court of Appeal, Second District, Division 2, California.
March 17, 1942.

1. Appeal and error 🔑458(3)

The District Court of Appeal has no authority to grant supersedeas staying proceedings for enforcement of mandatory injunction decree pending appeal from order denying motion to modify such judgment six months after entry thereof, as such power to stay proceedings is limited to restraining action on judgment or order appealed from.

2. Appeal and error 🔑488

A judgment for injunction is not stayed by appeal from order made after judgment, even by filing bond for stay.

3. Appeal and error 🔑488

A bond on appeal from order denying motion for new trial is only exception to rule forbidding stay of proceedings on judgment granting injunction by appeal from order made after judgment.

4. Appeal and error 🔑477

The District Court of Appeal has inherent power to preserve status quo pending appeal from order made after judgment only when it clearly appears that such order is demonstrably arbitrary, and hence cannot grant writ of supersedeas staying proceedings to enforce mandatory injunction judgment, which was stipulated after action had lain dormant for 10 years, pending appeal from order denying motion to modify judgment.

5. Appeal and error 🔑477

An order denying motion to modify injunction decree by extending effective date of mandatory provision therein was self-executing, and no process was necessary for its enforcement, so as to require denial of supersedeas suspending enforcement of judgment pending appeal from such order.

6. Appeal and error 🔑458(2)

Where no process is required to be issued for enforcement of order made after judgment, no supersedeas to stay proceedings for enforcement of judgment pending appeal from such order is allowed.

◆

Original proceeding by the City of Los Angeles and others for a writ of supersedeas, suspending enforcement of a judgment, granting the Crown Body Corporation, Limited, a mandatory injunction, pending petitioners' appeal from an order denying their motion to modify such judgment.

Petition denied, and order to show cause discharged.

Ray L. Chesebro, City Attorney, of Los Angeles, for petitioners.

Dudley R. Furse, of Hollywood, and Walter L. Bruington, of Los Angeles, for respondent.

MOORE, Presiding Justice.

This is an original proceeding to effect the suspension of the enforcement of all proceedings under a judgment for mandatory injunction pending appeal from an order refusing to modify the injunction granted some five months prior to such order.

On August 5, 1931, plaintiff instituted its action against defendants for an injunction to enjoin them from operating an asphalt plant within the limits of defendant city on the ground that the operation of such plant constituted a nuisance. Defendants duly filed their answer. Following certain proceedings and in accordance with a stipulation of the parties filed in the action, almost ten years later, to-wit on July 30, 1941, the superior court made and filed an injunction enjoining defendants from operating in any manner or degree whatsoever, in whole or in part, the asphalt plant described in plaintiff's complaint after the first day of November, 1941, and ordering them to commence the dismantling of said plant within fifteen days thereafter. The injunction further provided that at any time after said plant had been dismantled, defendant might construct a new plant on the same property and required that they comply with certain specified requirements. On October 22, 1941, the injunction was modified by extending its effective date to January 1, 1942. Pursuant to such injunction, the operation of the plant was actually suspended January 1, 1942, and has not been operated since that day.

On January 12, 1942, defendants presented their motion to the superior court for a modification of the injunction as amended October 22, 1941, by extending the effective date of the mandatory provision for the dismantling of the plant to "fifteen days after the termination of the present national emergency or within fifteen days after it should become possible to procure materials necessary for the building of a new asphalt plant." This appeal is from the order denying such motion.

Defendant's petition recites that the dismantling of the plant was begun January 16, 1942, and has proceeded continuously and diligently to the date of this petition.

The bases of the last motion filed for a modification of the injunction, as contained in the supporting affidavits, are as follows:

(1) Necessity for the preservation of the asphalt plant to the end that it might be utilized for the repair of streets in the event of dire necessity incident to damage caused by an act of the enemy of the United States or by increased use of the city streets due to military traffic; (2) that it does not appear from the records that the mere maintenance of the plant, as distinguished from its operation, constitutes a nuisance; (3) that the action was brought to enjoin the operation of the plant and did not seek its immediate destruction; (4) that the injunction of July 30, 1941, contemplates the erection of a new plant on the site of the old and does not contemplate the dismantling of the old without the erection of the new; (4) that by reason of the present shortage of steel and other materials for civilian purposes, it is impossible to procure materials necessary for the construction of the new plant; (5) that without the facilities of the old plant, it might become impossible properly to repair the streets of the city if damaged by acts of war; (6) that the modification of the decree sought by the motion of January 12th does not contemplate the operation of the plant but merely its preservation so that it might be used in the event of dire necessity in the interest of national defense if the superior court will allow its operation; (7) that the defendants intend to and will, in the event of such contingency, apply to the superior court for an order allowing the operation of the plant temporarily under such conditions as the court might impose; (8) that the denial of defendants' motion makes necessary a great waste of material and "potential productive capacity" and that said ruling is arbitrary and unreasonable and constitutes an abuse of discretion; (9) that in the event of the failure of defendants to comply with the mandatory provision of the injunction, plaintiff will apply to the superior court for an order citing defendants in contempt for disobedience of the injunction.

[1-3] We must, therefore, determine whether or not under the facts recited this court should stay proceedings pending appeal from the order of January 12, 1942, refusing to modify the consent decree of July 30, 1941.

Under the facts recited, in the light of the authorities we cannot do so. The order appealed from was entered six months subsequent to the entry of the stipulated judgment for an injunction ordering the dismantling of the plant. This court has no authority to grant a supersedeas under such circumstances. Such power is limited to restraining action upon the judgment or order from which the appeal is taken. The judgment for injunction is not stayed by an appeal from an order made after the judgment even by filing a bond for stay. Carit v. Williams, 67 Cal. 580, 8 P. 93; McCann v. Union Bank & Trust Co., 4 Cal.2d 24, 47 P.2d 283; Olsen v. Board of Supervisors, 30 Cal.App.2d 635, 638, 87 P.2d 36; Bryan v. Superior Court, 169 Cal. 761, 762, 147 P. 938. A bond on appeal from an order denying a motion for a new trial is the one exception to the rule which forbids the stay of proceedings on the judgment by appeal from an order made after judgment. Weldon v. Rogers, 154 Cal. 632, 634, 98 P. 1070.

[4] It is true that the court has inherent power on appeal from an order made after judgment to preserve the status

quo of the decree when it clearly appears that the order appealed from is demonstrably arbitrary. Rogers v. Superior Court, 158 Cal. 467, 468, 111 P. 357. No such inference can be drawn from the record in this case. The judgment for injunction was stipulated after the action had lain dormant for ten years and its enforcement was once thereafter delayed for two months on defendant's request. Moreover the order appealed from is merely a denial of a further stay of execution.

[5, 6] Defendants contend that the order in question is not self-executing but that a further affirmative act is required to make it effective (citing Feinberg v. One Doe Co., 14 Cal.2d 24, 92 P.2d 640). But on the contrary the order in question is self-executing and no process is necessary for its enforcement. Hulse v. Davis, 200 Cal. 316, 253 P. 136; Dulin v. Pacific Wood & C. Co., 98 Cal. 304, 33 P. 123. If no process is required to be issued for the enforcement of the order, no supersedeas is allowed. Tyler v. Presley, 72 Cal. 290, 292, 13 P. 856.

For the reasons given, it is ordered that the petition for a writ of supersedeas be and it is hereby denied and the order to show cause is hereby discharged.

W. J. WOOD and McCOMB, JJ., concurred.

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50 Cal.App.2d 643

JOHNSTON v. YARBROUGH et al.

Civ. 13256.

District Court of Appeal, Second District, Division 1, California.

March 23, 1942.

Rehearing Denied April 22, 1942.

Hearing Denied May 21, 1942.

Fraud 🔑58(1)

Evidence was sufficient to show that contract by which inventor who had assigned application for patent to corporation in return for 50 per cent. of stock of corporation sold his stock in corporation to owner of rest of stock in consideration of cash payment, and additional payments in the future, and reduction of corporation's indebtedness to inventor by means of cash payment and receipt of certain percentage of gross proceeds of corporation, was not result of fraud.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action involving a contract by M. O. Johnston against Harold C. Yarbrough and others. From judgments for the defendants, the plaintiff appeals.

Affirmed.

Hill, Morgan & Bledsoe and Kenneth K. Wright, all of Los Angeles, for appellant.

Raphael Dechter, B. L. Hoyt, and Michael G. Luddy, all of Los Angeles, for respondents.

YORK, Presiding Justice.

Appellant brought the instant action against two distinct sets of defendants, to wit: (1) H. C. Yarbrough, Oil Tools, Inc., Yarbrough Guns Co., and (2) Technicraft Engineering Corporation, Lane-Wells Co., Walter Wells and Wilfred G. Lane, and prosecutes this appeal from judgments in favor of said defendants, contending that the evidence is insufficient to sustain certain of the findings of fact, and that the court erred in its rulings excluding evidence sought to be introduced by appellant.

The record herein reveals that in December of 1932, appellant, claiming to be the inventor of a "gun perforator involving the fire retarding means and sequential firing," filed an application for letters patent in the United States Patent Office. A gun perforator is used in the oil well industry for perforating oil well casing after it has entered the well, in order to permit the oil to filter through such perforations from oil bearing strata. Previous to filing his application, appellant had been working with respondents Wells and Lane in an endeavor to perfect the device under an agreement whereby he, as inventor, was to have a 50 per cent interest in the same. Unknown to appellant, and while they were carrying on their experiments with the gun, respondent Lane made application for letters patent therefor, whereupon appellant withdrew from his association with these two men, and filed his application, as hereinbefore mentioned. Appellant's application, after some preliminary proceedings in the patent office, came into interference with the application of respondent Lane which application later became the property of respondent Technicraft. On June 29, 1935, the patent office declared interference between the two applications and the matter was then ready for determination of the question as to who was the inventor of the device and to whom said patent should be issued.

It also appears that at the time appellant filed his application for letters patent there had been issued by the patent office patents to various other persons covering various types and kinds of "gun perforators," including a patent on a gun perforator known as the "Mims" patent which was "analogous to what is known as a basic patent in the patent office," and which was also controlled by Technicraft.

On April 18, 1934, the appellant and the respondent Yarbrough entered into a writtent contract by the terms of which appellant agreed to convey to respondent Oil Tools, Inc. (which corporation had been organized on March 17, 1934, by respondent Yarbrough) his application for letters patent, together with a license agreement which he owned under another patent known as the Ridley & Sutliff patent, in exchange for which appellant was to receive one-half of the stock of Oil Tools, Inc., the other half to be issued to and owned by said Yarbrough, each party contributing to the corporation the sum of $1,500 in cash.

Pursuant to said contract, appellant conveyed his application and license agreement to the corporation and received one-half of the stock issued, the other half being issued to Yarbrough. The corporation then commenced operations with Yarbrough as its general manager, and subsequently became the owner by assignment of an application for letters patent filed by Yarbrough embracing a gun perforator. Up to this time the gun had not been used commercially.

The subsequent operations of Oil Tools, Inc., were mainly experimental, and during the course of such experiments both appellant and Yarbrough advanced and loaned to the corporation considerable sums of money which were used to carry out the experimental work. Much difficulty was experienced by the corporation in its endeavor to make a gun into a workable product, it being unable to acquire certain types and kinds of equipment necessary for this purpose, such as cable, measuring devices and other patented appliances, patents for which were controlled by other organizations, including Technicraft.

During this period of development by Oil Tools, Inc., respondent Yarbrough devoted his entire time and attention, together with his money, in an endeavor to make the corporation a success; appellant was engaged in other phases of the oil business, but in so far as Oil Tools, Inc., was concerned, he was acting in an advisory capacity. Meanwhile respondent Technicraft which controlled the Mims, as well as other patents embracing several phases of the art of gun perforating, built up a large and lucrative business and was entirely successful in the field.

About December 15, 1935, it became necessary for Oil Tools to obtain more money to carry on its work, whereupon Yarbrough called upon appellant to put up an additional $1,500, which appellant refused to do unless Yarbrough would do likewise. Yarbrough was short of funds and advised appellant he could advance no more money. Discussion between the parties ensued which culminated in a "buy or sell" proposition, appellant agreeing to sell his interest in Oil Tools. Appellant gave Yarbrough a ten-day option to purchase said interest, the substance of which was that appellant's stock was to be purchased for $5,000—$1,500 cash and $3,500 to reduce Oil Tools' indebtedness to appellant—and a further 8 per cent of the gross proceeds received from the rental or sale of gun perforators to be applied on the balance of the indebtedness due appellant from Oil Tools, which balance was therein fixed at the sum of $6,642.30, payable two years after date. Said option also provided for payment to appellant over a period of seventeen years thereafter of 2 per cent of the gross receipts, or at least $1,200 per year. This option was given with the understanding and for the purpose of enabling Yarbrough to raise money to exercise the same. However, he was unsuccessful in his effort, and appellant gave him a verbal extension thereof, and on January 31, 1936, Yarbrough and appellant executed an agreement pursuant to the terms of the option.

While the option was pending, Yarbrough continued his efforts to raise the money and on January 15, 1936, contacted and had his first meeting with respondent Wells, an officer of respondent Technicraft Engineering Corporation. At this meeting they discussed the various aspects of the situation, to wit: the respective patent applications;

the interference proceedings between appellant's application and the Lane application (the latter then being owned by Technicraft) and the possibility of a compromise of the same for the mutual benefit of the contending parties, as well as the expense involved in a determination thereof; also the fact that Technicraft had theretofore threatened Oil Tools, Inc., with infringement of the Mims patent.

Negotiations continued intermittently between respondent Yarbrough and respondent Wells, the latter definitely stating to Yarbrough that he would make no deals with Oil Tools, Inc., so long as appellant was interested in any manner with said corporation. As a result of such negotiations, a meeting was held on January 28, 1936, in the office of Mr. Brown, the patent attorney for Technicraft, at which time discussion took place between the interested parties, and Brown prepared a memorandum addressed to Yarbrough's attorney outlining the basis upon which Technicraft would deal with Oil Tools, Inc. Another meeting was held on January 31, 1936, at which time respondent Wells was apparently satisfied that Yarbrough either had purchased or was in a position to purchase appellant's interest in Oil Tools, Inc.

On February 2, 1936, Oil Tools, Inc., consented to and joined in the execution of the agreement of January 31, 1936, between Yarbrough and appellant, whereupon Yarbrough completed his contract with appellant for the purchase of the latter's interest in Oil Tools, paying him the sum of $5,000 cash from the $7,000 which Yarbrough had previously received from Wells as a loan. Yarbrough personally guaranteed the performance of the contract of January 31, 1936, but there is a dispute in the evidence as to whether Yarbrough told Wells that he intended to use part of the $7,000 loan to purchase appellant's interest. Appellant made no inquiry and Yarbrough made no disclosure as to where the latter was to get the money to exercise the option and they had no discussion relative to Technicraft. Final agreement between Oil Tools, Inc., and Technicraft was not reached until February 14, 1936; appellant had no knowledge of the negotiations being conducted between Yarbrough and Technicraft, but in all of these negotiations leading up to the contract of February 14, 1936, Technicraft was represented by its attorney, J. Calvin Brown, and Oil Tools, Inc., by its attorney, Frank L. A. Graham. The court found that the terms of said agreement were unknown to appellant until January 31, 1937.

Oil Tools, Inc., subsequently received from Technicraft the sum of $15,000 cash, including the $7,000 above referred to, all of which was used in Oil Tools' business except the $5,000 paid to appellant. By the terms of the contract of February 14, 1936, between Technicraft and Oil Tools, Inc., the latter transferred to the former appellant's application for letters patent, the Yarbrough application and the license agreement under the Ridley and Sutliff patents, in return for which Technicraft granted to Oil Tools a nonexclusive license to make and use, but not to sell, the devices, including gun perforators, covered by the generic Mims patent controlled by Technicraft; the Lane application; the appellant's application, and a sub-license under the Ridley application. Likewise, Technicraft agreed to sell to Oil Tools specially constructed cables, weight indicators and measuring devices, power takeoffs and other patented devices made under its patents at the regular selling price. The lack of these devices had been one of the reasons why Oil Tools had been unable to commercially operate the gun perforator which it had been attempting to perfect.

It should be noted that by the above agreement of February 14, 1936, the threatened suit by Technicraft against Oil Tools on the Mims patent and the pending interference proceeding between the appellant's and the Lane applications with its probable cost, were eliminated. Said interference proceeding was dissolved by reason of common ownership of such applications and a patent was issued on appellant's application under date of July 21, 1936, being serial number 2,048,451.

Subsequent to the agreement of February 14, 1936, Technicraft extended a line of credit to Oil Tools, Inc., advanced money to it to keep it going and also furnished information and facilities to Oil Tools for its use in the gun perforating business.

Prior to the execution of the option agreement of December 15, 1935, and the agreement of January 31, 1936, between Yarbrough and appellant, the latter requested that Oil Tools assign the application for letters patent to him as security for the indebtedness owing by Oil Tools to him. This Yarbrough was unable to do, and offered appellant a mortgage on his home. Appellant refused such offer but demanded and received a block of Yarbrough's stock in Oil Tools as security for such indebtedness.

On August 31, 1936, and without the knowledge of Technicraft, Oil Tools executed a chattel mortgage to Yarbrough on its assets for moneys which Yarbrough had advanced to it. Yarbrough assigned this mortgage to Oilfields National Bank at Brea to obtain credit and the bank later foreclosed said mortgage and bid in the property. Appellant knew of the proposed execution of said mortgage and attempted to prevent it by making demand on Oil Tools under date of August 29, 1936, of "immediate payment of ten per cent (10%) of the gross receipts from the rental, use, and/or sale of gun perforators received by you, your licensees and agents during the months of March, April, May, June and July, 1936 * * * the immediate payment to me of damages in the sum of Five Thousand Dollars ($5,000.00) sustained by me during the aforesaid months by reason of the breach by you of the aforesaid agreement (of January 31, 1936) and in particular the following covenants thereof, which you have breached and which read in part as follows:

"'It is further understood and agreed that said corporation will at all times assert reasonable effort to create a demand for the general use of its perforating gun and will satisfy said demand; * * *.

"'It is further covenanted, understood and agreed that said corporation will within sixty (60) days from the date hereof have one complete casing perforating gun outfit operating and shooting reasonably continuously, and that the said corporation will within six (6) months from the date hereof have an additional complete casing perforating gun outfit operating and shooting reasonably continuously * * *.'"

Appellant served notice of such demand upon the Oilfields National Bank of Brea.

After the foreclosure of the mortgage, Yarbrough succeeded in interesting outside capital, as a result of which respondent Yarbrough Guns Company was organized. The former assets of Oil Tools which had been acquired by the bank were transferred to Yarbrough and by him to the new guns company in exchange for stock in that company. Approximately $100,000 was raised from these outside sources which went into Yarbrough Guns Company. Before the organization of the Yarbrough Guns Company around March 1, 1937, Yarbrough contacted appellant and advised him of the condition of Oil Tools and the proposed refinancing thereof, and offered appellant stock in the new company on the same basis that he, Yarbrough, would receive stock therein, to wit: on a dollar for dollar basis for the moneys due appellant and Yarbrough which they had theretofore contributed to Oil Tools. This appellant refused to do and demanded that Yarbrough and Oil Tools perform the terms of the original contract of January 31, 1936. Appellant at this time knew of the terms of the Oil Tools-Technicraft contract of February 14, 1936. Yarbrough on behalf of Yarbrough Guns Company then attempted to obtain a new license agreement from Technicraft embracing the matters set forth in the original agreement of February 14, 1936, and was informed that such license would not be given unless the moneys which were due Technicraft were paid, which at this time amounted to approximately $18,000.

Upon the payment of this sum by Yarbrough Guns Company on March 15, 1937, Technicraft gave said guns company a new license agreement covering the letters patent and applications for letters patent which were embraced in the original contract of February 14, 1936, and upon substantially the same terms. None of the persons connected with Yarbrough Guns Company was in any wise connected with Technicraft, nor did Technicraft have knowledge of the organization of the guns company until Yarbrough sought the new license agreement from it.

While it is admitted that appellant first became aware in the month of July, 1936, of the transfer of his patent application to Technicraft, it is urged that "he did not know of the facts which gave him the right to rescind, nor did he even know that Oil Tools, Inc., had made the transfer under circumstances which showed that Technicraft had knowledge of his rights at the time of the assignment."

It is alleged in the second amended complaint that appellant on September 24, 1937, "caused to be served upon all of the defendants herein, with the exception of H. C. Yarbrough and defendant Yarbrough Guns Company, his notice of rescission, and then and there offered to return everything of value received by him in said transaction, and to place all parties in the same position they were in before the execution of said contract dated January 31, 1936."

After setting out in haec verba the agreement of January 31, 1936, the consent and joint execution of Oil Tools, Inc., dated February 2, 1936, and the guaranty of Yarbrough, the court found: "that in the negotiations leading up to the execution of said contracts and agreements hereinabove set forth and referred to, that there was no plan or scheme on the part of defendants or any of them to defraud Plaintiff, nor was the execution of any of said agreements by the Plaintiff herein induced by or caused by a plan or scheme of any nature whatsoever to defraud or otherwise illegally deprive Plaintiff of any rights or properties which might have been owned or which were conveyed away or disposed of under the terms of said agreements hereinabove set forth; the court further finds that the Plaintiff at all times during the negotiations leading up to the execution of the agreement of January 31, 1936, was represented and advised by independent counsel; that no representations of any kind were made by the Defendant Yarbrough to induce the Plaintiff to execute such agreement of January 31, 1936; that said agreement of January 31, 1936 was entered into by the Plaintiff voluntarily and free of any fraud, coercion or undue influence on the part of anyone; that said agreement of January 31, 1936, was the result of Plaintiff's own offer to the Defendant Yarbrough that he would either buy or sell the stock of Oil Tools, Inc., from or to the Defendant Yarbrough, on the terms set forth in the agreement of January 31, 1936. That prior to the execution of the agreement of January 31, 1936, Plaintiff had given the Defendant Yarbrough an option to purchase his stock interest in Oil Tools, Inc., substantially on the terms and conditions set forth in the agreement of January 31, 1936, being Exhibit 'B' of the Second Amended Complaint; that no representations of any kind had been made by the Defendant Yarbrough to the Plaintiff to induce him to enter into such option agreement; that at no time were any representations of any kind made by the Defendants in this action, or any of them, of a false or misleading nature, or any representations at all to induce the Plaintiff to execute the agreement of January 31, 1936 or the option agreement of December 14, 1935. The court further finds that at no time did any conspiracy or scheme or plan on the part of the Defendants or either or any of them ever exist to defraud the Plaintiff in any wise whatsoever."

Appellant urges in his closing brief: (1) That the contract of January 31, 1936, was made without any intention on the part of Yarbrough to perform and that this fact is established by the contract of February 14, 1936, between Oil Tools, Inc., and Technicraft; (2) that the findings of fact establish that the promises of Yarbrough and Oil Tools, Inc., were made without any intention to perform; (3) that the parties were bound to disclose to appellant the negotiations for transfer of the patent applications to Technicraft; (4) that the liability of Technicraft is clearly established by the terms of the several contracts; (5) that the assignee of a patent takes subject to existing equities therein; (6) that the rights of innocent parties have not intervened; (7) that certain findings of fact are wholly unsupported by the evidence, to wit: (a) that Yarbrough and appellant were not the sole directors of Oil Tools, Inc., up to January 31, 1936; (b) that appellant did not have confidence in Yarbrough and did not rely upon his promises; (c) that Oil Tools, Inc., could not have restrained Technicraft from patent infringement; (d) that Yarbrough did nothing to prevent appellant from learning of the facts in connection with the contract of February 14, 1936; (8) that the court erred in refusing to determine the question of inventorship and also in excluding certain proffered evidence.

When the contract between appellant and Yarbrough was executed on January 31, 1936, following the terms of the option agreement theretofore existing between them, both parties knew that Oil Tools, Inc., was in difficulties and had no assets with which to raise the capital required to continue the business. At that time appellant sought to procure his patent application as collateral security for the balance due him from Oil Tools, Inc., but Yarbrough refused to turn it over for the reason that he needed it in his effort to finance Oil Tools, Inc.

In interpreting the contracts the trial court of necessity took into consideration the situation of the parties, the objects to be accomplished, as well as the problems confronting the parties at the time the contracts were entered into. That the court weighed these various aspects of the situation in construing the contracts and in arriving at its ultimate conclusion is clearly revealed by the complete findings of fact made in this cause.

With the facts heretofore narrated before it, the trial court determined in the light thereof that there was no concerted plan or scheme to defraud appellant, and refused to draw an inference of unfair dealing from circumstances, which at best apparently were regarded by said court as merely suspicious.

An examination of the entire record discloses sufficient evidence to support the findings of fact and the judgment, and likewise that no errors were committed by the trial court in the conduct of the trial.

For the reasons stated, the judgments appealed from are affirmed.

DORAN and WHITE, JJ., concurred.

PEOPLE v. PUTNAM.*

Cr. 3525.

District Court of Appeal, Second District, Division 1, California.

March 18, 1942.

Hearing Granted April 16, 1942.

1. Criminal law 🔑238

Testimony of complaining witness at preliminary hearing was sufficient to indicate clearly that there was reasonable cause to commit accused under statute dealing with crimes against children, and that there was no error in denying accused's motion to strike the information. Pen.Code, §§ 288, 995.

2. Infants 🔑20

Evidence sustained conviction under statute dealing with crimes against children. Pen.Code, § 288.

3. Criminal law 🔑785(6)

In prosecution under statute dealing with crimes against children, wherein prosecuting witness who was 12½ years of age at time he testified narrated his version of what took place in a clear and concise manner, trial court did not err in failing to give requested instruction of defendant that jury should view with great care and caution the testimony of a child of immature years, since the prosecuting witness was not a child of "immature years". Code Civ.Proc. § 1880, subd. 2; Pen.Code, § 288.

See Words and Phrases, Permanent Edition, for all other definitions of "Immature Years".

4. Criminal law 🔑878(3)

In prosecution under statute dealing with crimes against children, and for contributing to the delinquency of a minor, acquittal of defendant of count charging contributing to delinquency, did not constitute an acquittal of the count charging violation of the statute dealing with crimes against children, in view of statute providing that a verdict of acquittal of one or more counts shall not be deemed an acquittal of any other count. Pen.Code, §§ 288, 954.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Roy J. Putnam was convicted of a violation of the statute dealing with crimes against children, and he appeals.

Affirmed.

Gladys Towles Root and Eugene V. McPherson, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

Appellant was charged in an information with a violation of section 288 of the Penal Code. He was arraigned on May 22, 1941, entered his plea of "not guilty" to the charge and trial was set for August 5th. On June 6th, he moved to strike the information under section 995 of the Penal Code "on account of the insufficiency of the preliminary transcript." On June 11th such motion was denied and an amended information was filed adding count 2 charging "contributing to delinquency, a misdemeanor," whereupon appellant was rearraigned and entered his plea of "not guilty, as charged in each count of the amended information."

The jury returned its verdict finding appellant guilty of a violation of section 288 of the Penal Code, as charged in count 1 of the amended information, and "not guilty" of contributing, as charged in count 2 thereof. Thereafter, appellant's motions for new trial and in arrest of judgment, as well as his application for probation, were denied, sentence was pronounced and judgment of conviction was entered.

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* Subsequent opinion 129 P.2d 367.

This appeal is taken from the judgment of conviction and from the order by which appellant's motion for a new trial was denied.

It is contended by appellant that while the complaining witness, who was a boy twelve years of age, testified at the preliminary hearing that his private parts had been touched by appellant, his testimony clearly showed that he did not understand the meaning of the words "private parts," and therefore it was an abuse of discretion on the part of the trial court to deny appellant's motion to strike the information under section 995 of the Penal Code. It is further contended that the evidence is insufficient to support the verdict for the reason that it shows at most a mere casual touching of the boy while riding in appellant's automobile, and that the testimony of the boy given at the trial is glaringly inconsistent with that given by him at the preliminary hearing with regard to the number of times he was touched by appellant, these varying from four to ten times.

From the testimony of the complaining witness given at the preliminary examination, a transcript of which is before this court, it appears that he met appellant in Westlake Park in the City of Los Angeles on Wednesday of Holy Week in 1941, which was April 9th; that appellant asked him if he would like a job distributing bills and he said that he would. Appellant thereupon told him to be at the park the next morning at 10 o'clock. They met at the time and place agreed upon, the complaining witness testifying that appellant told him that "we should go now, because he (appellant) said he had to go home and change clothes and then he had to go to the printer's to get the bills because they weren't ready * * * so he went and got in his car and went to his house. * * * Well, we got out of the car and went up into his apartment, and he got—he changed clothes. And on the way over to his house, that is, he kept feeling my private parts." When asked "Where are your private parts?" the boy indicated the front of his crotch and the rear and stated that appellant "kept feeling me here (indicating) and between the crotch (indicating)." In answer to the question, "Will you tell us now, Harry, just what part of your body this defendant touched in the apartment when you said he felt you?" the boy replied, "my private parts." On cross-examination, the attorney for the defense questioned the boy with regard to how many times appellant "placed his hand upon, touched or patted the boy's leg," the words "private parts" not being used by said attorney during this examination of the boy. After appellant and the boy left the apartment, the latter testified "we walked down the hall and opened the front door and then he went to the car, and I said, 'Get another boy. I'm just through with you'." The boy immediately proceeded to his home and reported the incident to his mother.

At the trial of appellant in the Superior Court, the complaining witness testified that after they got in the automobile appellant "kept putting his hand on my leg." At the suggestion of the attorney for the defense, the boy was asked to stand up and show where appellant touched him, at which time the court made the following statement for the record: "Well, that is pretty close to the groin, I would say, on the front of the leg, though, right directly on the front of the leg opposite the groin. That is the left leg." The witness then testified that appellant touched him more than once during the ride, and when asked to describe how, he replied: "Well, he kept feeling me in the same place, only higher up here more toward the groin. Q. Did he at any time touch your private parts? A. He did." It further appears that when they reached the apartment, appellant asked the boy if he would like to see his private parts, and the boy told him "No." Upon cross-examination, the witness testified that appellant touched him only once while they were in the apartment.

[1] The testimony of the complaining witness at the preliminary hearing of appellant, hereinbefore recited, clearly indicates that there was reasonable or probable cause to commit appellant, and that there was no error on the part of the trial court in denying appellant's motion to strike the information under section 995 of the Penal Code.

[2] While it is true that the record discloses some inconsistencies between the testimony given by the complaining witness at the preliminary examination and that given by him during the trial of the cause, nevertheless, the evidence considered as a whole definitely indicated that appel-

lant was guilty of the offense charged against him.

It is further claimed by appellant that the court erred in failing to give the cautionary instruction requested by him, "You are instructed to view with great care and caution the testimony of a child of immature years."

[3] Subdivision 2 of section 1880, Code of Civil Procedure, provides that children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly, cannot be witnesses. The witness in this case was twelve and a half years of age at the time he testified, and he narrated his version of what took place in a clear and concise manner. In view of the record in this case, it cannot be said that the complaining witness was a child of immature years.

[4] Appellant's final point, that the acquittal of the second count of the information constituted an acquittal of count 1, is without merit. Section 954 of the Penal Code provides that "A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count." See, also, People v. Stangler, 18 Cal.2d 688, 696, 117 P.2d 321, 325.

For the reasons stated, the judgment and order appealed from are, and each of them is, affirmed.

DORAN and WHITE, JJ., concurred.

WASHER v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.*

Civ. 11728.

District Court of Appeal, First District, Division 1, California.

March 16, 1942.

Rehearing Granted April 15, 1942.

1. Libel and slander ⇨15, 33

Defamatory words may be actionable or not according to whether they are denounced by libel and slander statutes, and if the words uttered fall within the ban of the statutes, they may be actionable in themselves, and if their injurious effect is not readily ascertainable on their face, the plaintiff to recover is required to plead the injury by proper allegation and support it with proof. Civ.Code, §§ 45, 46.

2. Libel and slander ⇨33

If defamatory publication is of unprivileged and unfounded statements and charges which expose one to contempt or obloquy, or tend to injure him in his occupation in their natural consequence, the law presumes an injury from the bare fact of the publication itself. Civ.Code, § 45.

3. Libel and slander ⇨33, 101(1)

A defamatory publication which is "actionable per se" imports malice as well as damage, and neither damage or malice need be pleaded or proved, and the utterance of the defamatory words is all that is required to be shown. Civ.Code, §§ 45, 46.

See Words and Phrases, Permanent Edition, for all other definitions of "Actionable Per Se".

4. Libel and slander ⇨19

Words which are alleged to be "defamatory" must be considered according to their natural import and as ordinary hearers would understand them and the court should as nearly as possible place itself in the position of a hearer or reader of the words and determine the meaning of the language according to its natural and popular construction. Civ.Code, §§ 45, 46.

See Words and Phrases, Permanent Edition, for all other definitions of "Defamatory".

5. Libel and slander ⇨34

Generally the circumstances giving rise to publication of defamatory words are of great importance in determining whether words violate libel and slander statutes, and relation existing between the parties, their standing in the community, time and place of the publication and persons to whom publication was addressed are all important factors to be considered, especially where character is involved, or fitness of one to occupy position or to follow a profession is assailed. Civ.Code, §§ 45, 46.

6. Libel and slander ⇨18

Where newspaper reporters and others had assembled to obtain views of large bank which occupied high position in banking world, concerning decision of National Labor Relations Board ordering bank to reinstate an employee, statement to the group made by the bank's vice president and personnel director that "we cannot see how this institution could possibly reinstate anybody who had admitted he had falsified his expense account, who has been guilty of flagrant insubordination" was "actionable per se" under libel and slander statutes. Civ. Code, §§ 45, 46.

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* Subsequent opinion 123 P.2d 575.

7. Libel and slander 🔑34, 54, 93, 94(1), 101 (4, 5)

When defamatory words uttered are actionable per se, defendant in order to avoid liability may show that the statement was in fact the truth or was privileged, but it is incumbent on defendant to plead specially and to prove the truth of the charge or that it was privileged, including the absence of malice, unless truth of charge or privilege appear on face of complaint. Civ.Code, §§ 45–47.

8. Libel and slander 🔑36

The privilege to make a defamatory statement in proper discharge of official duty or in any legislative, judicial or other official proceeding, is termed an "absolute privilege", since an absence of malice is not essential to make the privilege available. Civ. Code, § 47, subds. 1, 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Absolute Privilege".

9. Libel and slander 🔑41

The privilege to make a defamatory statement granted to certain persons making communication, without malice, to a person interested therein, and to one making a fair and true report without malice in a public journal, concerning public official proceeding, and to one making fair and true report without malice of proceedings of public meeting if meeting was lawfully convened for lawful purpose and open to public or publication of matter complained of was for public benefit, is a "qualified privilege" since one claiming the privilege must show absence of malice. Civ.Code, § 47, subds. 3–5.

See Words and Phrases, Permanent Edition, for all other definitions of "Qualified Privilege".

10. Libel and slander 🔑83

In action for libel and slander an allegation of intent on part of defendant to injure plaintiff by utterance of defamatory words was sufficient allegation of actual malice. Civ.Code, §§ 45, 46.

11. Libel and slander 🔑83

Where malice is pleaded or may be inferred in libel or slander action and complaint otherwise shows on its face that libelous publication was made, a cause of action is stated regardless of whether the persons to whom the publication is addressed are interested. Civ.Code, §§ 45–47.

12. Libel and slander 🔑83

Where complaint alleged that newspaper reporters and others had assembled to obtain views of large bank which occupied high position in banking world concerning decision of National Labor Relations Board ordering bank to reinstate an employee, and that for purpose of injuring employee, the vice president and personnel director of bank stated "We cannot see how this institution could possbly reinstate anybody who had admitted he had falsified his expense account, who has been guilty of flagrant insubordination", the complant was not demurrable on ground that it disclosed an "absolute privilege" or a "qualified privilege" to make the statement. Civ.Code, §§ 45–47.

13. Libel and slanger 🔑116, 120(1)

On publication of a statement which is actionable in itself a cause of action for both actual and punitive damages is conclusively established. Civ.Code, §§ 45, 46.

14. Libel and slander 🔑101(1), 120(2)

Where publication is libelous per se the law presumes malice and in absence of evidence rebutting such presumed malice, plaintiff is entitled to exemplary damages. Civ. Code, §§ 45, 46.

15. Libel and slander 🔑116, 118

"Actual damages" recoverable for defamation are both general and special and "general damages" are such as compensate for the natural and probable consequences of the libel and "special damages" are such as will compensate for the actual pecuniary loss sustained. Civ.Code, §§ 45, 46.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Damages", "General Damages", and "Special Damages".

16. Libel and slander 🔑33

General damages may be recovered in libel and slander action in absence of actual proof and upon general allegation of damage, to an amount which in estimation of jury will compensate plaintiff, but special damages must be alleged and proved unless the publication is actionable per se. Civ. Code, §§ 45, 46.

17. Libel and slander ⚷116, 118

Allegation that prior to defamatory publication plaintiff had excellent reputation in banking business for honesty, integrity, and efficiency as bank employee and as an attorney, and that publication of the statement proximately and materially damaged his reputation among bank and trust companies to extent of rendering him unable to secure employment at his trade or employment presently and in the future sufficiently alleged both "general damages" and "special damages". Civ.Code, §§ 45, 46.

18. Damages ⚷159(3)

Generally, in actions of tort, damages arising out of loss of earning power are considered under the allegation of general damages.

◆

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Edward C. Washer against the Bank of America National Trust and Savings Association for libel and slander. From an adverse judgment plaintiff appeals.

Judgment reversed and cause remanded with instructions.

William H. Mackay, of San Francisco, for appellant.

Louis Ferrari, G. D. Schilling, and Kenneth M. Johnson, all of San Francisco, for respondents.

B. C. JONES, Justice pro tem.

In this case a general demurrer was sustained to a second amended complaint without leave to amend. The appeal is from the judgment thereupon entered. The complaint contains two counts, one sounding in libel and the other in slander. No point is made by the respondents that the demurrer was sustained only to the complaint generally. As is stated in their brief, each count is founded on the same publication and the arguments in defense of the alleged statement apply equally to each count.

The defamation alleged is set out in paragraph three of the complaint wherein it is pleaded that the defendant Fenton, who at the time was vice-president of the defendant bank and its personnel director, made of and concerning the plaintiff the following statement: "We cannot see how this institution could possibly reinstate anybody who had admitted he had falsified his expense account, who has been guilty of flagrant insubordination." This statement, so it is alleged, was made at a gathering of newspaper reporters and others who had assembled for the purpose of obtaining the views of the defendant bank upon a decision of the National Labor Relations Board by which decision the defendant bank had been ordered to reinstate the plaintiff in its employ.

A copy of this decision, consisting of the findings of the board and its order, is attached to the complaint and made a part thereof by way of exhibit. From the findings it appears that the defendant bank is one of the ten largest in the world, and one of the five largest in the United States with a branch in London, England, in addition to 493 branches in 307 California communities. The findings indicate that it does business through correspondents in at least thirty-four states of the Union, with resources of approximately one and one-half billion dollars, earning for its stockholders over twelve million dollars in paid dividends and undivided profits in the year 1936. The respondent employed the appellant, Washer, in the chief clerk's division of its trust department in Los Angeles in March, 1935, at a salary of $125 per month. Prior to this employment, he had had approximately fifteen years of banking experience and was the holder of an LL.B degree. It appears that in 1937 Washer engaged in some union labor activities and was transferred to the Fresno branch of the defendant bank. Later, he was instructed to report at the San Jose branch of the bank, which instructions were changed and he was directed to report at the branch in Chico, California. Some friction developed between Washer and one Kieferdorf, the senior trust officer of the bank, and on November 10th, 1937, Washer made a trip to San Francisco from Chico to confer with Kieferdorf at Kieferdorf's request concerning the disagreement. A further controversy arose between the bank and Washer over his expense account for this trip. In the findings it is stated: "The expense account rendered by Washer for this trip amounted to $15.12. Of this, $6.12 represented Washer's railroad fare and $9.00 represented meals and lodgings while in San

Francisco. After Washer submitted this expense account, it was returned to him by Kieferdorf with the request that he itemize his daily expenses. Washer replied to Kieferdorf stating that he was 'writing off as a loss the $15.12 I considered a nominal but fair expense account for a two-day trip to San Francisco made upon your order.' Kieferdorf thereupon wrote to Washer stating that there was 'no complaint as to the amount of the expense involved' and asking Washer to return the expense statement, which Washer did. He then received a check payable to him in the amount of $15.12 with which there was enclosed a new statement of traveling expenses which Washer was asked to sign and return. This new statement had been prepared by the respondent and contained a purported itemization of Washer's expenses on the San Francisco trip. Washer thereupon wrote a letter, addressed to the trust officer from whom he received this new statement, explaining that his failure to itemize the expenses, in the first instance, was due to the fact that while in San Francisco he had stayed with friends and as a result had not incurred a hotel bill. He explained, however, that he had thus become obligated to his friends and it had been necessary for him to reciprocate by entertaining them while in San Francisco, and that the expenses actually incurred by him on the trip exceeded $15.12. With this letter, Washer returned the check and asked that the respondent return the check to him 'if after reading this letter you are convinced of the fairness of the account as rendered. * * * If you do not consider the accounting satisfactory you may forget the entire matter.' The account was then approved by the respondent and the check returned to Washer."

The board states in its findings that "The respondent relies upon this incident to show that Washer made a false claim and was, therefore, dishonest. We find no merit in this contention. It would appear that had Washer been dishonest he would not have returned the check insisting that he did not want to receive payment unless the respondent understood thoroughly the entire situation."

The board further found that the defense of the respondent based on insubordination was not supported by the evidence.

Both actual and punitive damages are claimed by the plaintiff.

The respondents take the position that the alleged words are not actionable per se; that there is no sufficient allegation of damage; that the truth of the statement is demonstrated in the findings of the National Labor Relations Board; and that the complaint shows upon its face that both the bank and the defendant Fenton were, upon the occasion of the publication, clothed with both an absolute and qualified privilege under the provisions of section 47 of the Civil Code.

Libel is defined as a "false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation," by section 45 of the Civil Code.

Section 46 of the same code defines slander as "a false and unprivileged publication other than libel, which", among other things, "charges any person with crime", or "tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits."

[1-3] Defamatory words may be actionable or not according as they are or are not denounced by the statute. If the words uttered fall within the ban of the statute they may be actionable in themselves. If their injurious effect is not readily ascertainable upon their face, the plaintiff before he can recover is required to plead the injury by proper allegation and support it with proof. But if the publication is of unprivileged and unfounded statements and charges which expose a person to contempt or obloquy, or which tend to injure him in his occupation in their natural consequence, the law presumes an injury from the bare fact of the publication itself. In either case it is the uttered words which are the natural and proximate cause of the pecuniary damage. In the one case the damage must be pleaded and proved, and in the other it is conclusively presumed to result. A publication which is actionable per se, imports malice as well as damage. As is stated in Turner v. Brien, 184 Iowa 320,

167 N.W. 584, 585, 3 A.L.R. 1585, "upon the proof of such publication, the law will presume the falsity of the matter charged, that the publication was with malice, and that some damage follows." Neither the damage nor the malice need be pleaded or proved where the words are actionable in themselves. The utterance of the defamatory words is all that is required to be shown. Tonini v. Cevasco, 114 Cal. 266, 46 P. 103; Schomberg v. Walker, 132 Cal. 224, 64 P. 290; Bohan v. Record Publishing Co., 1 Cal.App. 429, 82 P. 634; Dewing v. Blodgett, 124 Cal.App. 100, 11 P.2d 1105; Semple v. Andrews, 27 Cal.App.2d 228, 81 P.2d 203; Rosenberg v. J. C. Penney Co., 30 Cal.App.2d 609, 86 P.2d 696; Gilman v. Lowell, 8 Wend., N.Y., 573, 24 Am.Dec. 96; Harris v. Curtis Pub. Co., 49 Cal.App.2d 340, 121 P.2d 761.

[4, 5] Words which are alleged to be defamatory are to be considered according to their natural import, and as ordinary hearers would understand them. The court should as nearly as possible place itself in the position of a hearer or reader of the words and determine the meaning of the language according to its natural and popular construction so that the interpretation may be fair and unstrained. As the court said in Bettner v. Holt, 70 Cal. 270, 11 P. 713, 715, "And not only is the language employed to be regarded with reference to the actual words used, but according to the sense and meaning, under all the circumstances attending the publication, which such language may fairly be presumed to have conveyed to those to whom it was published; so that in such cases the language is uniformly to be regarded with what has been its effect, actual or presumed, and its sense is to be arrived at with the help of the cause and occasion of its publication." In most cases the circumstances giving rise to the publication are of great importance in determining whether the words violate the statute. In this connection the relations existing between the parties, their standing in the community, the time and place of the publication, and the persons to whom it was addressed are all important factors to be considered. Tonini v. Cevasco, supra; Schomberg v. Walker, supra; Bettner v. Holt, 70 Cal. 270, 11 P. 713; Cole v. Millspaugh, 111 Minn. 159, 126 N.W. 626, 28 L.R.A.,N.S., 152, 137 Am.St.Rep. 546, 20 Ann.Cas. 717. They are indicative of the motive of the speaker and tend to show how the words were intended, or received and understood. This is especially true where character is involved or the fitness of one to occupy a position or to follow a profession is assailed.

[6, 7] It is common knowledge that in every community the banker has stood for decades as a symbol of character and integrity. He has been generally acclaimed as the custodian of the widow's mite, and counsel for the orphan. Only in rare cases has the banker failed to live up to this public trust. In speaking from such a position, the defendant here, with its influence reaching into practically every community in the state, into almost every state in the union, and across the ocean, was in a position by its slightest word to do great good or great harm. There can be no question but that the words were uttered concerning the plaintiff, although his name was not used. No other person was involved in the controversy between the officials of the bank and the plaintiff, or in the proceedings before the National Labor Relations Board. The words are limited to its regard of Washer by the bank. The statement clearly bases this regard upon their past dealings. It does not in any sense purport to be a criticism of a political principle or of a public policy. Nor is it a statement of economic theory. The words were aimed directly at Washer, and the natural imputation attached to them is thievery and falsification. Coming from a bank of such character and standing as the defendant, occupying the position that it does in the banking world, they could have but one effect, and that to blight the reputation of the plaintiff. Spoken of one engaged in the banking business in which integrity and character are of such prime importance, the words were devastating and come squarely within the code definitions of both libel and slander. Draper v. Hellman Com. T. & S. Bank, 203 Cal. 26, 263 P. 240.

[8] When the words uttered are actionable per se, as here, in order to avoid liability the defendant may show that the statement was in fact the truth, or that he had a right or privilege to make it. However, it is incumbent upon him to specially plead and prove the truth of the charge, or that it was privileged, including the absence of malice, unless the truth of the statement or the privilege appear upon the face of the complaint. Stevens v. Snow, 191 Cal. 58, 214 P. 968; Morcom v. San

Francisco Shopping News, 4 Cal.App.2d 284, 40 P.2d 940; Hale Company v. Lea, 191 Cal. 202, 215 P. 900.

The right or privilege to make a statement otherwise actionable of or concerning another in this state is declared in section 47 of the Civil Code, where it is provided: "A privileged publication is one made—1. In the proper discharge of an official duty. 2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law; provided, that an allegation or averment contained in any pleading or affidavit filed in an action for divorce or an action prosecuted under section 137 of this code made of or concerning a person by or against whom no affirmative relief is prayed in such action shall not be a privileged publication as to the person making said allegation or averment within the meaning of this section unless such pleading be verified or affidavit sworn to, and be made without malice, by one having reasonable and probable cause for believing the truth of such allegation or averment and unless such allegation or averment be material and relevant to the issues in such action. 3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information. 4. By a fair and true report, without malice, in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or (5) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant shall have been issued. 5. By a fair and true report, without malice, of (1) the proceedings of a public meeting, if such meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit."

[9, 10] The privilege provided in subdivision 1 and 2 of section 47 is usually referred to as an absolute privilege, as an absence of malice is not essential to make it available. The privilege referred to in the other three subdivisions is commonly referred to as a qualified privilege as it is incumbent upon the defendant to show an absence of malice before he can claim its benefits. Such an absence of malice is an express limitation upon the qualified privilege accorded under these subdivisions of section 47 of the Civil Code. Hale Company v. Lea, supra. In either case, as already stated, privilege is open only as a special defense, unless it clearly appears upon the face of the complaint.

No tenable ground here appears upon the face of the complaint which justifies an absolute privilege. In making the statement to the newspaper reporter as alleged, the defendants obviously were not acting in the discharge of any official duty nor participating in any legislative proceeding. No language has been pointed out, and neither is there any in the complaint, which would tend to show that the statement made to the newspaper reporters after the decision was made and the order of the board had been entered is in any way relevant or material to the proceedings. If, as contended by respondents, they intended to appeal from the order, there is nothing in the complaint to so indicate. The complaint does not plead any absolute privilege in the defendants.

[11, 12] Any qualified privilege to which the respondents may be entitled must, under the circumstances of the case, arise under subdivision 3 of section 47. In all cases involving the question of qualified privilege, the existence or non-existence of malice is of prime importance. Here, we are only concerned with it insofar as it may, or may not, be a pleaded fact. The plaintiff, in addition to pleading the actionable statement which imports actual malice (Tingley v. Times Mirror Co., 151 Cal. 1, 89 P. 1097), has alleged that said statement was made by Fenton with malice, for the purpose of injuring, disgracing and defaming plaintiff, and interfering with his ability to obtain employment; that it was false and known by Fenton to be false at the time it was made and Fenton did not have probable cause or any cause for believing it to be true; and that the statement was made and given to the newspaper reporters by Fenton for the purpose of having it printed in various newspapers; and that he, Fenton, requested the reporters to print and publish the statement and that it was printed and published in various newspapers throughout the country. An intent upon the part of the respondents to injure the plaintiff by the utterance of the defamatory words is alleged, and this is a suffi-

cient allegation of actual malice. Tingley v. Times Mirror Co., supra; Siemon v. Finkle, 190 Cal. 611, 213 P. 954. Where malice is pleaded, or may be inferred, and the complaint otherwise shows upon its face that a libelous publication was made to others, a cause of action is stated regardless of whether the persons to whom the publication is addressed are interested or not. Layne v. Kirby, 208 Cal. 694, 284 P. 441.

[13, 14] It is, of course, elementary that upon the publication of a statement actionable in itself, a cause of action for both actual and punitive damages is conclusively established. As is said in Tingley v. Times Mirror Co., supra [151 Cal. 1, 89 P. 1102], "Where the publication is libelous per se, the law presumes malice in fact in its publication, and, in the absence of evidence on the part of the defendant rebutting this presumed malice, plaintiff is entitled to an award of exemplary damages".

[15-18] Actual damages are both general and special. General damages are such as compensate for the natural and probable consequences of the libel. Special damages, as a branch of actual damages, are such as will compensate for the actual pecuniary loss sustained. While general damages may be recovered in the absence of actual proof and upon a general allegation of damage to an amount which in the estimation of the jury will compensate the plaintiff, special damages must be alleged and proved, unless the publication is actionable per se. Harris v. Curtis Publishing Co., supra; Bates v. Campbell, 213 Cal. 438, 2 P.2d 383; Layne v. Kirby, supra. The complaint here alleges that prior to the defamatory publication the plaintiff had an excellent reputation in the banking business for honesty, integrity and efficiency as a bank employee and as an attorney, and that the publication of the statement proximately and materially damaged his reputation among bank and trust companies to the extent of rendering him unable to secure employment at his trade or employment presently and in the future. A similar allegation based upon an alleged libel was held to be a sufficient allegation of both general and special damages in Oberkotter v. Woolman, 187 Cal. 500, 202 P. 669. Turner v. Hearst, 115 Cal. 394, 47 P. 129, and Waite v. San Fernando Pub. Co., 178 Cal. 303, 173 P. 591, are to the same effect. The general rule is that in actions of tort, damages arising out of loss of earning power are ordinarily considered under the allegation of general damages. Hoffmann v. Lane, 11 Cal.App.2d 655, 54 P.2d 477; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513.

We are of the opinion that the demurrer should not have been sustained.

The judgment appealed from is reversed and the cause remanded with instructions to the trial court to overrule the demurrer and permit the defendants to answer if they are so advised.

PETERS, P. J., and WARD, J., concurred.

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50 Cal.App.2d 507

OVERLAND v. DAVIS.

Civ. 12860.

District Court of Appeal, Second District, Division 3, California.
March 17, 1942.

1. Sales 🔑52(6)

Evidence of transactions between cattle dealer, and two livestock brokers, failed to sustain judgment against broker D for reasonable value of cattle sold by broker O to dealer who shipped them to broker D for sale, on theory that dealer purchased cattle for broker D, or for dealer and broker D jointly, or that dealer acted and broker O dealt with him as ostensible agent of the broker D. Agricultural Code, §§ 368, 1263.

2. Sales 🔑359(3)

In action on check which was payable to livestock broker O, and livestock dealer, and was issued as an advance to the dealer from livestock broker D to whom dealer shipped the cattle for sale, evidence which failed to show nonpayment of amount represented by the check, on which payment was stopped, was insufficient to authorize recovery by broker O.

3. Evidence 🔑354(26)

In action against livestock dealer and livestock broker D for reasonable value of cattle sold by livestock broker O to dealer

who shipped the cattle to broker D for sale, account books of broker O showing account of dealer were not admissible against broker D in absence of showing of joint liability of dealer and broker D for items in the account.

4. Evidence ⊜354(26)

In action against livestock dealer and livestock broker D for reasonable value of cattle sold by livestock broker O to dealer who shipped the cattle to broker D for sale, account books of broker O showing account of dealer were not admissible against broker D, where the books did not purport to embrace transactions between the two brokers and did not purport to be confined to transactions with dealer in which broker D was interested.

◆

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by J. H. Overland against John A. Davis and another for reasonable value of cattle allegedly sold to defendants and for amount of check given in connection with the sale transactions and on which payment had been stopped, wherein named defendant filed a counterclaim. From an adverse judgment, the named defendant appeals.

Reversed.

Bailey & Poe, of Los Angeles, for appellant.

Roger R. Walch, of Hanford, for respondent.

SHINN, Justice.

Defendant Davis has appealed from a judgment against him and his defaulting codefendant Palumbo in the sum of $2,374.48. One count of the complaint was for the reasonable value of cattle sold to the defendants in that amount; the second count was based upon a check of defendant Davis in favor of plaintiff for the sum of $1,000 given in connection with transactions, and included in the sum, involved in the first cause of action, and upon which payment had been stopped. Findings were in favor of plaintiff on both causes of action.

A reversal of the judgment is called for because of the insufficiency of the evidence and for error in the admission of evidence.

The proper disposition of the appeal has required a somewhat tedious study of the evidence relating to matters of accounting between two livestock brokers and a cattle dealer with whom they had a multitude of business transactions within a brief period of time. While the amount involved is not large, the evidence was presented in a confusing manner. The labors of the trial judge would have been considerably lessened had counsel in the case provided the services of a skilled accountant for the assistance of the court. Judges should not be expected to do the work of accountants.

We shall discuss the facts as they are established by uncontradicted evidence. There is in reality no conflict as to the controlling facts.

Plaintiff Overland was a licensed livestock broker and auctioneer with a sales yard at Hanford. Davis was engaged in the same business at Hynes, California. Defendant Palumbo was a licensed dealer in livestock. These are distinct avocations, separately licensed by the State. Agricultural Code, secs. 368, 1263, Deering's Codes of California 1937, pp. 80, 284. During the months of August to November, inclusive, 1937, Palumbo purchased livestock from Overland, in the latter's auction ring at Hanford, and shipped them to Davis to be sold by the latter in his auction yard at Hynes. Palumbo made all of the purchases from Overland, his account with Overland was in his own name, and the cattle sold were not charged to Davis. The latter could be held responsible for the account only upon the theory that Palumbo purchased the cattle for Davis, or for himself and Davis jointly as the agent of the latter, or upon the theory that he acted and Overland dealt with him as the ostensible agent of Davis. None of these theories of liability is sound.

[1] Palumbo had been a cattle dealer for some twenty-five years; he had transacted business with Overland in the latter's capacity of livestock auctioneer for some six years. He expressed to Overland a desire to ship cattle to the Los Angeles market, which the latter advised him not to do. However, about the first of August, 1937, Palumbo visited Davis at Hynes and made an arrangement to ship cattle from Hanford to Hynes for sale at auction by Davis, who agreed to and did advance some $2,300 to Palumbo which the latter was to use for the purchase of cows. Palumbo deposited $400 with Davis for the shipment of one carload of cattle consisting of about twenty-five head, which

deposit was to serve as a guarantee to Davis against loss on the shipment. Under the arrangement then made Davis was to receive cattle in his yard as they were shipped by Palumbo, to care for them until they were sold, and to sell them upon the customary terms for the sale of livestock at auction. Davis' advances were in the form of drafts upon himself which were furnished in blank to Palumbo, to be filled in and delivered to the sellers of the cows as purchases were made. The form of draft used was accompanied by a bill of sale and warranty of title by which Palumbo conveyed to Davis title to the cows as they were purchased. These transfers of title were purely by way of security. Palumbo shipped the first carload and from time to time made other shipments. On Davis' books Palumbo's account was charged with advances, with the expenses connected with the handling of the cattle, with Davis' commissions as auctioneer, and was credited with the amounts received for cattle sold. Davis had no interest in any profits which might result from Palumbo's operations; his sole remuneration was that which came to him as a livestock broker, including minor charges for work of a clerical nature. During all of the period in question the business of the two men continued on this basis. Palumbo drew comparatively small sums of money against expected profits, which were charged to his account by Davis, he received statements of auction sales as often as they were held—there were twelve in all,—he always had on hand at Davis' yard a number of cattle which had not been sold, and no balance of the account was ever struck until on or about the 26th day of November, 1937, when all cattle which had been shipped in Palumbo's name had been sold. The periodical statements took into consideration the cows that were on hand, apparently at their cost prices. After all cattle on hand in November had been sold, Palumbo remained in debt to Davis in the sum of $132.46.

The business between Overland and Palumbo was carried on as follows: Palumbo purchased cows at auction in Overland's sales yard and these sales were charged to his account. He also bought cows from farmers and brought them to Overland's yard. When a sufficient number had been accumulated a shipment was made by Palumbo to the Davis yard at Hynes. In the beginning Palumbo drew drafts on Davis in payment for cattle, and not infrequently when the sellers would not accept the Davis drafts Overland would issue his own checks in payment for cattle purchased by Palumbo and would accept in exchange drafts drawn on Davis. Palumbo received cash advances from Overland which were charged to his account. He also had a great variety of dealings with Overland which were entirely foreign to his business with Davis. During the time in question an open account with Palumbo was carried by Overland. Although from time to time, as shipments were made, Palumbo would issue drafts on Davis in favor of Overland which would be credited to Palumbo's account and would be paid by Davis, the business was not done on a cash basis. Palumbo purchased more cattle than he paid for and more than he shipped to Davis, he had a variety of other dealings with Overland, and when the account was closed in December, 1937, it showed a balance due Overland of $2,374.48. Overland had no interest in Palumbo's business. He operated as Davis did, solely as a livestock broker and auctioneer.

It appears without doubt that each of the three men involved conducted his own business in which he alone was interested. There was no partnership arrangement or sharing of profits between Palumbo and Overland or Palumbo and Davis. Neither of the brokers guaranteed to the other payment of Palumbo's account and neither had any interest in cattle purchased by Palumbo except in so far as possession and control of the cattle from time to time afforded security for moneys that had been advanced to Palumbo. Prior to the institution of this suit neither broker at any time called on the other to make good Palumbo's indebtedness.

There is nothing in this evidence to show that Davis either by himself or jointly with Palumbo was a purchaser of cattle from Overland. He made no purchases directly nor did Palumbo ever have authority to purchase for him. All of the latter's purchases were made for his own account. The manner in which Davis conducted his business with Palumbo demonstrates that he was acting merely as a broker. In every statement rendered to Palumbo he charged the latter with all of the expenses of handling and selling the cattle and credited him with all of the receipts from sales. There was therefore no evidence to support a finding that Overland sold any cows to Davis or that the latter ever agreed to pay for any that were sold to Palumbo.

It is contended by respondent that Palumbo acted as the ostensible agent of Davis and that Overland so regarded and dealt with him. There is nothing in the record to support this contention. Overland in his testimony repeatedly and consistently stated that his sales were made to Palumbo and, as we have seen, they were all charged to the latter. Palumbo did not represent to Overland that he was purchasing for Davis' account nor did Overland testify that he understood that Davis was interested in any of the transactions as a buyer. It is clear from Overland's testimony of conversations had with Davis that he understood that the latter was financing purchases by Palumbo as an incident to his brokerage business, and that he was not purchasing cattle himself or jointly with Palumbo. In fact Davis financed other dealers who also purchased cattle from Overland as a broker, and Overland in the same manner financed Palumbo and other dealers in the purchases of cattle, although upon a smaller scale, but they did not buy and sell upon their own accounts. Overland testified to a conversation he had with Davis about September 1, 1937, at which time none of the transactions here involved had taken place, as follows: "He (Davis) went on to tell me that he had made arrangements with Mr. Palumbo for him to buy cattle up to a truckload, and he had gone in and bought $3,000 worth of cattle and he was not financing any man for that much money * * * and I did tell him at the time that he had better hold Mr. Palumbo down a little bit, because he was a great hand for shooting in a big way and lots of times it was dynamite. * * *

"Q. He told you at that time that his arrangement with Palumbo was to finance him just for a load of cattle at a time? A. Yes, sir.

"Q. He said that this was more than Palumbo should have purchased, but he made it good just the same, did he? A. Yes, sir.

"Q. Following that discussion did Mr. Palumbo continue to buy cattle from you to ship to the Davis Sales Yard? A. Yes, sir.

"Q. And did Mr. Davis continue to pay for the cattle? A. Yes, sir."

In October, 1937, Palumbo purchased sixteen head of cows from Overland, which he represented to Davis to be "queens" or "top cows." Davis issued his check to Palumbo and Overland in the sum of $1,000 as part payment for the cows, having arranged with Palumbo to advance that amount. The cows were shipped to Davis by Overland and Davis stopped payment on the check. Overland went to see Davis and the latter stated as a reason for his having stopped payment that the cows were inferior. Overland questioned Davis at that time about the condition of Palumbo's account, asking, "Well, how much is it in the red?" and Davis replied, "Well, four or five or six cows will straighten it up." Overland said, "If that is the case, go ahead and sell them and we can work it out. Q. Go ahead and sell them and credit it onto the account? A. Yes." This Davis did, although some of the cows had to be fed for a long time, before they were fit to sell. Overland at the same time requested Davis to send him any balance remaining after Palumbo's account was paid, stated that any shipments in the future would be made in his own name and requested that remittances should be made to him. He examined Palumbo's account on Davis' books at that time. Overland's name was substituted for that of Palumbo on Davis' books, but it does not appear that Overland was advised of that fact. It has no significance in the case, however. The business continued, but under somewhat different conditions. Overland as a broker continued to sell cattle to Palumbo on open account and to ship them, not as an owner but as a broker, to Davis but Davis was not called upon to finance the purchases. He received and sold them and made remittances to Overland. Palumbo meanwhile purchased cows elsewhere with drafts on Davis which were paid and the cows were sold through the same account as the ones coming from Overland. Although the account was not closed out until the end of January, 1938, when all cattle had been sold, it was transferred to Overland's name as of November 1st and Palumbo's account was balanced as of November 26th, showing a balance in Davis' favor of $132.46 but the business went on, notwithstanding. Overland's account with Palumbo showed items as late as December 20, 1937. Upon a final closing of Davis' books a balance was due him in the amount of $124.53. Undoubtedly Overland arranged that all moneys payable by Davis should come to him as a measure of security when he learned that Palumbo's account with Davis showed a balance in the latter's favor. But he had no account with Davis on his books, continued to make sales to Palumbo without transferring title to him, and continued to sell through Davis. There was nothing in this course of business even suggesting the sale of cows to Davis. All of the evidence upon the subject tends to show that Overland knew exactly what the business arrangement and relationship were between Davis and Palumbo.

[2] As to the second cause of action the evidence sustains the findings as to the issuance of the check for $1,000 and that payment was stopped thereon, but the finding that the sum of $1,000 represented by the check has not been paid is not sustained by the evidence.

The evidence shows without dispute that Davis and Palumbo were dealing solely in dairy cows and bulls. Calves which accompanied the cows or were born of cows in Davis' possession were necessarily involved in the account. Records of the account between Davis and Palumbo and between Davis and Overland, as heretofore explained, were introduced in evidence, together with a detailed record of all cattle received by Davis and the proceeds received from sales. The accuracy of these books was not and is not questioned. It appears therefrom that Davis not only paid for everything he received from the beginning to the end of his dealings with Palumbo and Overland, but also that there remained unpaid to him on the two accounts the total sum of $256.99.

[3, 4] The account books of Overland showing the account of Palumbo, and which showed a balance of $2,374.48 in favor of the former, were introduced in evidence in support of the claim of Overland, over the objections of Davis. These objections should have been sustained for various reasons. The account books were not admissible against Davis in the absence of a showing of a joint liability of Palumbo and Davis for the items in the account. There was no proof of such joint liability. Other reasons are that the account did not purport to be one embracing transactions between Overland and Davis and it did not purport to be confined to transactions with Palumbo in which Davis was interested. Palumbo's business with Davis, as we have seen, consisted of shipping dairy cattle to the latter for sale, and nothing else. However, at the same time his business with Overland covered a much wider field. The account of transactions on which Davis was sued embraced also all of the business dealings between Palumbo and Overland. There were many transactions shown in the account with which Davis had nothing whatever to do. A few examples will suffice to demonstrate this fact. Palumbo purchased "Whiteface" steer beef, paying therefor $1,347.22, which Overland advanced to him. This amount was charged to Palumbo in the Overland account. They were sold for $957.88, or at a loss of $389.34, and this loss is included in the account in question. Also included in the account are charges and credits showing dealings in horses, mules, one colt, heifers, calves, pigs, an animal referred to by counsel as a "bull cow," hay, feed, promissory notes, cash advanced, unexplained checks and advances, and telephone calls. The promissory notes were for $1,254.23 and $300, respectively. Palumbo was questioned about them but was unable to offer any explanation as to what the notes represented. In fact no explanation at all was given of these items or of many others which went into the account upon which the judgment was based. The account was admitted against Davis upon the assurance of respondent's counsel that no recovery was sought against Davis for items in the account which did not relate to transactions in which he was engaged. It does not require a meticulous examination of the account to see that $1,943.57 of the amount claimed could not be chargeable to Davis or recovered in this action upon any theory because the three items mentioned did not concern Davis, nor involve purchases of cows. The further the account is examined the more questionable it appears whether cows purchased with Davis' money were not reported to Davis as having cost considerably more than Palumbo had paid for them.

There was only a smattering of evidence in the record which attempted to segregate the items in the account representing shipments to Davis and those which could not under any tenable theory be charged against him. It appears that Palumbo's total operations with Overland, assuming that he was credited with all sums received by Overland from Davis, showed a net loss in operations of $2,374.48. But it likewise appears, and much more satisfactorily, that Davis paid in full for all cattle received by him from the beginning to the end of his dealings with both Palumbo and Overland. The amount represented by the check has therefore been paid.

The loss which Overland has sustained is traceable to only two sources, first to expenses incidental to the handling of the cattle by Davis, including feeding, branding, testing, hauling, losses by death, commissions on auction sales, etc., all of which charges naturally reduced the cash amounts remitted by Davis from the proceeds of auction sales, and secondly, to Palumbo's independent operations and business transactions with Overland, which were entirely separate and apart from the business in which Davis was interested. Davis was not shown to be responsible or liable for those losses.

Davis had a counterclaim against Overland for $124.53, the balance of his account at the end of the business between the two. No finding was made with reference to this counterclaim although the effect of the judgment was to disallow it.

The judgment is reversed.

SCHAUER, P. J., and PARKER WOOD, J., concurred.

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50 Cal.App.2d 549

ROYAL INS. CO., Limited, v. MAZZEI et al.

Civ. 2666.

District Court of Appeal, Fourth District, California.

March 18, 1942.

Rehearing Denied April 16, 1942.

1. Negligence 🔑32(1)

The duties owed to chattels in the possession of a business invitee are the same as the duties owed to the business invitee personally.

2. Negligence 🔑32(1)

A landowner is not an insurer, but owes duty of ordinary care to keep the premises reasonably safe for business invitees.

3. Negligence 🔑52

The owner of premises is under obligation to warn business invitee of any dangers of which he has knowledge and which are not readily apparent to the eye, but there is no obligation to give warning of an obvious danger or one which should have been perceived by the invitee through ordinary use of his own senses.

4. Negligence 🔑52

The owner of premises is entitled to assume that business invitee will perceive that which would be obvious to him upon the ordinary use of his own senses, and is not required to give invitee notice or warning of such an obvious danger.

5. Pleading 🔑53(1)

Inconsistent causes of action may be pleaded in separate counts where pleader thinks it desirable so to do, as where exact nature of facts is in doubt or exact legal nature of plaintiff's right and defendant's liability depends on facts not well known to the plaintiff, and in such case an election of remedy cannot be forced.

6. Negligence 🔑52

Where dangerous condition on premises arises from causes or conditions not readily apparent to the eye, and such danger should have been known to owner by exercise of reasonable diligence, but not to business invitee, owner has duty of giving invitee reasonable notice or warning of such danger.

7. Appeal and error 🔑917(1)

On appeal from judgment entered after refusal to amend complaint after sustaining of demurrer, it is presumed, in support of judgment, that pleader has pleaded his case as strongly as it can be stated in his favor, and all ambiguities and uncertainties must be resolved against pleader.

8. Electricity 🔑19(3)

In suit by insurer to recover amount paid under fire policy for damage to cotton which was burned when hoist on truck on which cotton was being carried came in contact with electric wires in defendant's cotton gin yard, where there was no allegation that wires were maintained by defendant in violation of law, the presumption that defendant was not guilty of a violation of law was against the pleader. Code Civ.Proc. § 1963, subd. 1.

9. Electricity ⟹19(2)

In suit by insurer to recover amount paid under fire policy for damage to cotton which was burned when hoist on truck on which cotton was being transported came in contact with electric wires in defendant's cotton gin yard, complaint which failed to allege that the electric wires constituted a latent and obscure danger, and that defendant had knowledge thereof and failed to warn the trucker of such danger, and which alleged that the trucker negligently failed to observe position of the wires, failed to state a cause of action against the defendant.

10. Negligence ⟹62(1)

A prior remote cause cannot be made basis of action if it did nothing more than furnish condition making injury possible, if there intervened between such remote cause and the injury a distinct and efficient cause of the injury, even though injury would not have happened but for such condition.

11. Negligence ⟹62(1)

Where independent negligent act or defective condition sets into operation circumstances which result in injury because of a prior defective condition, the subsequent act or condition is the "proximate cause".

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

◆

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Suit by the Royal Insurance Company, Limited, against Roy G. Mazzei and Harry E. Abraham, to recover the amount paid by the plaintiff on a fire insurance policy insuring cotton damaged by fire when truck driven by first-named defendant came in contact with electric wires maintained by the last-named defendant. From a judgment of dismissal entered in favor of the last-named defendant, the plaintiff appeals.

Judgment affirmed.

Arthur C. Shepard and Richard V. Aten, both of Fresno, for appellant.

Claflin, Dorsey & Campbell, of Bakersfield, and Wild & Carlson, R. H. Reeve, and R. F. Maxwell, all of Fresno, for respondent.

GRIFFIN, Justice.

This is an appeal from a judgment of dismissal entered in favor of respondent Harry E. Abraham, after his demurrer to the third amended complaint was sustained without leave to amend, appellant having declined to further amend. The defendants, other than Abraham, did not demur and the judgment does not mention them.

The material allegations of the third amended complaint are that on October 27, 1939, defendant Harry E. Abraham owned and operated a cotton gin and yard; that at that time he had in his possession, in storage, 30 bales of cotton owned by R. G. Hamilton & Company and insured against fire loss by plaintiff and appellant Royal Insurance Co., Ltd.; that defendant Roy G. Mazzei, a common carrier and independent contractor, on behalf of R. G. Hamilton & Company, paid defendant Abraham the storage charges due on said cotton and loaded the cotton onto his truck; that in leaving respondent's place of business Mazzei traveled on a road through the cotton gin yard maintained by respondent for use by cotton trucks entering and leaving the yard; that Mazzei's truck was equipped with an immovable hoist extending 12 feet, 11 inches above the road bed; that respondent knew the foregoing facts and that all cotton trucks were equipped with such hoists extending to that height and higher; that, nevertheless, he was at that time negligently maintaining three electric wires crossing said road at a height of approximately 12 feet; and that the failure to give warning of the position of said wires was a proximate cause of the damage. The complaint then recites that the hoist on Mazzei's truck came into contact with the wires and the electricity ignited the cotton, damaging it to the extent of $1,104.40; that appellant paid this sum to R. G. Hamilton & Company under the fire insurance policy and the claim for damage to the cotton was assigned to appellant. As to the respondent, there is no allegation that the three electric wires constituted a latent and obscure danger, and that the invitor had knowledge thereof and failed to warn the invitee of such danger. On the other hand, the complaint in the same cause of action, as against the common carrier, recites that they "negligently failed to observe the position of said wires prior to the time said wires were struck by said hoist" and that said negligence was a proximate cause of the damage.

The trial court held, in sustaining the demurrer, that the alleged negligence of respondent, if any, in failing to give any warning of the position of the wires, was a remote cause and not a proximate cause of the accident; that the complaint affirmatively showed that there was no breach of duty by respondent in this respect and therefore no negligence was alleged as to him; that the complaint affirmatively showed that the negligence of the defendant Mazzei was the superseding and sole cause and that the alleged negligence of the respondent was a remote cause, if any, which was superseded by the negligence of defendant Mazzei, in failing to see a danger that would have been obvious in the exercise of ordinary care.

[1-4] Under the allegations of the amended complaint defendant Mazzei was a business invitee upon the land of respondent and as such business invitee Mazzei had the cotton owned by appellant's assignor in his possession and under his exclusive control when the cotton was damaged. The duties owed to chattels in the possession of a business invitee are the same as the duties owed to the business invitee personally. Restatement of the law of Torts [Am.Law Institute], sec. 497. California authorities are in accord with this rule. California Annotations to the Restatement of the Law of Torts, sec. 497. Since the respondent landowner owed the same duties toward the chattels in defendant Mazzei's possession as he owed to Mazzei personally, and since Mazzei was a business invitee, the duties here involved are those of landowner to business invitee. For the purposes of this opinion it may be assumed that Mazzei was a business invitee upon the premises of respondent. The rule is well established that in such a case the owner of the premises is not an insurer but that he owes a duty of ordinary care to see that the premises are reasonably safe. Among other things, the invitor is under the obligation to warn the invitee of any dangers of which he has knowledge and which are not readily apparent to the eye. There is no such duty where the dangers are obvious or as well known to the invitee as to the owner of the premises. There is no obligation to give a warning of an obvious danger or one which should have been perceived by the invitee through ordinary use of his own senses. Ambrose v. Allen, 113 Cal.App. 107, 298 P. 169; Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 50 P.2d 801; Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 296 P. 76; Vitrano v. Westgate Sea Products Co., 34 Cal.App.2d 462, 93 P.2d 832. Such an owner is entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. He is not required to give to the invitee notice or warning of an obvious danger. Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793.

Respondent cites Hayden v. Paramount Productions, Inc., 33 Cal.App.2d 287, 91 P.2d 231, 236. That case involved the duty of a landowner to an innocent business invitee with reference to electric high power tension wires maintained on the premises. The facts are similar to the case at bar with the exception that personal injuries resulted to an innocent third party rather than injury to his goods, and the cause of the injury was due to a crane contacting an electric high tension power line on a leaning pole. The action was to recover for personal injuries alleged to have been sustained through the negligence of respondent as a landowner. The other defendant, City of Los Angeles, maintained an electric power line over property belonging to respondent owner. The line sagged to some extent due to a leaning pole. A building was being erected on that property and the steel in that building was being placed, through use of a crane, by an independent contractor. The independent contractor was not made a party to the action. The plaintiff and appellant was an employee of the independent contractor. The crane was operated by a fellow employee. While the appellant was guiding a column of steel being carried by the crane, his fellow employee caused the boom of the crane to come into contact with one of the city's high tension wires and the innocent appellant was injured, receiving an electric shock and burns. The trial court granted a nonsuit at the close of appellant's evidence, and the judgment of dismissal was affirmed. The appellant sought to impose liability on the landowner, Paramount Productions, Inc., on the ground that it exercised control over the power line of the city by refusing to permit the city to replace the leaning pole with a taller pole, and was negligent in so maintaining the wires and failing to give warning of the danger. On this point, i.e., negligence of the landowner toward the innocent business invitee, the appellate court held that even assuming that the landowner controlled the wires, still there was no breach of duty and no negligence on its part as the wires were open to view and presented an obvious danger. The court said: "It was not incumbent upon Paramount to warn appellant of any danger, because the high voltage wires were open to view and presented a patent danger by reason of common knowledge of the fact that power lines such as the one here in question are dangerous instrumentalities, and ordinary prudence dictates that one situated as were appellant and his fellow employees should refrain from exposing himself to the danger occasioned by contact with such wires. [Citing cases.] * * * Respondent Paramount * * * having exercised ordinary care in its conduct, thereby discharged its obligation as an invitor to the appellant invitee."

In the instant case the respondent landowner owed no greater duty to appellant's assignor's goods carried by the business invitee Mazzei than he owed to Mazzei personally, or would have owed to appellant's assignor had he been personally present as a business invitee. Hayden v. Paramount Productions, Inc., supra.

[5, 6] It becomes apparent from the pleadings that appellant predicates its cause of action against respondent Abraham upon the theory that the electric wires were not maintained at a sufficient height to allow the safe passage of the invitees in similar trucks similarly loaded upon the premises, and that the respondent negligently failed to give any warning of the position of the wires and that such failure was a proximate cause of the damages. Appellant apparently predicates its cause of action against the common carrier set forth in the same count, not upon this ground, but upon the ground that the wires were and the danger therefrom was, apparent to any person using reasonable care, and that the common carrier failed to exercise such care. Appellant recognizes these inconsistent theories of liability between the respondent and the common carrier because it alleges that it "is in doubt as to whether it is entitled to redress from the defendant Abraham or from the defendant Mazzei" or both. Inconsistent causes of action may be pleaded in separate counts where the pleader thinks it desirable so to do, as where the exact nature of the facts is in doubt, or when the exact legal nature of plaintiff's right and defendant's liability depends on facts not well known to the plaintiff. An election of remedy under these circumstances cannot be forced. Tanforan v. Tanforan, 173 Cal. 270, 159 P. 709. To hold the respondent owner liable, then, it would have to be alleged in the count charging him with such negligence that there was a danger attending upon the entry by a business invitee, and that such danger arose from causes or conditions not readily apparent to the eye, and that such danger would or should have been known to the invitor by the exercise of reasonable diligence, and not to the invitee. It would then be the duty of the owner to give such invitee reasonable notice or warning of such danger if the dangerous condition was known or should have been known to the owner and not to the invitee. The owner was not required to give to the invitee notice or warning of an obvious danger. Shanley v. American Olive Company, supra; Mautino v. Sutter Hospital Ass'n, supra; Dingman v. A. F. Mattock Co., 15 Cal.2d 622, 104 P.2d 26.

[7-9] As to the respondent, the complaint fails to allege that there was a dangerous known condition not readily apparent to the eye, and that the dangerous condition was known to the invitor and not to the invitee. Whether the electric wires in the instant case were hidden from view by foliage or for some other reason were not open to view and not clearly visible to the eye, cannot be determined by the pleadings in so far as this respondent is affected. The only allegation in this respect would indicate that the wires were open to view and clearly visible. The presumptions are against the pleader.

Upon appeal from a judgment entered after refusal to amend a complaint after a demurrer is sustained, in support of the judgment of the trial court it is presumed that the pleader has stated his case as strongly as it can be stated in his favor, and all ambiguities and uncertainties must be resolved against the pleader. McIntyre v. Hauser, 131 Cal. 11, 63 P. 69; Higgins v. Security Trust, etc., Bank, 203 Cal. 398, 264 P. 744; Hauser v. Pacific Gas & Electric Co., 133 Cal.App. 222, 23 P.2d 1068. Many of appellant's cited cases were actions against a power company for maintaining its high-voltage lines over or across public highways or agricultural lands. In those cases it has been held that the failure of the company to maintain the wires at a height less than that height required by the Railroad Commission or ordinance was negligence per se. Stasulat v. Pacific Gas & Electric Co., 8 Cal.2d 631, 67 P.2d 678; Howell v. San Joaquin Light & Power Corp., 87 Cal.App. 44, 261 P. 1107; Fairbairn v. American River Electric Co., 179 Cal. 157, 175 P. 637. In the instant case there is no allegation that the wires were maintained in violation of law or of a ruling or regulation of the Railroad Commission. The legal duty of respondent to maintain the wires at any particular height is not shown. The presumption that respondent was not guilty of a violation of law is against the pleader. Sec. 1963, subd. 1, Code Civ.Proc. Hauser v. Pacific Gas & Electric Co., supra, presented a similar question to the one here involved. There the facts gathered from the pleadings show that the defendant company maintained a pole line carrying high tension wires along a certain lane and across a yard or corral. Plaintiff, with the permission of the owner and lessee, went upon the lands to move a hay derrick. He hitched his horses to the derrick and was moving the derrick across the corral when the boom thereof came in close proximity to the electric wire, and the electricity arced across the intervening space and thence into the body of plaintiff. The complaint alleged the negligence as follows [133 Cal. App. 222, 23 P.2d 1069]: "* * * Was moving and conveying the same (derrick) across the aforementioned yard * * * toward the * * * power line when, because of defendant's carelessness, recklessness and negligence in maintaining aforesaid wires within dangerous proximity and at an insufficient height from the ground and failing to insulate same the boom came in close proximity * * * and as a result thereof * * *" that "the contact was caused solely and due to the negligence of the defendant in the maintenance of said power line" and "that as a result of defendant's carelessness * * * plaintiff received a severe electrical shock" and also, "as a further result of defendant's carelessness" etc., plaintiff required the attendance of a physician. The court said, in sustaining an order for judgment on the pleadings: "It is obvious that all of the foregoing allegations are as to the cause of the injury, leaving the fact of negligence to inference and innuendo." (Citing cases.) It then said: "Examining the present complaint further, we find no allegation of any duty owed by defendant to plaintiff, nor * * * that plaintiff unwittingly nor accidentally came in contact with wires negligently maintained. * * * If there were an allegation that the wires were maintained in violation of law or of a rule or regulation of the Railroad Commission, then the law would impose the duty. No such allegation is here found except by recital that the wires were maintained 'in dangerous proximity' and at 'an insufficient height' above the ground. Such words are meaningless as allegations of fact, and are averments of opinion of the pleader only."

In support of the trial court's ruling respondent not only advances the contention that appellant did not plead any act of negligence of respondent, but if there was one pleaded that such act of negligence was a remote cause and not a proximate cause of the accident.

[10, 11] The governing rule is stated in 45 Cal.Jur., page 931, sec. 491 (referred to in Hauser v. Pacific Gas & Electric Co., supra [133 Cal.App. 222, 23 P.2d 1070]), as follows: "A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury, even though such injury would not have happened but for such condition or occasion. If no danger existed in the condition except because of the independent cause, such condition was not the proximate cause. And if an independent negligent act or defective condition sets into operation the circumstances which result in injury because of the prior effective condition, such subsequent act or condition is the proximate cause."

In Hauser v. Pacific Gas & Electric Co., supra, it was held that the contact with the wire was the deliberate act of the plaintiff with full knowledge of all of the circumstances; that the pleading brought the plaintiff within the rule above quoted and that from the complaint it appeared that plaintiff knew of the dangerous character of the wires and their exact location and condition and deliberately moved a derrick into them and was injured; and that from the foregoing it appeared that the complaint and amended complaint failed to set forth any cause of action. The amended complaint in the instant action was similarly defective as to respondent Harry E. Abraham.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concurred.

50 Cal.App.2d 389

WHITFIELD v. DEBRINCAT.

Civ. 11602.

District Court of Appeal, First District, Division 2, California.

March 11, 1942.

Rehearing Denied April 10, 1942.

Hearing Denied May 8, 1942.

1. Automobiles ⇨244(42)

In action for injuries sustained in head-on automobile collision, evidence with respect to gouges cut in the roadway, one of which was on plaintiff's side of the road and the other not shown to have been connected with the collision, did not support defendant's contention that collision resulted because plaintiff was driving on left hand side of highway.

2. Evidence ⇨383(10)

In action for injuries sustained in head-on automobile collision, wherein plaintiff and defendant each contended that the other was driving on the wrong side of road, photographs showing injuries to plaintiff's automobile failed to establish whether it was struck once or twice and hence did not support defendant's contention that plaintiff's automobile was on wrong side of highway and was struck twice.

3. Trial ⇨267(3)

The trial court's modification of defendant's requested instruction, relating to the statutory duty of a motorist to keep on right half of highway except when overtaking or passing another vehicle, by striking statement that if jury found from evidence that plaintiff failed to comply with the statute and that such failure proximately caused the injury, plaintiff was guilty of negligence and could not recover, was not error, notwithstanding instruction as given was not addressed to the issue on trial, in that plaintiff, if he was driving on wrong side of road, was violating a different provision of the Vehicle Act. St.1931, pp. 2124, 2125, §§ 122, 124.

4. Appeal and error ⇨928(4)

Where record failed to show at whose request instructions, to which defendant objected on appeal, were given, but showed the instructions given, instructions requested by defendant which the court modified and gave, and instructions requested by defendant which the court refused to give, it would be presumed in support of judgment in favor of plaintiff that the objectionable instructions were given at the request of the defendant.

5. Appeal and error ⇨1067

Where instructions given stated affirmatively the statutory duty of drivers of motor vehicles, court's refusal to give defendant's requested instruction that defendant was not required to use the utmost care, although such instruction might properly have been given, was not reversible error. St.1931, pp. 2120, 2124, 2125, §§ 113(a), (b)1, 122, 124(a).

6. Appeal and error ⇨1067

In action for injuries sustained in automobile collision, where jury was instructed that one who is himself exercising ordinary care has right to assume, until the contrary becomes apparent, that all other persons using street or highway will obey the law and use ordinary care, court's refusal to give defendant's requested instruction that plaintiff was not entitled to assume that others would exercise ordinary care if plaintiff was acting in a negligent manner or was himself violating any of the rules of the road, although such instruction might properly have been given, was not reversible error.

7. Automobiles ⇨243(14)

In action for injuries sustained in head-on automobile collision, wherein participants each contended that the other was driving on the wrong side of the road, court did not err in permitting plaintiff's witness to testify over objection concerning where certain gouges made in the roadway commenced.

8. Witnesses ⇨226

The object of all examinations of witnesses in judicial tribunals is to elicit truth and there are many cases where the form of question, and the manner of examination must be left to the discretion of the trial judge.

9. Appeal and error ⚷690(3)

Where plaintiff in personal injury action, after introducing evidence regarding nature of injuries, his incapacity to follow his profession as a dentist and continuation of such incapacity, waived his claim for loss of earnings and it was stipulated that such items should be withdrawn from the jury, defendant could not complain for the first time on appeal that he was thereby deprived of cross-examination in the absence of any showing in the record that attempted cross-examination concerning such item of damages had been restricted by trial court.

10. Damages ⚷216(7)

In personal injury action wherein plaintiff waived any claim for loss of earnings, an instruction that if jury found plaintiff should recover, damages should be awarded in such amount as would compensate plaintiff for the injuries sustained by him, if any, including such amount as would compensate him for pain and suffering certain to result in the future, was not erroneous.

11. Evidence ⚷383(9)

In action for injuries sustained in head-on automobile collision, plats drawn to scale, from which jury might have found that at the place of collision plaintiff's view was not obstructed within a distance of 200 feet ahead, warranted finding that plaintiff was not guilty of contributory negligence barring recovery for violating statute limiting speed to 15 miles per hour in traversing curves where driver's view is obstructed within a distance of 200 feet ahead. St. 1931, p. 2120, § 113(b)3.

12. Appeal and error ⚷204(2), 237(2)

In action for injuries sustained in automobile collision, the statement volunteered by plaintiff's witness that in his opinion it was impossible to determine the time when a gouge in the roadway was made did not constitute prejudicial error where no objection was made thereto and there was no motion to strike.

13. Appeal and error ⚷1004(1)

To say that a verdict has been influenced by passion and prejudice merely amounts to saying that the verdict exceeds any amount justified by the evidence.

14. Damages ⚷132(13)

An award of $14,000, nearly $3,700 of which constituted special damages proved by dentist, for injuries which required dentist to be under the constant care and treatment of a physician for almost a year and finally resulted in the amputation of the little finger on his left hand, was not excessive.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Albert J. Whitfield against Joseph Debrincat for injuries sustained in an automobile collision. From an adverse judgment, defendant appeals.

Judgment affirmed.

For prior opinion, see 120 P.2d 40.

John J. Taheny, of San Francisco, for appellant.

Bronson, Bronson & McKinnon, of San Francisco, Archibald D. McDougall, of Sacramento, and A. Dal Thomson, of San Francisco, for respondent.

STURTEVANT, Justice.

At about 8:15 p. m. on the evening of July 8, 1933, plaintiff was driving a light Buick automobile in a southerly direction on the Skyline Boulevard in San Mateo County. The defendant Debrincat was driving a heavy Buick automobile northerly along said boulevard. At a point about two miles south of the boundary line between San Mateo County and San Francisco the two automobiles collided. To recover damages for injuries sustained in said collision the plaintiff commenced this action. The defendant answered and on the issues framed a trial was had. The verdict was in favor of the defendant. A motion for a new trial was granted. A second trial was had in May, 1935, and the verdict was in favor of the plaintiff. A motion for a new trial was granted and the order was affirmed on appeal. Whitfield v. Debrincat, 18 Cal.App.2d 730, 64 P.2d 960. A third trial was had in July, 1937, which resulted in favor of the defendant. A new trial was ordered and that order was affirmed on appeal. Whitfield v. De Brincat, 35 Cal.App.2d 476, 96 P.2d 156. A fourth trial was had in April, 1940, which resulted in a verdict of $14,000 in favor of the plaintiff. This appeal is from the judgment entered upon said verdict.

At the point where the accident occurred the plaintiff was driving uphill and the defendant was driving downhill on a grade of about 4½ per cent. Neither car was traveling faster than 30 miles per hour. Both cars had their lights turned on and each car was seen by the driver of the other several hundred feet distant. The roadway was paved and had a white stripe painted along its middle line. The course of the road was curved but at about the point of the collision the arcs of the curves were broad.

Riding in the car with the plaintiff was a guest, Madeline Trobock. Riding with the defendant was Joe Grima. Excepting those individuals there was no other eyewitness. It was the contention of the plaintiff that the defendant was driving on his left-hand side of the road and of the white line. On the other hand it was the contention of the defendant that the plaintiff was driving on his left-hand side of the road and of the white line. These two conflicting theories were presented by the attorneys for the respective parties with meticulous care in their opening statements. The evidence introduced by the parties was conflicting.

[1, 2] The defendant claims the physical facts show he was not to blame. He calls attention to gouges cut in the roadway. An examination of the record discloses that one gouge was on plaintiff's side. Considered solely by itself it is opposed to the defendant's contention. The other gouge mentioned was about 70 feet south from the gouge first mentioned. When that gouge was made the evidence does not show. Neither does the evidence connect it with the collision. It is of little help. Another physical fact relied on by the defendant is the condition of the plaintiff's car after the accident. The defendant claims the body of the car shows it was struck twice and that such fact tends to support the defendant's theory that the plaintiff's car was on the wrong side of the highway and was struck twice as defendant drove forward. The photographs show such injuries to the plaintiff's car that the question as to whether it was hit once or twice is clearly debatable.

[3] The defendant asked the trial court to give an instruction as follows: "You are instructed that the California Vehicle Act, in effect at the time of the accident complained of, provided that upon all highways of sufficient width, other than one-way highways, the driver of a vehicle shall drive the same upon the right half of the highway and as close to the right-hand edge or curb of such highway as is practicable, except when overtaking and passing other vehicles, in which event the overtaking vehicle may be driven on the left side of the highway, if such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made completely without interfering with the safe operation of any vehicle approaching from the opposite direction; and provided that such overtaking vehicle shall return to the right-hand side of the highway before coming within one hundred feet of any vehicle approaching from the opposite direction, and in no event shall a driver drive to the left side of the center line when approaching the crest of a grade or upon a curve in the highway where the driver's view along the highway is obstructed, *and if you find from the evidence that the plaintiff, Whitfield, failed to comply with said law, and that such failure proximately caused his injuries, then you are instructed that said plaintiff was guilty of negligence and cannot recover against the defendant.*" (Italics ours.) The trial court struck out the portion we have italicized and then gave the instruction. The defendant contends that the modification was error. We think it was not error. The instruction as given was not an erroneous statement of the law. § 122, California Vehicle Act, St.1931, p. 2124. But it was not addressed to the issue on trial. If plaintiff was driving on his left hand side of the middle of the highway and a collision occurred, the cause thereof was his violation of the provisions of section 124, St.1931, p. 2125, and not section 122 of the California Vehicle Act. The violation of the provisions of the latter section would be at most a remote cause and not the proximate cause of the accident.

[4] The trial court gave the following instructions:

"You are instructed that the plaintiff while in the operation of his automobile immediately prior to and at the time of the accident involved in this case, was not under the duty to exercise the utmost or highest degree of care. The only duty imposed upon plaintiff was that of exercising the care of an ordinarily prudent person acting under like circumstances, and if you should find from the evidence in this case that said plaintiff immediately prior to and at the time of the said accident, was conducting himself while in the operation of his automobile in the same manner that any other person of ordinary care and prudence, acting under like circumstances, would have conducted himself, then said plaintiff was not guilty of contributory negligence.

"Before the plaintiff can recover in this action it must first appear by a preponderance of evidence that the defendant was guilty of some act of negligence which contributed proximately to the accident.

"Contributory negligence is defined as such an act or omission on the part of an injured party amounting to a want of ordinary care, as, concurring or cooperating with the negligent act of a defendant, was the proximate cause of the injury complained of. Unless it is shown by, or may be inferred from the evidence offered by plaintiff, such negligence is a matter of defense, to be proved affirmatively by the defendant. It is not incumbent upon the plaintiff to prove that he was free from contributory negligence. Contributory negligence cannot be presumed from the mere fact of injury." The defendant objects to each one. He asserts or implies each was given at the request of the plaintiff. The record does not show such was the fact. It shows (1) the instructions given; (2) instructions requested by defendant which the court modified and gave; and (3) instructions requested by defendant but which the trial court refused to give. As it is presumed the trial court did not err, we must assume in support of the judgment that each of said instructions was given at the request of the defendant. 2 Cal.Jur. 870; Sutter Butte C. Co. v. American R. & A. Co., 182 Cal. 549, 554, 189 P. 277.

[5] The trial court gave instructions which stated affirmatively the duties of drivers of motor vehicles. § 113(a), § 113(b) 1, § 122, and § 124(a), California Vehicle Act St.1931, pp. 2120, 2124, 2125. But defendant asked and the trial court refused to give an instruction that the defendant was not required to use the utmost care. The requested instruction might well have been given, but where, as here, the court states the rules of law affirmatively it is not reversible error to refuse to negative other possible elements not contained in the statutory rules.

[6] The trial court instructed the jury as follows: "One who is himself exercising ordinary care has a right to assume, until the contrary becomes apparent, that all other persons using a street or highway will obey the law and use ordinary care." It is not claimed the instruction was an erroneous statement of the law. Moreover it applied to both parties. But the defendant asked and the trial court refused an instruction worded as follows: "While it is the law that the plaintiff Albert Whitfield had a right to assume that all others, including the defendant, would exercise ordinary care and obey the rules of the road herein defined, he was not entitled to assume that others would exercise ordinary care if at the same time the plaintiff was acting in a negligent or careless manner or was himself violating any of said rules of the road." The defendant contends it should have been given and he cites and relies on Varner v. Skov, 20 Cal.App.2d 232, 239, 67 P.2d 123. As intimated by the court in the cited case the requested instruction might well have been given. But as stated by the same court it was not reversible error to decline to give it.

[7, 8] The plaintiff called Charles T. Rowley as a witness. He arrived at the scene of the accident a few minutes after the collision. His attention was directed to the "gouge" in the road near the white post. The attorney for the plaintiff then asked him, "Q. Where did you see the marks commence? Mr. Taheney: Just a moment. I object to his testifying where they commence. The court: Objection overruled. A. When I first got out of the car I walked across the road. Those marks was definite, you couldn't help but see them, and I presume, by that marker, they commenced about five feet south of the marker." We think the trial court did not err in overruling the objection. Nolan v. Nolan, 155 Cal. 476, 101 P. 520, 132 Am.St.Rep. 99, 17 Ann.Cas. 1056. On page 481 of 155 Cal., on page 522 of 101 P., 132 Am.St.Rep. 99, 17 Ann.Cas. 1056, the court quoted with approval as follows: "While it would not have been a legal error to have sustained the objection, I am of the opinion, under the circumstances of this case, that it was not a legal error to overrule it. The object of all examinations in judicial tribunals is to elicit truth, and there are many cases where the form of questions and the manner of examination must be left to the dis-

cretion of the trial judge. No injustice could have been done, because the answer would not be likely to prevail against facts which might be drawn out on cross-examination, or proved by other witnesses, inconsistent with it."

[9] The defendant assigns misconduct of the attorney for the plaintiff. The alleged acts involved the following facts. The trial commenced on the 25th day of April, 1940. As from the beginning the plaintiff introduced evidence regarding the nature of his injuries, his incapacity to follow his profession as a dentist, the continuation of that incapacity, and also evidence regarding surgical operations which took place in the meantime. It transpired that the plaintiff carried accident insurance and was compensated at the rate of $350 per month. On the third day of the trial, for reasons not disclosed in the record, a conference was held in the chambers of the judge of the trial court without the presence of the jury. In that conference plaintiff's attorney stated that the plaintiff waived "* * * the issues and proof relative to any loss of earnings *from the period of the accident until the period he returned to work.*" No objection was made to the waiver. In the same conference it was stipulated "* * * that at the conclusion of the trial the court can give the jury instructions that the subject of the loss of earning capacity is not a matter for them to consider in estimating damages." Later the terms agreed on at the conference were carried out. At this time the defendant complains that he was deprived of cross-examination. However, we find no place in the record that he sought to cross-examine, that an objection was sustained, or that any other ruling was made by the trial court. In the light of the foregoing facts the contention comes too late.

[10] The trial court instructed the jury as follows: "You are instructed that if your verdict is in favor of the plaintiff, Dr. Whitfield, in fixing his damages you should award him such amount as will compensate him for the injuries sustained by him, if any, including such amount as will compensate him for pain and suffering certain to result in the future." The defendant objects to that instruction and to others. His objection is closely allied to the point last discussed. He says: "To tell the jury that they may in the face of a waiver for all claim of loss of earning capacity, award damages for the pain and suffering and for the injury is to ignore the waiver." A comparison of the waiver with the language of the instructions given discloses that there was no conflict. On the contrary the instructions given were more favorable to the defendant than was permissible under the terms of the waiver.

[11] The defendant asserts that the plaintiff was guilty of contributory negligence as a matter of law. He relies on the provisions of section 122, subdivision (b) of the California Vehicle Act. We have discussed that contention above. He also relies on the provisions of section 113, subdivision (b) 3. That provision limits speed as follows: "Fifteen miles an hour in traversing or going around curves or corners of a highway when the driver's view is obstructed within a distance of two hundred feet along such highway in the direction in which he is proceeding." There is evidence that there were curves in the highway. However, there were plats in evidence drawn to a scale by competent engineers. An examination of such plats discloses that at the place of the impact the jury might have found the plaintiff's view of the road was not obstructed nor was it obstructed two hundred feet north of said point. In other words, this court is unable to say that the jury erred in finding that the plaintiff was not guilty of contributory negligence.

[12] The plaintiff called Carl Stern as a witness. He drew the witness' attention to a gouge in the road. Having asked the witness several questions, the following proceeding occurred: "Q. Let me ask you this—now, your Honor, I want to show the witness this transcript and the testimony. This is Mr. Taheney's direct examination. The Witness: I will say this, that the mark at that time (November, 1934) that I saw out there first, appeared to be what you just termed a fresh mark. As to the definite time when it was made, I don't think that is humanly possible to determine that." No objection was made, nor was there a motion to strike. The volunteer remark of the witness was not prejudicial error.

[13, 14] The defendant also contends that the verdict, $14,000, was grossly excessive. The special damages proved by the plaintiff amounted to $3,695.48, a little over $10,000 was awarded as general damages. Admitted facts are that for nearly a

year the plaintiff was under the constant care and treatment of doctors; and that in the early part of 1935 a final operation was performed and the little finger on his left hand was amputated. There is nothing in the record showing passion or prejudice. To say that a verdict has been influenced by passion and prejudice is but another way of saying that the verdict exceeds any amount justified by the evidence. Doolin v. Omnibus Cable Co., 125 Cal. 141, 144, 57 P. 774. All facts considered we are unable to say the verdict in the instant case was excessive.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

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50 Cal.App.2d 661

BALKWILL v. CITY OF STOCKTON.

Civ. 6738.

District Court of Appeal, Third District, California.

March 24, 1942.

As Modified on Denial of Rehearing April 21, 1942.

Hearing Denied May 21, 1942.

1. Municipal corporations 🔑819(1, 6)

In pedestrian's action against city for injuries sustained when she stepped in a hole in concrete sidewalk in business district, evidence sustained implied findings that hole was dangerous and that city had either actual or constructive knowledge of its existence so as to warrant recovery by pedestrian. Gen.Laws 1937, Act 5619, § 2.

2. Appeal and error 🔑1001(1)

Jury's findings, supported by substantial evidence, are binding on District Court of Appeal.

3. Municipal corporations 🔑768(3)

City is not liable for injuries resulting from slight defects in a sidewalk from which it may not reasonably be anticipated accidents may result. Gen.Laws 1937, Act 5619, § 2.

4. Municipal corporations 🔑768(3)

Cracks and defects in sidewalks may be so slight and unsubstantial that a court should determine, as a matter of law, that accidents could not be reasonably anticipated therefrom, and that consequently city could not be held liable for injuries resulting therefrom. Gen.Laws 1937, Act 5619, § 2.

5. Municipal corporations 🔑821(6, 15)

In pedestrian's action against city for injuries sustained when she stepped in a hole four or five inches long, two inches wide, and from one-half to two inches deep in concrete sidewalk in business district, whether such hole, which had previously caused similar accidents, although not serious, and which had been observed and deliberately avoided by other citizens, was dangerous, and whether city was chargeable with knowledge of its existence, were for the jury. Gen.Laws 1937, Act 5619, § 2.

6. Municipal corporations 🔑790

Where city employed an inspector to periodically examine the sidewalks for holes or other defects which might be dangerous to pedestrians, city was chargeable with the knowledge of such inspector relative to the existence of holes in sidewalk in business district. Gen.Laws 1937, Act 5619, § 2.

7. Municipal corporations 🔑821(6, 15)

Whether defect in sidewalk was dangerous and whether city was chargeable with knowledge of the existence thereof so as to render city liable to pedestrian for injuries sustained as a result thereof are properly questions for the jury, where the evidence is so conflicting that different conclusions may reasonably be drawn with respect thereto. Gen.Laws 1937, Act 5619, § 2.

8. New trial 🔑144

Where separate affidavits of eight jurors disclosed that, although a quotient sum was obtained as a basis for subsequent discussion as to amount of damages to be awarded, the verdict adopted and approved was not a quotient verdict but the result of subsequent consideration, court properly denied defendant's motion for new trial on the ground that verdict was adopted by means of chance in violation of statute. Code Civ. Proc. § 657, subd. 2.

9. New trial 🔑6

Whether a new trial should be granted or denied rests within the sound discretion of trial judge, even though motion for new trial is based on affidavits.

10. Appeal and error 🔑977(5)

Trial judge's denial of a motion for new trial, even though motion is based on affidavits, will not be disturbed on appeal in absence of clear abuse of trial judge's discretion in such matters.

11. Trial 🔑**315**

A "quotient verdict" does not necessarily constitute a "chance verdict", prohibited by statute, provided the average sum which is thus procured is not adopted without subsequent consideration or balloting by the jurors. Code Civ.Proc. § 657, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Chance Verdict" and "Quotient Verdict".

12. Trial 🔑**315**

The purpose of statute which prohibits the rendering of a verdict which is the result of chance is to preserve to litigants the benefit of the independent judgment of jurors with respect to both the party who is to prevail and the amount of damages to be awarded. Code Civ.Proc. § 657, subd. 2.

13. Appeal and error 🔑**207, 688(2)**

Prejudicial error could not be predicated upon statement made by defense counsel during argument to the jury by plaintiff's attorney that it was improper to go outside the evidence in the case and court's reply that attorney should confine himself to the evidence in the case, where challenged argument did not appear in the record, defendant failed to assign the remarks as prejudicial, and court was not asked to direct jury to disregard them.

14. Appeal and error 🔑**1060(1)**

In pedestrian's action against city for injuries sustained when she stepped in a hole in concrete sidewalk, the quotation by plaintiff's attorney in the course of argument to the jury from Supreme Court opinion in a similar case to the effect that drunk man is as much entitled to a good sidewalk as a sober one and much more in need of it, as illustrative of his contention that every pedestrian is entitled to assume that city will not knowingly permit its sidewalks to remain in a dangerous condition, was not prejudicial.

15. Appeal and error 🔑**207**

Appellant "waived" its objection to opposing counsel's argument to the jury by failing to assign such argument as prejudicial and by omitting to ask the court to instruct the jury to disregard it.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

16. Trial 🔑**296(9)**

Requested instruction relating to the actual or constructive notice of the defect essential to charge city with liability was not erroneous as assuming that there was a dangerous and defective condition of the sidewalk, where jury was told in other instruction that it possessed sole province of determining from the evidence whether the defective or dangerous condition existed and that if it found it did not the verdict should be for the city.

◆

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Lyda A. Balkwill against City of Stockton to recover damages for a fractured hip sustained when plaintiff stepped into a hole in the concrete sidewalk in the business district of defendant city. From a judgment in favor of plaintiff, defendant appeals.

Judgment affirmed.

Joseph C. Tope, City Atty., and H. C. Stanley, Asst. City Atty., both of Stockton, for appellant.

J. LeRoy Johnson, of Stockton, for respondent.

THOMPSON, Acting Presiding Justice.

The City of Stockton has appealed from a judgment for damages in the sum of $8,500, in favor of the plaintiff, to compensate her for a broken hip resulting from stepping into a hole in the concrete sidewalk in the business portion of the city, and falling thereon. It is not contended the judgment is excessive.

For the period of a year two holes were permitted to exist in the surface of the concrete sidewalk on California Street in the business portion of Stockton. They were only a few inches apart, and were approximately four or five inches long, two inches wide and from one-half to two inches in depth. Mrs. Anna McDade testified from observation in that regard that the hole in question was about six inches long, two and a half inches wide and "almost three inches deep." She said "It seemed to be full of pulverized cement." Arthur Shaw, the City Engineer of Stockton, testified that he measured the holes after the accident occurred and that the one in question was four and five-eighths inches long, two inches wide and one-half inch deep. The plaintiff was 59 years of age. She wore glasses. About noon on the 24th day of April, 1940, she was walking along California Street in the vicinity of the Penney Store, on her way to mail a package. As she approached the point where the holes existed, she was accosted by a lady friend from a position somewhat to her rear. She turned about to respond to the greeting, and inadvertently stepped into one of the holes. Catching the heel of her shoe, she fell violently to the pavement and fractured the neck of her right femur bone. The plaintiff's shoe was received in evidence. The leather was skinned from the heel at a point about half an inch from the bottom. The heels were neither extremely long nor slender. On the contrary, they were sensibly-shaped heels. After the accident the plaintiff was taken to a hospital where she remained for about a month. The broken bone failed to knit. A subsequent operation was necessarily performed to fasten the fractured ends in apposition. At the time of the trial, which was more than a year from the date of the accident, she was suffering severely from her injury. It is evident that she may be permanently disabled.

The hole, which caused the plaintiff to fall, had existed in the middle of the sidewalk in a business portion of the city for nearly a year before the time of the accident. Mrs. Ten Bruin, who lived in Stockton, testified that she was familiar with the street where the accident occurred and that she knew of the defective condition of the sidewalk. She said in that regard: "On one occasion I had seen a lady trip in that very same place. She fell on her knee and I helped pick her up." That was in the summer of 1939. She added, "I walked past there frequently and I always avoided that spot." Mrs. Violet Hunt, who also lives in Stockton, testified she had observed the holes in question, and in December, 1939, she stepped in one of them and turned her ankle. She also took pains to avoid the holes. There is some conflict regarding the exact size of the holes. For the purpose of this appeal we may assume the evidence of the exact measurements furnished by the city engineer should prevail over the estimates of the depth of the hole made by other witnesses, although, ordinarily, the determination of such facts is a matter for the jury where there is a conflict of evidence. Regardless of the size and depth of the holes, the question still remains as to whether the city authorities knew of the existence of the holes and that they constituted a hazard to the safety of pedestrians.

For the purpose of showing that the defendant had knowledge of the existence of the alleged dangerous and defective condition of the sidewalk the city engineer was called as a witness and testified that the city regularly employed an inspector whose duties it was to periodically examine the sidewalks for holes, cracks or defects which might be dangerous to pedestrians, and that the inspector actually examined the sidewalk on California Street, where the accident occurred, on the 12th day of March prior to the date of the accident, but reported no holes or defects. Mr. Cowell, the city sidewalk inspector, testified that he examined the sidewalks in the vicinity of the accident on March 12, 1940, but observed no holes or defects "which he considered dangerous." The evidence shows that the particular holes in question had existed for a year or more previous to the accident. They were repaired immediately thereafter.

Regarding the legal liability of the city for the damages resulting from the accident, two questions are primarily involved, namely: Was the hole in the sidewalk, into which the plaintiff stepped, a dangerous defect, and did the city have either actual or constructive knowledge thereof? Both of these questions were determined by the jury adversely to the defendant.

[1, 2] We are of the opinion this court may not determine on appeal, as a matter of law, that the hole in the sidewalk which caused the injuries sustained by the plaintiff was not so dangerous as to create a liability on the part of the city for negligently permitting it to remain without repair. In other words, under the circumstances of this case, the implied findings of the jury that the hole was dangerous and that the city had knowledge of its existence are binding upon this court for the reason that they are supported by substantial evidence.

[3-6] It is true that a city will not be held liable for injuries resulting from slight defects in a sidewalk from which it may not reasonably be anticipated accidents may result. Whiting v. National City, 9 Cal.2d 163, 69 P.2d 990; 7 McQuillin's Municipal Corporations (2d ed.), p. 312, sec. 3033, note 76. Holes, cracks and defects in sidewalks may be so slight and unsubstantial that a court should determine, as a matter of law, that accidents could not be reasonably anticipated therefrom. In the present case, the hole was large enough to catch the heel of a pedestrian so as to cause a serious accident. It proved to be actually dangerous in this case. It had previously caused other similar accidents,

although they were without serious results. The holes existed in the surface of a smooth, sloping, concrete walk in the business portion of the city where many persons were accustomed to travel. They were clearly observable. Others had seen them and knew of their presence. They were apparently dangerous enough so that other citizens deliberately avoided them. Under such circumstances we may not say, as a matter of law, that the defects were not dangerous. Nor may we hold that the city was not chargeable with knowledge of their existence. The city sidewalk inspector did not say that he failed to observe the holes in question. All that he testified to was that he did not see any holes in that walk "which he considered dangerous." There is ample evidence from which we must assume the inspector saw the holes and knew they existed, or that, in the exercise of ordinary care, he should have seen them. The knowledge of the inspector, with relation to the existence of the holes, necessarily charges the city with that knowledge, since he was employed by the city for the express purpose of examining the walks for that very purpose. It was his duty to critically examine the walks for cracks, holes and other defects. We must assume the jury was warranted in finding that he actually saw and knew of the existence of the holes.

The liability of the city is based on the provisions of paragraph 2 of Statutes of 1923, page 675 (2 Deering's Gen. Laws of Calif. of 1937, p. 2630, Act 5619), which reads in part: "Counties, municipalities and school districts shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board * * * or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition * * * and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition * * *."

[7] In spite of the fact that defects in sidewalks may be so slight or trivial as to create mere questions of law regarding their dangerous nature, it is, nevertheless, true that when the evidence is so conflicting that different conclusions may reasonably be drawn regarding the dangerous character of the defects, or concerning the question of notice thereof on the part of the officers of the city, the determination of such questions should be left to the jury and their conclusions should not then be disturbed on appeal. Ackers v. City of Los Angeles, 40 Cal.App.2d 50, 104 P.2d 399; 25 Am.Jur. 876, sec. 589; 119 A.L.R. 168, note; 9 Cal. Jur., Ten-Year Supp., 641, sec. 194. In the authority last cited it is said in that regard: "Whether or not a county, municipal corporation or school district is liable for an injury caused by defective or dangerous condition of streets, buildings or other public property should ordinarily be determined by the jury from the facts of the particular case. Thus the jury should ordinarily determine, as a question of fact, whether a dangerous or defective condition existed, whether the plaintiff's injury proximately resulted from such condition, whether the proper authorities had notice or knowledge of the condition, and whether a city through the persons 'having authority to remedy such condition,' failed or neglected for a reasonable time after acquiring knowledge of the defective condition, to remedy the same. However, a nonsuit may be granted if the evidence wholly fails to show liability upon the part of the defendant."

Under the circumstances of this case, we may not say, as a matter of law, that the hole which is here involved was not dangerous, nor that the city authorities should not have reasonably anticipated that it was hazardous. Certainly we may not hold that reasonable persons could not differ in their conclusions regarding those questions. If those are proper questions for the jury, under the circumstances of this case, this court has no right to substitute its judgment for that of the jury. The hole in question was actually dangerous, for the plaintiff broke her hip on that account. It caused two other ladies to fall. The city promptly repaired the hole after plaintiff was injured. Eleven jurors and the trial judge believed that liability on the part of the city was adequately shown. A motion for new trial was denied. We must assume the city had actual knowledge of the existence of the holes at least a month and a half before the accident occurred, which was ample time within which to have repaired the defects. The inspector actually examined that very walk, in search of defects, on March 12, 1940. The accident did not occur until April 24th. The holes were plainly visible. We must assume he saw them. The plaintiff is not bound by his opinion that the holes were not dangerous enough to require repairing. We therefore conclude there is sufficient evidence to sustain the verdict and judgment against the city.

The facts of no two cases of this character are exactly alike. Each must be determined on its own particular facts. Scores of cases from numerous jurisdictions, based on somewhat similar facts, are reported, as indicated by the elaborate annotation of that subject which appears in 119 A.L.R. at page 161. The same questions have frequently arisen in this state. In support of its contention that nonliability of the city, under the circumstances of this case, should be determined as a matter of law, the appellant relies chiefly on three cases: Nicholson v. City of Los Angeles, 5 Cal.2d 361, 54 P.2d 725; Whiting v. National City, supra, and Balmer v. City of Beverly Hills, 22 Cal.App.2d 529, 71 P.2d 854. Each of these cases appears to have been reversed on the theory that the cities had no actual notice of the defects, and that constructive notice thereof would not be presumed from the mere fact that the defects had existed for short periods of time prior to the accidents. In other words, these cases were apparently reversed for lack of evidence constituting constructive notice of the defective sidewalks. In the Nicholson case [5 Cal.2d 361, 54 P.2d 727] it is said in that regard: "The rule as stated in the cases relied upon by the respondent is that the existence of a conspicuous defect or dangerous condition of a street or sidewalk for a considerable length of time will create a presumption of constructive notice. * * * There is no evidence of any prior event which would put the city on inquiry as to the existence of a dangerous break at this point, and aside from the testimony that it had existed for several months, that it was about an inch and one-half high, and that the plaintiff thought it was caused by the root of a tree growing in the parking beside it, there is no testimony with regard to the defect itself. This, we think, is insufficient to sustain a finding that, had the city fulfilled its duty of reasonable inspection and supervision of the streets of the city as a whole, it would have had actual knowledge of the break."

In the present case actual inspection of the very sidewalk where the hole existed was made about six weeks before the accident occurred.

The Whiting case was clearly reversed on the same ground that constructive notice of the presence of a defect in the sidewalk will not be presumed from its mere continued existence for a brief period of time. The court [9 Cal.2d 163, 69 P.2d 991] concludes its opinion in that case by this statement: "In view of the holding in the Nicholson case and the pertinent authorities elsewhere, we conclude that the constructive notice found by the court is insufficient to support the judgment."

The Balmer case was likewise reversed for lack of evidence of constructive notice of the existence of the dangerous defects. That case was specifically determined on the authority of the Whiting case. No previous inspection of the walks were made prior to the accidents in any of these reversed cases. At least, the weight of recent California authorities in this character of action favors the support of the judgment in this case.

Contrary to the preceding cases, judgments for damages recovered under somewhat similar circumstances were supported in four recent California cases. In three of them hearings by the Supreme Court were denied. Ackers v. City of Los, Angeles, supra; Barrett v. City of Sacramento, 128 Cal.App. 708, 18 P.2d 356; Hook v. City of Sacramento, 118 Cal.App. 547, 5 P.2d 643; Allen v. City of Los Angeles, 43 Cal.App.2d 65, 110 P.2d 75.

We therefore conclude that the questions of the existence of dangerous defects in the sidewalk, the knowledge thereof on the part of the city authorities, and the consequent liability of the city for negligence in failing to repair the hole in question until after the accident occurred were properly submitted to the jury, and that its verdict and the judgment in this case are adequately supported by the evidence.

The defendant's motion for new trial on the ground that the verdict was adopted by means of chance, contrary to subdivision 2 of section 657 of the Code of Civil Procedure, was properly denied. The motion was heard on affidavits of the jurors. There is a conflict of evidence regarding the method by means of which the verdict was reached. The verdict awarded plaintiff damages in the sum of $8,500, which sum was confirmed by the jury in open court. One juror averred that the amount which was inserted in the verdict was the result of dividing by twelve the aggregate sum of the several amounts placed on separate ballots by the individual jurors, without subsequent consideration or balloting thereon, and with the previous agreement that sum should become their verdict. Two other jurors averred that the quotient thus obtained "was to be the verdict of the jury," but they failed to state that it was adopted without further consideration. On the contrary, eight jurors aver, in separate affidavits, that it was not a quotient verdict. They assert that a quotient sum of $6,500 or $7,000 was obtained as a mere basis for subsequent discussion, and that after subsequent consideration and balloting ten jurors agreed to adopt the different figure of $8,500 as their award of damages, which sum was thereupon inserted in the verdict, returned to the court and approved by the jury in open court.

[8-10] The overwhelming weight of evidence therefore supports the conclusion that the verdict was not what is commonly termed a quotient verdict, nor was it obtained by resorting to chance. The court therefore properly denied the motion for new trial on that ground. The trial judge has a sound discretion in granting or denying a motion for new trial even though the motion is based on affidavits. In the absence of clear abuse of such discretion the denial of a motion for new trial, which is based on affidavits, will not be disturbed on appeal. Spadoni v. Maggenti, 121 Cal. App. 147, 156, 8 P.2d 874.

[11] A quotient verdict does not necessarily constitute a chance verdict, provided the average sum which is thus procured is not adopted without subsequent consideration or balloting by the jurors. If, after a quotient figure is obtained, the jurors discuss and ballot upon the adoption or rejection of that sum, it is conclusive evidence they were not bound by a previous agreement to accept it without further consideration. Certainly an award of damages may not be said to constitute a quotient verdict, when the average sum thus obtained was subsequently actually changed to another and different amount, as the majority of the jurors averred was done in the present case. Under the circumstances related by most of the jurors in this case, the verdict which was returned was neither a quotient verdict nor a chance verdict. Ham v. County of Los Angeles, 46 Cal. App. 148, 153, 189 P. 462; Mirabito v. San Francisco Dairy Co., 1 Cal.2d 400, 35 P.2d 513; 52 A.L.R. 44, note; 23 Cal. Law Rev. 218; 8 So.Cal. Law Rev. 163. In the Ham case, supra [46 Cal.App. 148, 189 P. 464], the amount of a quotient verdict was held to be void, on the theory that it was the result of chance, because it was adopted "without further discussion, balloting or assent" of the jurors. But it was therein significantly said that: "It is true * * * that there is no impropriety in the jurors making an average of their individual estimates as to the amount of damages for the purpose of arriving at a basis for discussion and consideration, nor in adopting such average if it is subsequently agreed to by the jurors; but to agree beforehand to adopt such average and abide by the agreement, *without further discussion or deliberation,* is fatal to the verdict." (Italics added.)

[12] The purpose of the statute which prohibits the rendering of a verdict which is the result of chance is to preserve the benefit to litigants of the independent judgment of jurors with respect to either the party who is to prevail or the amount of damages to be awarded. Chance verdicts are destructive of the very foundation upon which the right of trial by jury is based. But the amount which will adequately compensate one for personal injuries is not usually susceptible of mathematical calculation. Reasonable men will differ greatly in that regard. The honest and fair judgment of jurors is all that may be expected in such litigation. There is no objection to the use of a quotient figure as a basis for discussion of the jurors, if it is subsequently fairly and freely considered or balloted upon. Certainly it is not objectionable or fatal if a different figure is subsequently adopted as the verdict of the jury. The motion for new trial on the ground that the verdict was the result of chance was properly denied.

[13] We find no prejudicial misconduct of counsel for the plaintiff in his argument to the jury. The transcript discloses the fact that, in the course of his argument, the attorney was interrupted by a statement from defendant's attorney that, "Your Honor, I don't think it is proper to go outside the evidence in this case." The court replied, "No, you confine yourself to the evidence in this case." The challenged argument does not appear in the record. We have no way of ascertaining what counsel said to the jury nor can we determine whether the statements were within the evidence. The defendant failed to as-

sign the remarks as prejudicial, and the court was not asked to direct the jury to disregard them.

[14] It was not prejudicial for plaintiff's attorney, in the course of his argument, to quote the language of the Supreme Court in a similar suit for damages growing out of injuries sustained by falling on a defective sidewalk as follows: "A drunk man is as much entitled to a good sidewalk as a sober one, and much more in need of it." He was merely illustrating his contention that every pedestrian was entitled to assume that a city would not knowingly permit its sidewalks to remain in a dangerous condition. It does not appear this statement was objected to. It was not assigned as prejudicial. It may have been an extreme illustration, but it does not appear to have been beyond the realm of legitimate argument. Nor do we see how it could have been prejudicial.

[15] Moreover, the appellant waived its objection to the challenged language by failing to assign it as prejudicial, and by omitting to ask the court to instruct the jury to disregard it. Kershaw v. Tilbury, 214 Cal. 679, 690, 8 P.2d 109; Rogers v. Foppiano, 23 Cal.App.2d 87, 95, 72 P.2d 239; People v. Ward, 40 Cal.App.2d 143, 150, 104 P.2d 537.

[16] The appellant contends the court committed reversible error in giving to the jury an instruction at the request of the plaintiff in which it was assumed there was a "dangerous and defective" condition of the sidewalk. In view of the entire charge to the jury, we are of the opinion the challenged instruction could not have misled the jury in that regard. This instruction reads in part:

"It is for you to determine from the evidence whether or not the city had notice of the dangerous and defective condition alleged in the complaint, and if it did, whether it failed to remedy the condition within a reasonable time.

"Notice of such a condition may be of two kinds, namely, actual notice or constructive notice. Actual notice is where the dangerous or defective condition, if any, is known to the City Counsel or to the persons or officers of the city whose duty it is to correct such conditions. Constructive notice is notice received by virtue of facts and circumstances sufficient to put the city officials, as reasonable persons, on notice of the actual condition of the sidewalk which is alleged to be defective and dangerous.

"If the evidence satisfies you that the city had constructive notice of the alleged defective and dangerous condition, the requirements of the law are met the same as if the proof satisfies you that the city had actual notice thereof."

It is apparent that the foregoing instruction purports to deal only with the subject of actual or constructive notice of the alleged defect so as to charge the city with knowledge thereof. Under the proper subject, the jury was elsewhere clearly instructed that it possessed the sole province of determining from the evidence whether a defective or dangerous condition of the sidewalk did exist, and that if they were not satisfied it did exist, it then became their duty to return a verdict in favor of the city. For instance, the third instruction following the previously-challenged one informs the jury that the city is not liable for any and all defective sidewalks even though injury may be sustained thereby. It then declares that "If you find from the evidence that the sidewalk at the place of the alleged injury was in a reasonably safe condition for use by pedestrians, then you will find for the defendant." Moreover, the jury was also clearly informed that the burden was on the plaintiff to prove the affirmative of every issue raised by the complaint. The chief issue at the trial was whether there existed in the sidewalk where the plaintiff was injured a defective and dangerous condition. The very challenged instruction clearly indicates that the court did not charge the jury, as a fact, that a dangerous and defective condition of the sidewalk actually existed. The second paragraph, in reciting the character of notice that would charge the city with knowledge said that "actual notice is where the dangerous or defective condition, if any," is known to the city. Twice in succeeding paragraphs of the same instruction the "dangerous and defective condition" is referred to as that "which is alleged" in the complaint.

We are of the opinion the challenged instruction is neither misleading nor erroneous. We are perfectly satisfied the jury could not have been mislead thereby. The giving of that instruction is certainly not reversible error.

The judgment is affirmed.

STEEL and TUTTLE, JJ., concurred.

50 Cal.App.2d 585

FIELD v. MOLLISON.

Civ. 6632.

District Court of Appeal, Third District, California.

March 19, 1942.

Hearing Denied May 14, 1942.

1. Gifts ⚿4

The essentials of a valid "gift inter vivos" are competency of donor to contract, voluntary intent of donor to make gift, actual or symbolical delivery amounting to transfer of title, actual or imputed acceptance, complete divestment of all control by donor, and lack of consideration in return for gift.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift Inter Vivos".

2. Gifts ⚿29

Transfer on books of corporation is not required to effect a valid gift of stock of corporation.

3. Gifts ⚿49(1)

While testimony of donee of gift should be viewed with caution and even with suspicion to prevent fraud, there is no presumption that such testimony is false.

4. Appeal and error ⚿994(3), 1012(1)

To trial court is committed determination of credibility of witnesses and weight of evidence, and such court must be assumed to have been guided by the appropriate rules of law in determining questions of fact.

5. Appeal and error ⚿931(1)

The District Court of Appeal must accept as true all evidence tending to establish the correctness of findings and must consider such evidence in the most favorable aspect toward the prevailing party, and if there be substantial evidence to support conclusion of trial court, such conclusion is final.

6. Gifts ⚿49(6)

Evidence was sufficient to show that grandmother, handing grandson an envelope containing two stock certificates and separate assignments of each to grandson, made a valid "gift" of stock to grandson.

See Words and Phrases, Permanent Edition, for all other definitions of "Gift".

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Marie C. Field, as administratrix of the estate of Marie C. Dorfler, deceased, against Walter D. Mollison, and others, to recover, on behalf of the estate, the possession of stock certificates and to quiet title thereto. From a judgment in favor of the named defendant, the plaintiff appeals.

Affirmed.

T. C. Van Ness, Jr., and Abraham Setzer, both of San Francisco, for appellant.

Raymond Haizlip and Orrick, Dahlquist, Neff & Herrington, all of San Francisco, for respondent.

HELD, Justice pro tem.

On April 21, 1925, certificate No. A754, for 40 shares of the capital stock of Fireman's Fund Insurance Company was issued to Marie C. Dorfler, and on April 17, 1929, certificate No. B15333, for 20 shares, was also issued to her. The ownership of these certificates, and the stock thereby represented, with accrued dividends, is here involved. Marie C. Dorfler died on January 2, 1935, and after due proceedings had, appellant was appointed administratrix of her estate, and has brought this action to recover, on behalf of the estate, the possession of the certificates, and to quiet title thereto. The defendants Gertrude Mollison and Fireman's Fund Insurance Company, by their respective answers, disclaimed any interest in the property involved herein. Defendant Walter D. Mollison filed an answer, denying title in the estate, and claimed ownership by virtue of an alleged gift to him by Marie C. Dorfler. The trial court rendered judgment in favor of the defendant Walter D. Mollison, and plaintiff administratrix appeals.

It is the claim of appellant that the findings are entirely unsupported by credible or substantial evidence. This renders it necessary to consider the evidence in detail. Marie C. Dorfler had, among other children, two daughters, Marie C. Field and Gertrude Mollison. Each of these had one child. Gertrude Schwab is the daughter of Marie C. Field, and respondent Walter D. Mollison is the son of Gertrude Mollison. Mrs. Dorfler, who, at the time of her death, was 78 years of age, made her home, sometimes with one of her daughters, and sometimes with the other, and, on occasions, also visited with her granddaughter, Mrs. Schwab, who resided in Los Angeles. The respondent was born on January 8, 1911, and lived with his parents in San Francisco. The home of Mrs. Field was in Oakland.

Respondent, Walter D. Mollison, testified that in the latter part of 1932, at his parent's home, and while his grandmother temporarily resided there, she handed him an envelope and told him to look inside and see what he would find; that he accepted the envelope, and examined its contents, and found it to contain the two stock certificates here involved, and an assignment of each, separate from the certificates; that when he expressed his gratitude and appreciation, his grandmother told him she wanted him to have the stock, and thought it best to give it to him then, but admonished him to mention the circumstances to no one; that he placed the envelope, with its contents, in a cash-box in a closet in his home, where it remained until the month of January, 1933, at which time he rented a safe deposit box at the home office of the Bank of America in San Francisco, and placed the documents therein, in a sealed envelope; that they remained there until he removed them on the day following the death of Mrs. Dorfler; that at the time of the gift, his grandmother was mentally sound; that he told neither of his parents, nor anyone else, of the gift, nor was the matter ever subsequently discussed between his grandmother and himself. No transfer of ownership of the stock was made on the corporate books, and all dividends were mailed to, and received by Mrs. Dorfler, until shortly prior to her death.

On the trial, the stock certificates and separate assignments were produced from the possession of respondent, and offered and admitted in evidence. Each certificate was the original issued to Marie C. Dorfler and bore on the reverse side a blank form of assignment, which purported to be signed by Marie C. Dorfler in the presence of Gertrude Schwab, and the signature guaranteed by an official of the Bank of America National Trust & Savings Association. The assignments separate from the certificates, each purported to be signed, witnessed and guaranteed in the same manner as the endorsements on the certificate. Instead, however, of being in blank, there appeared in each separate assignment, the name of Walter D. Mollison as assignee, and the number of the certificate assigned. These assignments were dated as of September 17, 1931.

Respondent produced as witnesses his mother, Gertrude Mollison, and his father, Walter P. Mollison. The former testified to a conversation with her mother during the month of January, 1934. At that time, Mrs. Dorfler's mailing address was the home of Mrs. Field, in Oakland, and she expressed concern that her dividend checks, which were mailed to her at that address, might go astray during Mrs. Field's absence from her home. The witness sought to reassure her mother, whereupon the latter said, "Well, I have not got the stock, anyway; it does not belong to me." The witness asked, "What did you do with it, did you sell it?" Her mother laughed and replied, "No; some day you will know. You will find out."

Respondent's father, Walter P. Mollison, related an incident which occurred in June, 1934, while the witness was driving Mrs. Dorfler from San Francisco to the home of her daughter, Mrs. Field, in Oakland. During the trip, Mrs. Dorfler burst into tears, and when asked the cause, said she dreaded going across the bay, presumably to the Field home, because, "All I hear over there is 'stocks, stocks, stocks', and I get sick of it; what a surprise they will get when they find out."

The foregoing, we think, is a fair résumé of the case made out by respondent. In rebuttal, Mrs. Schwab testified that while en route to the undertaking establishment to arrange for the funeral of Mrs. Dorfler, respondent stated to the witness and others then present in an automobile, that his grandmother had given him an envelope for safekeeping, with the request that he open it when she passed away, and that he would be surprised, and that he did so open it, and that he was surprised. In this, the witness was corroborated by her mother, Mrs. Field. Respondent's version of this incident was that on the journey referred to, Mrs. Field stated to others, in his presence, that Mrs. Dorfler had given respondent the stock, and that it was nice that he had it. He denied making any statement indicating his ignorance of the contents of the envelope.

Mrs. Field also testified that on the evening following the death of Mrs. Dorfler, she and Mrs. Mollison made a search for the stock certificates among the effects of Mrs. Dorfler, in the Field home in Oakland, but without success; that Mrs. Mollison then left for her home in San Francisco; that before she left, she arranged for a meeting with her sister at the office of the American Trust Company, in San Francisco, on the following day, for the purpose of withdrawing, and dividing between them.

a bank deposit of approximately $12,000, which stood in the name of Mrs. Dorfler and Mrs. Mollison as joint tenants; that it was understood between them that when Mrs. Mollison reached her home she should make search among Mrs. Dorfler's effects there, for the stock certificates, and report the result of her search to her sister by telephone. It is conceded that a conversation by telephone was had between Mrs. Mollison and her sister, shortly after the former arrived at her home, but the parties differ as to the purport thereof. Mrs. Field testified that her sister said, "The stock is found." Mrs. Mollison denied this. She testified that on her return to her home she referred, in the presence of respondent, to the search for the stock certificates which had been made among the effects of Mrs. Dorfler in the Field home; that respondent then, for the first time, told her that his grandmother had given him the envelope. However, he still did not reveal to her the nature of its contents, but requested that she tell her sister that he had an envelope which he desired to exhibit to his mother and aunt at the meeting which they had arranged for the following day. Thereupon, Mrs. Mollison telephoned to her sister. She denied, however, that she said anything about the certificates having been found, and claims that she did not herself then know that the certificates were in the envelope referred to by her son.

There is also some difference between the witnesses as to the conversation had on the following day, when the parties met at the office of the American Trust Company. It is the testimony of Mrs. Field that on that occasion respondent produced an envelope which he showed to her, and that he then said, "Well, grandma left me the stock. She gave me the envelope to take care of, and she said whenever she passed away, and I opened it, I would be surprised, and I was surprised." Respondent, on the other hand, testified that when he met his mother and aunt at the Trust Company's office, he produced the envelope which he had that morning withdrawn from his safe deposit box, and handed it to Mrs. Field, unopened; that he said to her and his mother, "That this was an envelope that I wanted them to see, or I wanted them to see it together"; that Mrs. Field "then opened the envelope and looked at its contents, and congratulated me on having the stock; said it was nice that I had it, that 'Gram' had always thought a lot of me, and so it was nice that I had it."

In addition to the foregoing statements attributed to respondent by Mrs. Field and Mrs. Schwab, these two, and the latter's husband, testified to several occasions on which Mrs. Dorfler had expressed to them a desire, and an intention, to divide the shares of stock equally between Mrs. Field and Mrs. Mollison. Mrs. Schwab also detailed the circumstances under which the stock certificates and separate assignments were executed. Her testimony was that in the month of March, 1931, at her mother's home in Oakland, Mrs. Dorfler spoke concerning the disposition she desired to make of the stock in the event of her death, and that upon that occasion she stated that "she wanted to fix it so that in case anything happened to her, she wanted it equally divided between my mother, Mrs. Field, and Mrs. Mollison." The witness advised her that to accomplish this, it would be necessary that she sign the assignments on the reverse of each certificate, and also the assignments separate from the certificates, and to have the signatures guaranteed by an officer of a banking institution. Mrs. Dorfler thereupon signed her name, in the presence of the witness, to each of the four assignments, and requested Mrs. Schwab to arrange for the necessary guarantee of the signatures. Thereafter, Mrs. Schwab presented the certificates and assignments to an official of the Bank of America in Oakland, and was told by him that it would be necessary that she add her signature as a witness to that of Mrs. Dorfler; that she thereupon signed her name as a witness on each instrument, and the guarantees were thereupon placed on each instrument by the bank official. Mrs. Schwab testified, also, that at the time of the execution of the assignments, and the return of the documents to Mrs. Dorfler, all the assignments were in blank, and that neither the date, nor the name of respondent, appeared on any.

Appellant stresses greatly the fact that on the trial in the court below, respondent fixed the time of the gift as in the latter part of 1932, while in the answer, verified by him, it is alleged to have been made on September 17, 1931, and in a deposition of respondent, taken before trial, he fixed the time as the middle of 1932. These discrepancies as to date, and the inability of respondent to recall certain of the details surrounding the gift, such as the color of the envelope in which the documents were contained at the time he received them from his grandmother, the room in which, and the hour of the day when the transaction took place, appellant contends, discredits the testimony of respondent to such an extent that it should have been wholly disregarded and rejected by the trial court.

[1, 2] The essentials of a valid gift inter vivos are set forth in 13 Cal.Jur., at page 32, as follows: (1) Competency of the donor to contract; (2) a voluntary intent on the part of the donor to make the gift; (3) delivery, either actual or symbolical, amounting to transfer of title; (4) acceptance, actual or imputed; (5) complete divestment of all control by the donor; and (6) a lack of consideration in return for the gift. Lefrooth v. Prentice, 202 Cal. 215, 259 P. 947; Lynch v. Lynch, 124 Cal. App. 454, 12 P.2d 741. Respondent has established all these, and we cannot say that his testimony is of such a character that it should have been rejected by the trial court. Transfer on the books of the corporation is not required to effect a valid gift. Delannoy v. Quetu, 73 Cal.App. 627, 239 P. 71.

[3-5] While the testimony of the donee of a gift should be viewed with caution, and even with suspicion, to prevent fraud, there is no presumption that such testimony is false. To the trial court is committed the determination of the credibility of the witnesses and the weight of the evidence, and that tribunal must be assumed to have been guided by the appropriate rules of law in determining questions of fact. Eckstrom v. Brooks, 115 Cal.App. 727, 2 P.2d 207; Burrows v. Burrows, 18 Cal.App.2d 275, 63 P.2d 1135. This court must accept as true all evidence tending to establish the correctness of the findings, and must consider such evidence in the most favorable aspect toward the prevailing party. 2 Cal.Jur. 880. And, if there be substantial evidence to support the conclusion of the trial court, that conclusion is final. 13 Cal.Jur. 47; Steinberger v. Young, 175 Cal. 81, 165 P. 432; In re Estate of Filippi, 9 Cal.App. 2d 407, 49 P.2d 892; Brown v. Canadian, etc., Co., 209 Cal. 596, 289 P. 613; Clark v. Abrams, 49 Cal.App.2d 497, 121 P.2d 750; Kennington v. Neff, 49 Cal.App.2d 692, 122 P.2d 58. In Bright v. Zabler, 43 Cal.App. 2d 706, 111 P.2d 387, 389, the court said: "If there is competent evidence to support the findings of fact in question, disregarding all conflicts and considering the evidence most favorable to plaintiff, then they must be sustained."

[6] Here, there is competent evidence to support the finding that Marie C. Dorfler made a valid gift of the stock in question to the respondent, and that finding we are not at liberty to disturb. It follows, therefore, that the judgment appealed from must be affirmed, and it is so ordered.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

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50 Cal.App.2d 520

KELLEY et al. v. RUSSELL.

Civ. 3012.

District Court of Appeal, Fourth District, California.

March 17, 1942.

Hearing Denied May 14, 1942.

1. Mines and minerals 🔑53

Where lessor made certain objections to notice of exercise of election by lessee to purchase land on which oil had been discovered, he "waived" all other objections.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

2. Mines and minerals 🔑53

Where there were two leases and options giving lessees right to purchase lands on which oil was discovered, and the interested parties were the same, they could join in one notice of election to exercise option, particularly where lessor was in no way prejudiced thereby.

3. Mines and minerals 🔑53

Where lessees having the option to purchase land on which oil had been discovered notified lessor of their election, the fact that the deeds which accompanied the original notice were deficient in form was immaterial, since it was the duty of the lessor to furnish deeds, and to name and describe any tract or parcel he was entitled to have excluded.

4. Specific performance 🔑121(11)

In action by lessees having the option to purchase land on which oil had been discovered, proof that notice of election to exercise option was given lessor, and that an offer was made to comply with all the terms of the leases and options, and that lessees offered to pay the full amount due and deposited it with abstract company, and later paid the money into court for whoever was entitled thereto, and offered to except any land to which lessor was entitled, sufficiently showed an offer and tender and sufficient attempt to exercise options, and was a sufficient performance of conditions thereof. Civ. Code, §§ 1496, 1511; Code Civ.Proc. § 2076.

5. Mines and minerals 🔑53

The mere fact that lessor had the right under the options to claim and exclude from the 40-acre tracts which lessees were obliged to offer to purchase, any 10-acre parcels upon which a water supply had existed at the time lease containing option was made, did not make option contract so uncertain as to be unenforceable, since if lessor desired to exercise the right given him to exclude any 10-acre tract, the exclusion depended upon facts which were readily determinable, and the entire matter was one well within the powers of a court of equity.

6. Mines and minerals 🔑53

Where leases gave lessees options to purchase any 40-acre tract of land according to legal subdivision thereof on which oil should be discovered, and provided that lessor should not be required to sell any 10-acre parcel on which water supply was located, it must be assumed that use of different language in describing the 40-acre tracts and the 10-acre parcels was intentional, and such different descriptions should be considered and interpreted in connection with the other provisions of the leases and options.

7. Specific performance 🔑126(2)

Where leases gave lessees options to purchase any 40-acre tract of land according to "legal subdivision" thereof on which oil should be discovered, and provided that lessor should not be required to sell any 10-acre parcel on which water supply was located, but failed to specifically provide for the shape or form of the 10-acre parcels, trial court properly required the lessor in suit for specific performance to select any such 10-acre parcels in such manner as to best protect his water rights while at the same time interfering as little as possible with the lessees' oil rights there being no such thing as a "legal subdivision" of less than 40 acres.

See Words and Phrases, Permanent Edition, for all other definitions of "Legal Subdivision".

8. Specific performance 🔑121(3)

Where leases gave lessees options to purchase any 40-acre tract of land according to legal subdivision thereof on which oil should be discovered and provided that lessor should not be required to sell any 10-acre parcel on which water supply was located at time of making lease, in suit for specific performance, evidence sustained finding that creek flowing on certain 10-acre parcels at time of trial did not so flow at time leases were executed.

9. Specific performance 🔑130

In suit for specific performance of contracts to convey land under which oil should be discovered, where contracts providing that lessor should not be required to sell any 10-acre parcel on which water supply was located at time of lease, and it appeared that on one 10-acre parcel a well then existed, but had since been abandoned, and lessor did not wish to select the 10-acre parcel in accordance with the exact rights given him by the contracts and had offered to do equity, court was justified in giving the lessor an easement to use all the waters of a certain creek instead of allowing lessor to retain the legal title to particular 10-acre parcel.

10. Evidence 🔑318(1)
Trial 🔑56

A letter written by brother of party was properly excluded as "hearsay" where brother had no interest in the land in controversy, and no error appeared in excluding the letter, where it was also cumulative.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by Lillian Kelley and others against Hubbard S. Russell for specific performance of contracts to convey land. From a judgment for plaintiffs, the defendant appeals.

Judgment affirmed.

Cobb, Campbell & Kelley and Edward Flam, all of Los Angeles, for appellant.

Alfred Siemon and Bennett Siemon, both of Bakersfield, Sullivan, Roche & Johnson and J. H. Farraher, all of San Francisco, and U. T. Clotfelter, L. W. Butterfield, and Louis L. Swarthe, all of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment for the plaintiffs in an action for specific performance.

The respondent Lillian Kelley was formerly the owner in fee of all of the land here involved. On July 30, 1919, she conveyed about 900 acres of land in Kern County to one Anderson and, as a part of the same transaction, took back a lease on the same property giving her the right to explore for, develop and produce oil and other minerals therefrom during the term expiring July 30, 1939, without royalty or other payment to the lessor. The lease also provided that Miss Kelley should have the right, during said term, to purchase at $20 per acre the fee title "to any forty (40) acre tract of said land (according to the legal subdivision thereof) upon which" oil or other minerals had been discovered in paying quantities, together with not more than three additional forty-acre legal subdivisions cornering or adjoining the one on which discovery was made, with the further provision that the minimum number of acres which might be purchased when oil was discovered was forty acres unless the legal subdivision upon which oil was discovered was a fractional forty acres. It was also provided that in the event any land was purchased under this provision the lessor should have the right to repurchase the same at $20 an acre at any time thereafter when the wells or mines were abandoned. The lease further provided that the lessor should have the right to any water developed by the lessee on the land and not required in her operations. The lease also contained this provision: "It is expressly understood, any provisions of this lease, notwithstanding, that in no event shall the lessee have the right to purchase, or shall lessor be required to sell any ten-acre parcel of said premises upon which is located any water well, spring or other water supply now used for watering cattle, irrigation or domestic purpose."

In 1923, the respondent Kelley also conveyed about 200 acres of adjoining land to the appellant Russell and one Babbitt and took back a lease thereon, the terms of which were practically identical with the terms of the lease above described, and this lease and option was also to expire on July 30, 1939. The appellant Russell acquired title to and became the owner of both of the tracts above mentioned, subject to these leases, and about the same time he purchased other land in the vicinity, acquiring in all about 9,000 acres. He was in the cattle business and purchased the land for grazing purposes.

The respondent Chanslor-Canfield Midway Oil Company acquired by assignment from Miss Kelley her interest in a portion of the lands thus leased to her, and respondent Kelley still retains her interest in the remainder of the lands under the leases subject to certain subleases and agreements to other parties who claim under her, including the respondent Golden Bear Oil Company. Oil was discovered on the property and sixteen producing oil wells were drilled thereon by these two oil companies at a cost of some $500,000, and these wells are still producing oil in paying quantities.

In May, 1939, and prior to the expiration of the leases and options, the respondents Kelley and Chanslor-Canfield Midway Oil Company attempted to exercise their options to purchase six forty-acre tracts according to the legal subdivision thereof, being the tracts on which oil had been developed with certain forty-acre tracts adjacent thereto. At their request, an abstract company wrote to the appellant Russell advising him that these parties were exercising their optional rights and that the agreed purchase price would be paid to him upon his advising them that he would execute the necessary deeds. Russell replied to the effect that he had had no dealing with the abstract company and that he had thus far received nothing from the real parties in interest indicating their desires or intentions.

On June 20, 1939, respondents Kelley and Chanslor-Canfield Midway Oil Company wrote to Russell notifying him that they had elected to and did thereby exercise the options to purchase these six described forty-acre tracts, as provided for in the leases and by virtue of the discovery of oil in paying quantities upon certain described forty-acre tracts, and also informing him that they had been advised by the defendant Pacific Indemnity Company that it was entitled to receive the money to be paid for the land, and that they had deposited the purchase price of the land, amounting to $5,213.80, with the Bakersfield Abstract Company to be paid to the party entitled thereto and offering to pay this amount to Russell or to the Pacific Indemnity Company, as might be directed by them, upon the conveyance of the fee title. With this letter were sent forms of conveyances, with the request that these be executed and returned to the abstract company with instructions regarding the delivery of the same and the payment of the purchase price therefor. A copy of this letter was sent to the Pacific Indemnity Company. It is admitted that Russell had previously assigned his interest in these leases to the Pacific Indemnity Company for security purposes.

On June 22, 1939, Russell replied to this notice of election and offer to pay the purchase price, stating that he had no proof that oil had been discovered on the land; that since at the time of the execution of the lease the waters of Poso Creek as well as certain water wells were located upon a portion of the premises "it will be necessary to have a rather careful and authentic survey made to determine which ten-acre portions are excepted under said paragraph from the option provisions involved"; that there was a discrepancy in their notice with respect to the date of one of the leases; that the amount of the purchase price as stated by them was slightly too high; and that "I merely wish to point these discrepancies out to you in order that we may not at a later time be under any confusion in reference to the matter." The respondents replied to this letter on June 23, 1939, correcting the discrepancy in the date of the lease; explained the amount of money deposited in escrow by saying that some of the forty-acre tracts, according to the Government legal subdivisions, contained slightly more than forty acres; stating that the existence of the oil wells was well known and could be easily proved; and saying that if any water wells, springs or other water supply were actually located on the property they were electing to purchase at the time the leases were executed these could be excepted from the conveyance if Russell would advise them what land should be so excepted. On June 30, 1939, Russell replied to this letter saying he was turning the matter over to his attorney and stating "I wish to settle the matter with the least possible difficulty."

On June 28, 1939, Russell was again advised by an attorney for the respondents that the money for the purchase of these lands was in the hands of the Bakersfield Abstract Company but no offer to convey or expression of willingness to convey the property in question or any part thereof or upon any terms whatever were communicated to the respondents by the appellant. Being unable to get such a conveyance the respondents filed this action on July 26, 1939, and before the leases and options had expired. The complaint alleged, among other things, that written notice of a desire to exercise these options had been given on June 20, 1939, with a request for a conveyance of that part of the property; that the defendants had failed and refused to convey said lands or any part thereof, although no objection had been made to the manner of the exercise of the option or to the mode or amount of the offer and tender; that the purchase money was ready and available at the time of the offer and tender and is still ready and available; and that respondents offered to pay and deposit the amount due in court to be paid to the appellant or the other defendant upon a conveyance of the property. The amount of the purchase price was later and during the trial actually paid into court.

During the trial the respondents offered to accept deeds to the property in question, excepting therefrom any ten-acre parcels upon which there had been wells, springs or other sources of water supply, provided these were so chosen as not to include any property upon which there was a producing oil well, and it is conceded that a similar offer was made by the respondents before the action was filed. The court found in all respects in favor of the respondents and entered the judgment from which this appeal was taken. In this connection it may be observed that while the court found that there was a water well upon the property in question at the time the leases were executed and that this water well was later abandoned, the judgment gave the appellant a license and easement to use any water on the premises at the time of the trial instead of excepting any ten-acre parcel from the conveyances ordered to be made to the respondents. This portion of the judgment was based, in part, upon findings to the effect that the appellant had refused, and still refuses, to pick out a ten-acre parcel upon which there was or had been a water supply without including therein any property upon which there was a producing oil well. It should be further observed that in his answer and ever since, the appellant claims that five ten-acre tracts along the southern boundary of the property here in question are excepted under the terms of these options because they had water wells or other sources of water supply located thereon at the time the leases were executed. It so happens that nine of the sixteen oil wells are located on these five ten-acre tracts.

While the leases themselves indicate rather clearly an intention to give the lessees all of the oil and mineral rights and to preserve the water rights for the use of the lessor, the appellant now appears to be interested only in obtaining the oil rights. His two main contentions are that he is entitled, in selecting the land that is to be excepted from any conveyance under the terms of the lease, to take any square ten-acre parcel which constitutes one-fourth of a legal subdivision of forty acres and upon any part of which a water supply existed, and that he is entitled to retain all of the property on which oil wells are located since the options were not properly exercised.

It is first contended that the options were not properly exercised for the reasons that only one notice of election to exercise the options was served although there were two leases and options; that Miss Kelley had assigned a portion of her option rights to other parties who did not join in the notice of election; that the notice of election, as given, covered certain forty-acre tracts but did not exclude the five ten-acre parcels which the appellant claims he was not bound to convey and therefore was not in accordance with the terms of the options; that the deeds which the respondents sent with the notice of election did not contain certain reservations provided for in the leases and options; and that no sufficient tender was made.

[1-4] It may be first observed that with the exception of the point that the notice of the exercise of these options applies to more land than the lessees were entitled to purchase since it did not exclude any ten-acre parcel on which there had been a water supply, the objections to the exercise of the option now raised were all waived by the appellant since they were not included in such objections as were raised in replying to the notices first given by the abstract company and later given by the respondents on June 20, 1939. While there were two leases and options the interested parties were the same and no reason appears why the two parties entitled to exercise the options could not join in one notice. The appellant was in no way prejudiced and no reason appears why he could not have complied insofar as he was bound, without affecting his right to claim an exception as to a part of the property. The mere fact that the two optionees joined in one notice is immaterial. There was good reason for the respondents to attempt to complete the transfer through an escrow with an abstract company since the Pacific Indemnity Company was claiming the money which was to be paid to the appellant. Several of the objections to the form of the offer and to the tender are eliminated by the fact that the appellant did not recognize the escrow with the abstract company and a new notice of election was directly given by the respondents. The fact that the deeds which accompanied the original notice were deficient in form is immaterial since they were not used. They were offered as a mere matter of courtesy and the duty of furnishing deeds rested upon the appellant. When the appellant, in reply to the notice of the desire to exercise the option, called attention to the provision of the leases for the exclusion of any ten-acre parcel containing a water supply and stated that it had not been determined what land should be excepted on that account, the respondents offered to exclude any such ten-acre parcel from the conveyance to be made. The duty rested upon the appellant to name and describe any such ten-acre parcels and the original notice of election was not rendered invalid by the failure to exclude any such parcels. The leases expressly provided in this connection that the lessees, in exercising the options, must offer to purchase full forty-acre tracts or fractional forties, according to the government description. The only way they could comply with the terms of the options was to do this and if the appellant was then entitled to exclude any portion thereof from the conveyance under other clauses of the lease, it was incumbent upon him to do so. There was ample evidence that while Miss Kelley had subleased portions of the property, she had assigned no part except that held by the Chanslor-Canfield Midway Oil Company, and with that exception she had retained the full right to

exercise the options in her own name and her sublessees, while they may have been proper parties, were not necessary parties either to the notice of election or to this action. Not only was there an offer to pay the full amount due, which amount was deposited with the abstract company, since another party claimed to be entitled thereto, but the appellant refused to name and describe any ten-acre parcel which he desired to except from the conveyance as containing a water supply, and this made it impossible for the respondents to make a personal tender of the exact amount due. This situation was brought about by the act of the appellant and the respondents filed this action before the option time had elapsed and in their complaint offered to comply with all of the terms of the leases and options, offered to pay the money into court for whoever was entitled thereto, and during the trial the money was actually paid into court. During the trial the respondents offered to permit the appellant to select any ten-acre tract upon which there had been a water supply at the time the leases were executed provided that any such tract was so selected as not to include one of the oil wells. The appellant conceded that this same offer had been made to him before the action was begun. We think a sufficient offer and tender appears. Civ.Code, §§ 1496 and 1511; Code Civ.Proc., § 2076. It further appears that there was a sufficient attempt to exercise the options with a sufficient performance of the conditions thereof. Kofoed v. Gordon, 122 Cal. 314, 54 P. 1115; Cates v. McNeil, 169 Cal. 697, 147 P. 944; Marshall v. Hilton, 209 Cal. 531, 289 P. 165. A number of the objections now raised were waived, and any possible defects in connection with the form of the election and of the tender were cured by the timely commencement of this action and the offer to pay the money into court, which was actually done.

[5] Appellant's next point is that these option contracts cannot be specifically enforced because they were uncertain and lacked mutuality. This is based on one of the findings of the court to the effect that there is no ten-acre parcel containing a water well, spring or other water supply which is defined or can be identified by the terms of the leases, and that the appellant has failed and refused to properly designate or specify any such ten-acre parcel which he claims the right to except from the conveyance. From this it is argued that the option provisions are so uncertain that they cannot be specifically enforced. Any uncertainty which exists arises neither from the terms of the options nor from the court's finding but from the refusal of the appellant to designate any such parcels upon which a water supply existed without including land upon which the oil wells were located. The mere fact that the appellant had the right under the options to claim and exclude from the forty-acre tracts, which the respondents were obliged to offer to purchase, any ten-acre parcels upon which a water supply had existed at the time in question, does not make these option contracts so uncertain as to be unenforceable. Lange v. Waters, 156 Cal. 142, 103 P. 889, 19 Ann.Cas. 1207; Stamm v. Colvin, 94 Cal.App. 180, 270 P. 744; Janssen v. Davis, 219 Cal. 783, 29 P. 2d 196. If the appellant desired to exercise the right given him to exclude any ten-acre tracts from the conveyances he was required to make, this exclusion depended upon facts which were readily determinable and the entire matter was one which was well within the powers of a court of equity. Relovich v. Stuart, 211 Cal. 422, 295 P. 819; Fleishman v. Woods, 135 Cal. 256, 67 P. 276.

[6, 7] The real controversy in this connection is as to whether the appellant had a right under the terms of the options to select any ten-acre tracts upon which a water supply had existed by taking a square ten-acre parcel constituting the one-fourth part of any forty-acre tract, instead of selecting such a ten-acre parcel by taking ten acres around the water supply, whatever the form might be, but in such a manner as not to interfere, when possible, with the respondents' oil wells. The appellant concedes that there is nothing in the exception provisions of the options to indicate the shape or form of the ten-acre parcels he might be entitled to retain, but claims that since the rights to purchase were limited to forty-acre parcels according to the "legal subdivision," it follows that the parties intended that the ten-acre parcels should also be according to the "legal subdivision." The leases do not so provide but use different language with reference to the ten-acre parcels than that used with reference to the forty-acre tracts. It not only should be assumed that this was intentionally done, but this provision of the options should be considered

and interpreted in connection with the other provisions of the leases and options. The instruments as a whole clearly disclose an intention to give the oil rights to the lessees if oil is found and so long as it is produced and to preserve the lessor's rights to all unused water since he was interested only in the use of the land for the purpose of grazing cattle thereon. The appellant was even given the right to repurchase oil land which had been purchased under the options, after its use for oil purposes had been abandoned. The leases having failed to specifically provide for the shape or form of the ten-acre parcels, it certainly was reasonable for the trial court, as it did, to interpret this provision in the light of the entire instrument and the obvious intention of the parties, as requiring the appellant to select any such ten-acre parcels in such a manner as to best protect his water rights while at the same time interfering as little as possible with the respondents' oil rights. That this was the intention of the parties not only may be reasonably inferred from the leases themselves, but appears from appellant's letter to the respondents in reply to their notice of election in which he states that a survey will have to be made in order to determine which ten-acre tracts are to be excluded. This indicates that even at that time he did not understand that the parcels in question were to be exact quarters according to "legal subdivision" of forty-acre tracts as thus legally described, since no survey would then have been necessary and the deeds could have been drawn by describing quarters of forty-acre tracts. Incidentally, there is no such thing as a legal subdivision of less than forty acres. Fredericks v. Zumwalt, 134 Cal. 44, 66 P. 38. In our opinion, the court's interpretation of this clause of the option is a reasonable one and must be upheld.

[8] The appellant has contended at the trial and here that the options were not properly exercised since the notice of election demanded the conveyance of more land than that to which the respondents were entitled and in this connection has contended that five square ten-acre tracts along the southern boundary of the property here in question were parcels each of which had upon it a well, spring or other water supply at the time the leases were executed. Our attention is called to no evidence whatever of any such water supply on either the westernmost or easternmost of these ten-acre parcels. It is contended, however, that Poso Creek, at the time the leases were executed, flowed over the south half of the middle one of these ten-acre parcels and in entering and leaving that parcel also flowed over the corner of the two adjoining ten-acre parcels. The court found, however, that while Poso Creek now flows in this manner over a portion of these three ten-acre parcels, that it did not so flow at the time these leases were executed. There is evidence that the course or channel of this creek has moved north through the years, caused by the washing down of rocks and debris from the surrounding hills by heavy storms, thus blocking the old channel and causing the waters of the creek to pass more to the north. While there is some conflict in the evidence, there is evidence justifying the inference that this creek did not flow over any of the lands here in question at the time these leases were executed; that the creek was then a considerable distance south of the southerly boundary of these lands; and that the waters of the creek did not flow over any of this land prior to about 1931. The evidence sufficiently supports the court's finding in this regard. The court also found that the waters of this creek were not intended by the parties as such a source of water supply as was intended to come within the provision for the exclusion of any ten-acre parcel "upon which is located any water well, spring or other water supply now used." It seems rather incredible that it should have been intended to include any such source of water supply as would come from an open creek running across thirty acres of land when the parties used the language referred to. Had such a source of water supply then existed, it seems probable that different language would have been used in describing it. It is unnecessary, however, to give the matter further consideration in view of the finding that this creek did not flow over this land at that time.

[9] Technically, but not equitably, the most serious question presented is whether the provision of the judgment giving the appellant an easement to use all of the waters of Poso Creek instead of allowing him to retain the legal title to a particular ten-acre parcel can be sustained. The court found in accordance with the evidence that upon one of the ten-acre parcels as now outlined by the appellant there was, at the time the leases were executed, a well

which had been used for watering cattle, and that this well had been abandoned many years before the trial. While that is true, the exception provision of the options relates to land upon which a water supply existed at that time. It happens that the ten-acre parcel, as outlined by the appellant, upon which this water well then existed was one of the three ten-acre parcels, as thus outlined, over which Poso Creek now flows and in which the appellant was given an easement for the use of all of the water. While this easement gives the appellant more than he is entitled to, insofar as the use of the water is concerned, this portion of the judgment does not strictly follow the provisions of the options. On the other hand the appellant, although he had the right to have excepted from any conveyance and to reserve the fee title to a ten-acre parcel upon which there had been a water well, he was not entitled under the court's interpretation of the contract to make an arbitrary selection of a square ten acres constituting a one-fourth part of the forty-acre tract according to legal subdivision thereof. It appears that it was perfectly possible to select a ten-acre parcel upon which this old water well existed without interfering with any of respondents' oil wells. As a matter of fact, it appears that it would be possible to select a ten-acre parcel including both this old water well and all of Poso Creek which now flows over the lands in question, without interfering with any of these oil wells. This the appellant did not desire to do and refused to do. Moreover, no point is here raised attacking the judgment for this particular reason and to the end of obtaining his exact rights in this respect. The whole question is raised and presented as a part of the contention that no valid exercise of the option was made, that respondents are without any rights at all, and that the appellant is entitled to refuse to make any conveyance to the respondents and to retain not only the oil wells located upon the five ten-acre parcels which he has selected but all of the oil wells upon all of the lands in question. It clearly appears that the appellant did not and does not desire to select a ten-acre parcel in accordance with the exact rights given him by the leases and options, and under the circumstances, the appellant having himself offered to do equity, the court was justified in treating the matter as it did and no good reason is here presented for reversing the judgment in order to secure a more strict compliance with something which the appellant does not want. What he asks for is a judgment to the effect that the options were never exercised.

[10] The only other point requiring consideration is that the court erred in refusing to admit into evidence two exhibits consisting of letters. The first of these was from a brother of Miss Kelley, who had no interest in the land and who had since died, and the statements in the letter were not only hearsay but were merely cumulative to the other evidence in the same connection. The second exhibit was entirely immaterial and no error in either connection appears.

For the reasons given the judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.

50 Cal.App.2d 533

PEOPLE v. VIVIAN.

Cr. 2191.

District Court of Appeal, First District, Division 2, California.

March 18, 1942.

1. Witnesses ⇨344(2)

In prosecution for statutory rape, evidence that complaining witness had had sexual intercourse with other men was not admissible to show want of credibility in complaining witness' testimony. Pen.Code, § 261.

2. Rape ⇨40(5)

In prosecution for statutory rape on complaining witness, a girl about 15 years of age, there was no issue of consent, and evidence that complaining witness had had sexual intercourse with other men was not admissible on issue of consent. Pen.Code, § 261.

3. Witnesses ⇨350, 359

In prosecution for statutory rape, where defendant admitted convictions of three prior felonies, facts that one felony was a violation of the Dyer Act and that the other

two were forgeries could properly be shown by cross-examination of defendant or by the record of the judgments. Pen.Code, §§ 261, 264, 1323; Dyer Act, 18 U.S.C.A. § 408.

4. Criminal law ⚷713

In prosecution for statutory rape, the district attorney in his argument in submitting the case acted within his rights in asking the jury so to frame its verdict that defendant would be sent to state prison and not to county jail, in view of statute authorizing jury by its verdict to make recommendations to the court concerning whether punishment should be by imprisonment in county jail or state prison. Pen.Code, §§ 261, 264.

5. Criminal law ⚷1178

In a criminal case, points not stated, argued and supported by authorities need not be considered by a reviewing court.

6. Criminal law ⚷1130(2)

On appeal in a criminal case, counsel should point out clearly and concisely the rulings complained of as erroneous and reasons why they are erroneous with reference to authorities, if any.

◆

Appeal from Superior Court, City and County of San Francisco; Robert L. McWilliams, Judge.

Homer Vivian, Jr., was convicted of statutory rape, and he appeals from the judgment and from an order denying his motion for a new trial.

Judgment and order affirmed.

Raine Ewell, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

STURTEVANT, Justice.

Homer Vivian, Jr., was charged by information, tried, and convicted of violating section 261 of the Penal Code, statutory rape, upon the complaining witness, Dorothy May Kirby, a girl about fifteen years of age and who was not the wife of the defendant. He made a motion for a new trial. His motion was denied and he appealed from the judgment and order.

The information alleged the offense took place on the 12th day of August, 1940. It also charged the defendant with three prior convictions of felonies: the first, on October 25, 1935, in the United States District Court in the State of Texas for violation of the Dyer Act, 18 U.S.C.A. § 408; the second, on June 10, 1939, in the Superior Court of the State of Florida, of the crime of forgery; and third, in the Superior Court of this State of the crime of forgery. The last-mentioned offense is discussed in the case entitled People v. Vivian, 46 Cal. App.2d 163, 115 P.2d 559. The instant case is closely connected in point of time with the cited case. The defendant admitted all of the priors, entered a plea of not guilty to the charge of rape and was tried thereon.

Dorothy May Kirby, the prosecutrix, hitch-hiked from her home in Missouri to Los Angeles in the month of June or July of 1940, where she stopped with her mother for two or three weeks. While there she was employed at the Casino on Main Street under the name of Dorothy Humphries as a taxi dancer; she gave her age there as twenty-two years. She then came to Oakland, where she was employed as a waitress and part of the time as a taxi dancer at the Broadway Academy under the name of Jean Garrison. Here she stated her age to be twenty-two. She then secured employment at the Marino Club on Ellis Street, San Francisco, as a B-girl, under said name of Jean Garrison. She was paid a salary and received a commission on the drinks men purchased. She had been there a week when she met appellant; it was the night of the 12th of August, 1940. He asked her to dance with him, which she did. He invited her to become his partner at a Walkathon. From the Marino Club that night they went to a cafe, where they had something to eat, after which they went to the Walkathon and, at about 2 a. m., they drove to his apartment at 706 Polk Street. They were accompanied by his friend, Charlie Sinclair, whom she knew as Charlie. The apartment contained two rooms, a living room and kitchenette. There was a folding bed and a lounge. The prosecutrix and appellant retired and slept together on the folding bed that night and the succeeding night. On each of said nights he had sexual intercourse with her. The first night she was menstruating. He purchased some Kotex for her.

She earned from two to four dollars a night at the Marino Club, which, she testified, appellant took from her. Appellant purchased a pair of stockings, two pairs of step-ins, a slip and a suit of pajamas at Magnin's, where, on August 14, 1940, he was arrested by the police for forgery.

Some time after 11 o'clock on the night of August 14th, he was taken to his apartment by the police to search for checks. On the arrival of the police they found the prosecutrix asleep on the lounge; she was alone. Under the name of Jean Garrison she was booked for vagrancy by the police and after a week in the City Prison she was turned over to the juvenile authorities, who finally placed her in the custody of her mother. To the juvenile authorities she gave her true name as Dorothy May Kirby and her true age as fifteen.

[1, 2] During the trial the defendant attempted to prove that the complaining witness had had sexual intercourse with other men but the objections of the prosecution were sustained. He now contends that such evidence was admissible as showing a want of credibility in the testimony of the complaining witness. But it was not admissible for that purpose. People v. Murphy, 53 Cal.App. 474, 200 P. 484. Again he claims it was pertinent on the issue of consent. However, as she was only fifteen years of age, there was no such issue. 22 Cal.Jur. 375 "Rape," sec. 22.

[3] The defendant took the stand as a witness in his own behalf. He admitted convictions of three prior felonies. On cross-examination the district attorney asked questions tending to show that one felony was a violation of the Dyer Act, 18 U.S.C.A. § 408, and the other two were forgeries. The defendant objected, claiming he could not be cross-examined on such matters. Penal Code, sec. 1323. He is mistaken. Such facts could properly be shown by cross-examination or the record of the judgments. People v. Soeder, 150 Cal. 12, 20, 21, 87 P. 1016.

Before proceeding let it be noted that the defendant took the stand as a witness in his own behalf. He testified to all incidents occurring between the early part of the evening of Monday, August 12th, and extending to a time about 4 a. m. Wednesday, August 14, 1930, regarding the acts of himself, of the prosecuting witness, and of his friend Charlie Sinclair. The defendant denied that he had had sexual intercourse with the prosecuting witness. He volunteered that he had made some purchases for her. He volunteered that he was writing checks and that both Charlie and Dorothy were broke. The defendant testified that he slept on a couch alone, but that Charlie and Dorothy slept together in the only bed in the apartment. He now complains because on cross-examination he was asked questions regarding the checks he wrote and the purchases he made for the prosecutrix. But we have not found any ruling that was made by the trial court which improperly extended the boundaries of the cross-examination of a defendant in a criminal action. Penal Code, sec. 1323; People v. Turco, 29 Cal.App. 608, 610, 156 P. 1001; People v. D'Angelo, 13 Cal.2d 203, 206, 88 P.2d 708.

[4] In his argument in submitting the case the district attorney asked the jury to so frame its verdict that the defendant would be sent to state prison and not to the county jail. He acted clearly within his rights. The punishment for the offense on trial is provided in section 264 of the Penal Code. Under certain facts the jury by its verdict is entitled to make recommendations to the court as to the punishment to be imposed. Under such circumstances it is quite clear that the district attorney was entitled to include within the scope of his argument what recommendation, if any, should be made by the jury.

[5, 6] No other point is stated, argued, and supported by authorities. Points not so presented need not be considered by a court of review. In People v. McLean, 135 Cal. 306, at page 309, 67 P. 770, at page 771, the court said: "We again repeat what we have said before,—that we will not examine alleged errors presented in this way. It is due to this court from the members of the bar to point out clearly and concisely the rulings complained of as erroneous and the reasons why they are so, with reference to authorities, if any. In case counsel will not take the trouble to do so, we shall deem the matter as of not sufficient importance to merit notice in an opinion. People v. Woon Tuck Wo, 120 Cal. [294] 297, 52 P. 833." That passage is directly applicable to a number of contentions contained in the brief of the defendant.

The judgment and order appealed from are affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

50 Cal.App.2d 622

SCOVILLE et al. v. DE BRETTEVILLE et al.

Civ. 2963.

District Court of Appeal, Fourth District, California.

March 20, 1942.

Hearing Denied May 18, 1942.

1. Appeal and error 🔑931(1)

An appellate court must accept as true those portions of the evidence supporting findings and judgment of lower court.

2. Mines and minerals 🔑83

Where defendants, as lessees of an oil lease, entered into an agreement with plaintiffs for financing the completion of drilling of well, which provided that contract should terminate if first well was completed for 200 barrels per day or less, and which further provided for an executive committee to have charge of drilling operations, plaintiffs could not complain because production test was not made by committee named in contract, where it appeared that plaintiffs had virtually abandoned the project until through efforts of defendant, the well was improved so that it produced oil in paying if not large quantities.

3. Evidence 🔑518

The expression "the first well be completed for 200 barrels per day or less", as used in an agreement by defendants, as lessees of oil lease, with plaintiffs for financing completion of drilling of a well, with the provision that contract should terminate if first well was completed for 200 barrels per day or less, had a technical meaning given to it by those engaged in oil industry, and, hence, the meaning of words as used in the contract was a proper subject for expert testimony. Civ.Code, § 1645.

4. Mines and minerals 🔑83

Where lessees of oil lease entered into an agreement with plaintiffs for financing completion of drilling of a well, which provided that contract should terminate if first well was completed for "200 barrels per day or less", plaintiffs could not add number of barrels of casinghead gasoline to number of barrels of oil mixed with water and other impurities in order to reach a production of more than 200 barrels, in view of evidence showing that the term 200 barrels of oil per day as used in contract meant clean marketable oil.

See Words and Phrases, Permanent Edition, for all other definitions of "200 Barrels per Day or Less".

5. Contracts 🔑143

When clauses in written agreement, doubtful in meaning, are construed, entire agreement must be looked to for light in determining meaning to be given particular clause under scrutiny.

6. Contracts 🔑169

Circumstances and relations of parties at time of execution of agreement and insertion of particular clauses therein are considered in construing doubtful clauses. Civ. Code, § 1647.

7. Appeal and error 🔑1008(3)

Where a construction given an instrument by trial court appears to be reasonable and consistent with intent of parties making it, appellate courts will not substitute another interpretation even though it seems equally tenable.

8. Mines and minerals 🔑83

Where lessees of oil lease, entered into a contract with plaintiffs for financing of completion of drilling a well, which agreement provided for drilling of two other wells if first well proved sufficiently productive, and further provided that if first well was completed for 200 barrels per day or less plaintiffs would quitclaim to lessees all their interests under agreement, except as to such first well, trial court's construction of provision that plaintiffs would quitclaim to lessees all their interest under agreement, except as to such first well, as including a surrender of their right of joint management in operation of first well was reasonable and consistent with intent of parties.

9. Appeal and error 🔑1011(1)

Conflicts in evidence are addressed to and settled by trier of fact, and a judgment may not be reversed on appeal because of conflicts in the evidence.

10. Mines and minerals 🔑52

In action to enjoin defendants from interfering with drilling and production operations in connection with an oil well and for accounting of the receipts from and disbursements made in connection with well, plaintiffs could not complain of portion of judgment discharging receiver who was appointed to take charge of and operate the well, where it was determined that plaintiffs had no right of management of the well, and there was no indication that plaintiffs would not receive their participating royalties from the net production of the completed well.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Walter B. Scoville and others against G. deBretteville and others to enjoin defendants from interfering with plaintiffs' drilling and production operations in connection with an oil well, for an accounting of the receipts from disbursements made in connection with the well, for judgment for any moneys found due them, and for a receiver pendente lite to take charge of and operate the well. From an adverse judgment, the plaintiffs appeal.

Affirmed.

Leland J. Allen, of Los Angeles, for appellants.

Henry G. Bodkin and Charles S. Gass, both of Los Angeles, for respondents.

MARKS, Justice.

Plaintiffs brought this action to enjoin defendants from interfering with their drilling and production operations in connection with an oil well known as "Treasure No. 8," for an accounting of the receipts from and disbursements made in connection with this well, for judgment for any moneys found due them, and for a receiver pendente lite to take charge of and operate the well.

The receiver was appointed and the order appointing him was stayed by an appropriate appeal bond. The case was tried on its merits and the judgment before us for review was rendered in which the receiver was discharged. An appeal was taken from the order appointing the receiver. That appeal has been decided, Cal. App., 123 P.2d 622.

[1] The trial of the case was protracted and is presented to us in a long typewritten record. The evidence on many questions is conflicting and cannot be harmonized. Under the time honored rule that we must accept as true those portions of the evidence supporting the findings and judgment we will briefly summarize such of that evidence as may be necessary and will not attempt to detail other evidence conflicting with it.

The Treasure Company had oil leases on four parcels of land in the Del Rey Hills in Los Angeles County which are known respectively as the Fletcher lease and the Burns No. 1, No. 2 and No. 3 leases. It had endeavored to drill a well on the Fletcher lease but could not complete the undertaking because of financial difficulties. Negotiations were started with the Adamant Company, through Walter B. Scoville, its representative, looking to its financing the completion of the well. These negotiations resulted in the execution of a written contract, dated April 5, 1938, between the Treasure Company as first party, the Adamant Company as second party, and Walter B. Scoville as third party. The proper construction to be placed on some of its provisions is determinative of the principal issues in this case.

This contract recites the ownership of the various leases by the Treasure Company; that the well on the Fletcher lease had not been completed; that the Fletcher and Burns No. 1 leases were to be combined into one operating lease; that the parties desired to complete the first well and drill a well on each of the other Burns leases, No. 2 and No. 3, if the first well proved to be sufficiently productive; that the Adamant Company would furnish $10,000 for the purpose of carrying this program into effect, subject to its approval by the Commissioner of Corporations.

It was agreed that the Treasure Company would furnish the derrick, machinery, and drilling equipment for the completion of the well, and the Adamant Company would furnish the money. This money was to be deposited in a bank to the credit of the Treasure Company and withdrawn on checks signed by it and J. O. Seeple.

The Adamant Company was to receive a twenty-five per cent participating royalty in the leases, and Walter B. Scoville a participating royalty interest of nineteen per cent in the Fletcher and Burns No. 1 leases if the well were completed for less than one thousand barrels, to be reduced to sixteen and one-half per cent if it should be capable of producing one thousand or more barrels per day upon completion, and eighteen and one-sixth per cent participating royalties in the other two leases. These royalties were to be subject to their pro rata share of all operating and maintenance charges of all wells.

The contract also contained the following provisions:

"When the first well has been drilled to the basement the parties hereto agree to cooperate in obtaining the necessary casing and other completion equipment and material on credit or in connection with production contracts, or otherwise. If necessary, all monies payable on the royalties to be issued to Second and Third Parties, and the interest retained by First Party, after payment of operating expenses, shall be made available to pay for such completion costs. It is agreed, that should Second Party and Third Party decide, after the first well has been drilled to the basement schist, that they do not desire to proceed further, this contract shall then be terminated and they will quitclaim to First Party all of the interests to be received by them hereunder, except one-third (⅓) of their interests in the first well. It is also understood that should the first well be completed for two hundred (200) barrels per day or less, this contract shall terminate, and Second Party and Third Party will thereupon quitclaim to First Party all of their interests hereunder, except as to first well. * * *

"J. Orville Seeple, on behalf of the Second Party and Third Party, and G de Bretteville, on behalf of First Party, shall form an executive committee to have joint control and advisory powers with respect to all drilling and producing operations hereunder. No purchases shall be made on credit and no expenditures or other obligations incurred without the joint approval of both members of said committee."

This contract was later modified by adding Harry Wynn to the executive committee created in the last quoted paragraph of the contract.

The Corporation Commissioner issued his permit for the issuance of the participating royalties. Deepening the well started in April, 1938, and was continued until about May 28th of that year when it had been drilled to a depth of 6,510 feet. Differences arose between the parties over additional financing necessary to bring the well into production. To keep the hole from caving in and the well from blowing out, large quantities of drilling mud and water were pumped into it. The well remained in this condition until November, 1938.

Under date of November 2, 1938, J. Orville Seeple, Walter B. Scoville and the Adamant Company wrote the Treasure Company the following letter:

"The undersigned, for and on behalf of the Adamant Company, Walter B. Scoville, and himself, hereby agrees that Oliver Maze shall be employed as Drilling Superintendent and Tool Pusher in connection with the completion of the Treasure Well, now being drilled on Lot 9, Block 33, Tract 9809, Del Rey Hills, California, and we will assure you the necessary funds will be forthcoming to complete said well."

Work on cleaning out the well and reaming it to receive the casing were started about November 10, 1938, the casing was set several days later, and the other work was done preparatory to a production test. Swabbing started about November 25th, and was continued to December 3rd. The well went on the pump about December 7, 1938. It produced about eighty barrels a day. Up to December 15, 1938, all operations were in charge of plaintiffs or their agents.

The wages of the workmen, due on December 15, 1938, were not paid and defendants took charge of the operations on the afternoon of the following day. According to evidence offered by defendants no objection was made to this change of control until May, 1939.

Under defendants' management the production was increased to an average of about 180 barrels per day. It was not clean oil and required dehydrating before it could be marketed. The well also produced about 300,000 cubic feet of gas per day from which casinghead gasoline was extracted.

In May, 1939, plaintiffs tried to take physical possession of the well and were resisted by defendants. This action was started on June 1, 1939.

It seems to be the theory of the plaintiffs that the well was capable of producing more than 200 barrels of oil per day; that its production was wrongfully held down by defendants in order to defraud plaintiffs of their right of joint management and their interests in Burns No. 2 and No. 3 leases.

The trial court found that defendants did not forceably take possession of the well; that all the money furnished by plaintiffs was actually used in deepening the well and putting it on production; that all work on the well up to December 16, 1938, was under the control of Harry Wynn and J. O. Seeple; that they did not consult with deBretteville about such operations and contracted bills without his consent; that many bills were unpaid on December 16, 1938, when deBretteville took over the management of the well; that none of the plaintiffs objected to his so doing until May 18, 1939; that the operation of said well by defendants was well, efficiently, capably and skillfully done in accordance with good practices in the oil industry; that the well was completed and put on production not later than January 1, 1939, and that the average daily production for thirty days thereafter was less than 200 barrels of oil a day; that "it is not true that at the time said complaint was filed herein that said well was producing more than 200 barrels of oil a day, or as much as 200 barrels of oil per day, and the Court finds that said well was not capable of producing a monthly average of 200 barrels of oil a day for any month during the period of time from the date said well first produced until December 31, 1939, and was at no time capable of producing, nor did it produce more than 200 barrels of oil per day;"

The trial court further found that in November, 1938, the average production of oil was 51.38 barrels per day, in December, about 78.88 barrels a day, and in January, 1939, about 102.3 barrels a day.

There is ample competent evidence in the record to sustain the foregoing findings.

It was further found that "the clause 'be completed for two hundred barrels per day or less' in said contract, means, and did at the time of the execution of said contract mean, and was intended by all parties to it to mean 200 barrels, or less, of clean oil per day; the Court further finds that said well was not completed for 200 barrels of clean oil per day, but was completed for less than 200 barrels of clean oil per day, and that said contract and addendum thereto insofar as it provided for control or management of said well by plaintiffs, or any of them, or by a committee composed of plaintiffs J. O. Seeple and Harry Wynn, terminated no later than January 31, 1939, and plaintiffs thereby lost their interests in all leaseholds described in said contract other than the leasehold interest described" on which the first well was located.

It was also found that on some individual days in the months of February, March, April and May, 1939, the well did produce more than 200 barrels of oil per day but that during no month did it produce an average of 200 or more barrels of oil a day; that "said well and pump were properly operated and controlled so as to produce the maximum amount of oil and gas and that said defendants did nothing in the operation of the said pump, or otherwise, to delay the removal of mud and water or to diminish and retard the production of oil and other hydrocarbons; the Court further finds that the cleaning out of the mud and water from said well was not delayed nor the production of said well retarded or diminished."

These findings are supported by substantial evidence. Therefore, the only question left open for consideration is the legal effect of these findings in support of the judgment which terminates plaintiffs' interest in the leases (except in Treasure No. 8 well) and plaintiffs' rights of joint management of the leases and that well.

[2] Plaintiffs argue that no production test of the well was ever made under the terms of the contract and draw the conclusion that there is no evidence to support the finding that the well was completed for a production of less than 200 barrels of clean oil per day.

The foregoing argument is based on the theory that the only production test that could have been made under the terms of the contract would have to have been made by the three named members of the executive committee, and as no test was made by them there was no proof at all that the well was not capable of producing more than 200 barrels of oil per day; that defendants wrongfully took possession of the well on December 16, 1938, and should not profit by their own wrong. This argument overlooks the evidence indicating, as found by the trial court, that plaintiffs virtually abandoned the well on December 15, 1938; that without objection from anyone, defendants took possession of the abandoned well on the following day and proceeded to clean it out and put it on production; that the well was skillfully operated and did not produce 200 barrels of oil a day. The contingent rights of plaintiffs depended upon the amount of oil the well produced, and not upon a test by any particular person or persons.

A study of the record supports the inference that plaintiffs were not interested in a well having a small production; that they were disappointed in their efforts to put it on production and with its small production; that as a result they virtually abandoned the project on December 15, 1938, and did not again become interested in it until, through the efforts of defendants, the well was improved so that it produced oil in paying if not large quantities together with wet gas from which gasoline was extracted. Further, the well was skillfully operated by defendants and under the evidence and findings was produced to its maximum capacity. Under these circumstances plaintiffs cannot now complain because the production test was not made by the committee named in the contract.

[3] The trial court admitted evidence as to the meaning given in the oil industry to the expression "the first well be completed for two hundred (200) barrels per day or less." This evidence was to the effect that the expression meant 200 barrels of clean marketable oil produced; that the production of a well is determined by its average daily production of clean oil fit for commercial use over a period of thirty days after it is first put on production; that the expression does not mean emulsified oil and water and does not include gas or casinghead gasoline produced from such gas.

It is rather clear that the expression has a technical meaning given to it by those engaged in the oil industry. This being true it is settled that the meaning of those words, as used in the contract, was a proper subject for expert testimony. § 1645, Civ.Code; Alta Planing Mill Co. v. Garland, 167 Cal. 179, 138 P. 738. Further, it would be impossible to suppose that "two hundred (200) barrels per day," when used in a contract dealing with the production of an oil well, could refer to anything other than 200 barrels of oil per day. When used in an oil lease or a contract dealing with oil in the sense here appearing, the terms, when referring to oil, should be held to mean crude petroleum as produced from a well less free water therein, and less water and other foreign substances emulsified in it which render it commercially unfit for market as oil in the state in which it was produced. Certainly the term oil does not include gas or gasoline extracted from such gas unless such special meaning be clearly given it in the contract in question. No such special meaning is given the word in the contract before us.

[4] The trial court correctly received this evidence and was privileged to accept it as true. Plaintiffs cannot add the number of barrels of casinghead gasoline to the number of barrels of oil mixed with water and other impurities in order to reach a production of more than 200 barrels. In view of the evidence and findings their arguments in support of such a method of computing the amount of oil produced daily are untenable.

Plaintiffs further argue that the clause "Second Party and Third Party will thereupon quitclaim to First Party all their interest hereunder, except as to such first well" does not include a surrender of their right of joint management and operation of the first well.

It must be conceded that the clause of the contract under consideration is not definite in its terms and required construction by the trial court.

[5, 6] There are two rules of construction that must control here. The first is set forth in Smith v. Carlston, 205 Cal. 541, at page 550, 271 P. 1091, at page 1094, as follows:

"When clauses in a written agreement between parties, doubtful in meaning, are to be construed, it is a cardinal rule of interpretation that the entire agreement must be looked to for light in determining the meaning to be given to the particular clause thereof under scrutiny (6 Cal.Juris. 258, § 16, and cases cited), and a not less important rule for the guidance of courts in determining the intent of parties in the insertion of particular clauses in their written agreements is that the circumstances and relations of the parties at the time of the execution of their agreements and of the insertion of particular clauses therein shall be carefully considered in aid of such interpretation. (Civ.Code, § 1647.)" See, also, Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 19 P.2d 785.

[7] The second rule is set forth in Tide Water Assoc. Oil Co. v. Curtin, 41 Cal.App.2d 884, at pages 895, 896, 107 P.2d 945, at page 951, as follows: "* * * it cannot be said that the two instruments,

considered in the light of the facts, are not susceptible of the interpretation placed upon them by the court. Hence, we cannot disturb the decision. It was the province of the trial court to resolve doubtful language in the lease and to determine the meaning and effect of the subsequent agreement. Adams v. Petroleum Midway Co., Ltd., supra, [205 Cal. 221, 270 P. 668].

"When the construction given an instrument by the trial court appears to be reasonable and consistent with the intent of the parties making it, courts of appellate jurisdiction will not substitute another interpretation even though it seems equally tenable. Berdan v. Berdan [39 Cal.App. 2d 478], 103 P.2d 622."

[8] When we apply these rules to the facts before us we can not disturb the construction placed on the contract by the trial court. It rather clearly appears from the evidence that at the time the contract was executed the plaintiffs would not be interested in continuing with the contract unless the well was a good producer. They described a well producing a thousand barrels of oil or more a day as coming within that class and as coming within their hopes and expectations although they placed their minimum at a production of more than 200 barrels a day in the contract. They virtually abandoned the well when their efforts resulted in a small production. These facts, and others in the record, indicate that plaintiffs construed the contract to mean that their rights of management, not only of the Burns No. 2 and No. 3 leases, but of the first well, ended upon it appearing that the well produced less than 200 barrels of oil a day. As the construction placed by the trial court on the contract is reasonable and seems to be in accordance with the intent of the parties when it was executed and with the construction placed upon it by their subsequent actions we cannot disturb that construction here.

Plaintiffs complain of many of the items appearing in the accounting which were approved by the trial court.

The record discloses that under a stipulation of the parties the trial court appointed Eugene M. Berger, a certified public accountant, to audit the books of defendants and to render an account to the court. When this account was submitted, plaintiffs, being dissatisfied, employed their own accountant who prepared another account. Five days were consumed in taking evidence on this phase of the case. Certain of the more controversial items were reserved for future consideration and decision under stipulations made in open court. Other items were modified and as so modified were approved in the findings which went into very considerable detail concerning them.

[9] Without reviewing in detail the very considerable and somewhat conflicting evidence offered on this phase of the case it should be sufficient to state that there was very substantial evidence supporting the conclusion reached by the trial judge. This being true the findings and judgment on these questions become final here under the familiar rule that conflicts in the evidence are addressed to and settled by the trier of fact and that a judgment may not be reversed on appeal because of conflicts in the evidence.

[10] Plaintiffs complain of the portion of the judgment discharging the receiver who was appointed on July 19, 1939. The order appointing the receiver was stayed, pending appeal, by an appropriate bond so that the receiver never acted.

As plaintiffs have no right of management of the undertaking, and as there is no indication that they will not receive their participating royalties from the net production of the completed oil well, and because the controversies between the parties have been settled and no good reason for a receiver appears, the order discharging the receiver was proper and must be affirmed.

It is unnecessary to consider the other questions argued by counsel.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

50 Cal.App.2d 633

SCOVILLE et al. v. DE BRETTEVILLE et al.

Civ. 2775.

District Court of Appeal, Fourth District, California.

March 20, 1942.

Hearing Denied May 18, 1942.

Appeal and error ⚿790(3)

Where it appeared that receiver appointed by court had never acted and that final judgment rendered in the case discharged him from his office, question of legality of his appointment had become "moot".

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Walter B. Scoville and others against G. deBretteville and others. From an order appointing a receiver, the defendants appeal.

Appeal dismissed.

Henry G. Bodkin and Charles S. Gass, both of Los Angeles, for appellants.

Leland J. Allen, of Los Angeles, for respondents.

MARKS, Justice.

This is an appeal from an order appointing a receiver to take charge of an oil well and the property on which it was situated. The order was stayed by an appropriate bond pending the decision of this appeal and the receiver has never acted.

Pending this appeal the case was tried and a final judgment entered in favor of defendants in which the receiver was discharged. This judgment has been affirmed in an opinion this day filed. Cal.App., 123 P.2d 616.

As the receiver has never acted, and as the final judgment rendered in this case discharged him from his office, the question of the legality of his appointment has become moot and need not be decided.

The appeal from the order appointing the receiver is dismissed.

BARNARD, P. J., and GRIFFIN, J., concurred.

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50 Cal.App.2d 570

FRITZ v. METROPOLITAN LIFE INS. CO.

Civ. 12858.

District Court of Appeal, Second District, Division 2, California.

March 19, 1942.

As Corrected on Denial of Rehearing April 17, 1942.

Hearing Denied May 14, 1942.

1. Insurance ⚿516, 539(1)

The quoted words in provision in group policy that, on receipt of due proof that employee "while insured hereunder and prior to his sixtieth birthday" has become totally and permanently disabled, certain payments will be made to employee, meant that disability and not due proof of disability must occur while insurance is in force in favor of insured.

See Words and Phrases, Permanent Edition, for all other definitions of "While Insured Hereunder and Prior to His Sixtieth Birthday".

2. Insurance ⚿146(1, 3)

A policy of insurance should be construed, in the absence of any ambiguity, according to the plain, ordinary, and proper sense of the words used; but, where language used is conflicting, policy should be construed against the party who is responsible for the contradictory language used.

3. Insurance ⚿147(2)

The interpretation of group policy issued in Missouri is governed by the laws of Missouri.

4. Courts ⚿95(1)

Where interpretation of contract is governed by laws of Missouri, decision of intermediate court of appeals on the point involved must be accepted by the parties and California District Court of Appeal as stating the law of Missouri, in absence of any conflicting decision by any other intermediate court of appeals or by Supreme Court of Missouri.

5. Insurance ⚿536, 539(1)

Under Missouri law, insurer's liability for disability benefits under group policy providing that, on receipt of due proof that employee while insured thereunder and prior to his 60th birthday has become totally and permanently disabled, such payments will be made to employee, and that amount of each monthly payment shall be such as amount of insurance in force on life of employee at date of receipt of proof of disability will purchase, liability is not dependent on the employee's having given due proof while the policy is in force, and due proof while policy is in force is not a "condition precedent" to right of recovery.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition Precedent".

6. Appeal and error ⟹1

On appeal from judgment in action on group policy the interpretation of which was governed by laws of Missouri, the question whether litigant waived requirement of policy as to time when proofs of disability shall be made, by not making the point in trial court, involved a question of procedure governed by California law.

7. Appeal and error ⟹173(14)

An insurer sued for disability benefits under group policy could not complain for the first time on appeal that due proof had not been given while insurance was in effect.

8. Insurance ⟹516

Under Missouri law, an insured making sporadic and futile attempts to resume his work, and in fact doing some minor work, does not thereby lose his status as "totally and permanently disabled" within group policy.

See Words and Phrases, Permanent Edition, for all other definitions of "Totally and Permanently Disabled".

9. Insurance ⟹648(1)

In action for disability benefits under group policy, evidence whether insured was receiving disability benefits under some other policy was not admissible.

10. Evidence ⟹318(3), 333(7)
Witnesses ⟹216

In action for disability benefits under group policy, report concerning insured made by government physicians to Federal Veterans' Bureau was not "public record" made by public officers under act of Congress, so as to be admissible as exception to "hearsay" rule, where act of Congress provided that report could be disclosed only in proceedings in nature of an inquest of competency or in judicial proceedings when director of Veterans' Bureau deems such disclosure necessary and proper. World War Veterans' Act of 1924, § 30, 38 U.S.C.A. § 456.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay" and "Public Record".

11. Appeal and error ⟹926(5)

On appeal from judgment in action for disability benefits under group policy, District Court of Appeal would not assume that trial court admitted in evidence a report concerning insured made by government physicians to Federal Veterans' Bureau, for limited purpose and considered the report only so far as the law permitted, where trial court overruled objections generally and did not purport to limit the report for a particular purpose.

12. Appeal and error ⟹1050(1)

The contention that admission of evidence did not constitute reversible error on ground that evidence was merely cumulative, would not be sustained where there was no other evidence to sustain the judgment.

13. Insurance ⟹665(5)

The admission of insured suing for disability benefits under group policy, that insured had claimed and received disability benefits under later business men's policy issued by insurer, did not entitle trial court to infer that insured was not totally and permanently disabled while group policy was in force.

14. Insurance ⟹665(5)

In action for disability benefits under group life policy, evidence was insufficient to sustain finding that insured was not totally and permanently disabled during period of insurer's risk under the policy.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action to recover disability benefits under group insurance policy by Charles C. Fritz against the Metropolitan Life Insurance Company. From a judgment for the defendant, the plaintiff appeals.

Reversed for new trial.

Herzbrun & Chantry, Kenneth N. Chantry, and David Mellinkoff, all of Los Angeles, for appellant.

Walker, Adams, Duque & Smith, Henry Duque, and Mark E. True, all of Los Angeles, for respondent.

HANSON, Justice pro tem.

This is an action brought to recover disability benefits under a group policy of insurance issued in Missouri by respondent in July, 1926, to The Long-Bell Lumber Company of Kansas City, Missouri, as the employer, for the benefit of its employees, of whom plaintiff was one. Respondent's risk under the policy ended at midnight February 28, 1933, leaving the insurer without liability except as to such obligations as had then accrued under the terms of the policy. At the hour just mentioned a new group policy of insurance issued by Business Men's Assurance Company took effect. This policy, like that of respondent's, was procured by the employer for the benefit of its employees, of whom plaintiff was one. On the trial below plaintiff contended (1) that in 1932 he became totally and permanently disabled within the purview of the policy issued by respondent and while it was in full force and effect, and (2) that he submitted to respondent due proof of such disability in June, 1934. The court expressly found that plaintiff was not totally and permanently disabled prior to midnight February 28, 1933. Notwithstanding this finding the trial court also found that at the time of the trial, in December, 1939, plaintiff was totally disabled as a result of psychoneurosis, and that the condition was presumably permanent and had existed for some time. On these findings judgment went for defendant and the case is here on plaintiff's appeal.

The questions presented are: (1) Whether the policy by its terms requires the insured, where he becomes totally and permanently disabled while the policy is in effect, to submit due proof thereof to the New York office of the insurer while the policy is in full force; (2) if the terms of the policy so require, has the requirement been waived by the insurer in the trial below; and, if so, (3) is the admissible evidence sufficient to sustain the finding that plaintiff was not totally and permanently disabled during the period of respondent's risk under the policy.

First: Respondent argues that under the terms of the policy its obligation rests not alone upon the existence of insured's disability but is expressly conditioned upon (1) the receipt by it of proof of disability and (2) the receipt of such proof while the employee is insured under the policy and while it is in force. In support of its position it points first to the language in the first paragraph of the policy and secondly to the language of the second paragraph, both set forth in the margin.[1] However, the second paragraph deals with the computation of the company's liability and not with the time within which proof is to be given. Accordingly, before discussing it we turn to a consideration of the first paragraph, which alone bears directly on the subject.

[1] In his written argument counsel for respondent not only rests heavily on the language of paragraph two, but he quotes in connection therewith paragraph one and italicizes therein the words "while insured." From this we apprehend that he implies that the pertinent sentence from paragraph one should be deemed to read: "Upon receipt, at the Home Office * * * of due proof [while insured] that any Employee, while insured hereunder, and prior to his sixtieth birthday, has become totally and

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[1] "Upon receipt, at the Home Office in the City of New York of due proof that any Employee, while insured hereunder, and prior to his sixtieth birthday, has become totally and permanently disabled, as the result of bodily injury or disease, so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit, the Company will waive the payment of further premiums as to such Employee and three months after receipt of such proof will commence to pay, in lieu of the payment of insurance at his death, monthly instalments as defined below to the said Employee or to a person designated by him for the purpose. * * *

"The number of such instalments shall be limited to either sixty, or to one instalment for each $25.00 of Insurance whichever number is less. The amount of each monthly instalment shall be such as the amount of insurance in force on the life of said Employee at the date of receipt of proof of such disability will purchase, as of the due-date of the first instalment, on the basis of three and one-half per centum per annum, compound interest, and on the assumption that the insured will continue totally and permanently disabled for the period covered by the number of instalments described above.

"The following table illustrates the number of instalments, and the amount of each instalment for certain amounts of insurance:

"If such Amount of Insurance is:	Maximum Number of Instalments	Amount of Each Monthly Instalment
* * *	* * *	* * *
10,000	60	180.00

"On approval of claim of such disability, the insurance in force on the life of said Employee under this Policy shall be discontinued as of the date of receipt of due proof of disability."

permanently disabled * * *." But the phrase "while insured hereunder," as a matter of grammatical construction, modifies the word "Employee" and does not refer to the matter of due proof. More persuasive than mere grammatical construction, perhaps, is the support given by the fact that with the phrase "while insured hereunder" is grouped the further phrase, "and prior to his sixtieth birthday." The latter phrase could have no intelligent bearing on the time when due proof should be made, but does appear as a proper, if arbitrary, limit on the time within which disability must occur. Both phrases clearly have reference to the same event, and the second phrase clearly concerns the matter of time of disability and not time of proof. The clear meaning of the words "while insured hereunder and prior to his sixtieth birthday" is that the disability, and not due proof of disability, must occur while the insurance is in force in favor of the insured. This is buttressed by the more explicit language which is found in the certificate[2] which the insurer issued to the plaintiff.

While one would assume, as the first paragraph of the group policy deals with the question of "due proof," that all provisions in respect thereto would be found in that paragraph only, we are told by counsel for respondent that this is not so. To sustain his view he points to the language in the second paragraph, reading: "The amount of each monthly instalment shall be such as the amount in force on the life of said Employee at the date of receipt of proof of such disability will purchase * * *." Because of this language he contends that it follows that "due proof" must be made while the insurance is in force, and that it is a condition precedent to recovery. For this view he cites Metropolitan Life Ins. Co. v. Phillips, 236 Ala. 259, 182 So. 35, 36. In that case the language of the policy and the certificate was substantially the same as is here involved. The court there said: "The furnishing of proofs was not merely the event upon which payments should begin, but proof while the policy was in force is, by this policy, a condition precedent to liability for benefits." We agree that by the language used in the policy and certificate there involved, as in the instant case, the obligation is to pay in monthly instalments such an amount "as the amount of insurance in force on the life of the employee at the date of receipt of proof of disability will purchase as of the due date of the first instalment [three months hence], on the basis of 3½ per centum per annum, compound interest," and that this language, read literally, prohibits a recovery where the proof was not made while the policy was in effect. However, we do not agree with the Alabama court if its opinion implies that it is a condition precedent to recovery that the insured allege and prove that due proof was made while the policy was in force. Rather, the provision deals with the amount that will be paid, and that amount is nothing if the policy is not in force on the date the due proof is received. But this is not the same thing as saying that due proof while the policy is in effect is a condition precedent. In other words, the failure to make due proof while the policy is in effect is a matter of defense and not an element of the insured's cause of action.

In viewing the clause in question we think it is quite plain that the insurer had in mind, not that due proof of disability should be given while the insurance was in effect, but that the amount it should pay was to be predicated on the amount of insurance in effect at the date of due proof rather than that which might have been in effect at the date insured became totally and permanently disabled. Even so, the insurer neglected to provide, whether intentionally or not, for a situation where the insured was wholly and permanently disabled while insured, and who for want of time, disability or otherwise was unable to, or did not, give due proof while the policy was in force. Such a situation could have been covered by a provision that the computation would be made as of the last day the policy was in force. Had the policy, in terms, so provided, it is clear that the insured would be required to give due proof within a reasonable time. If, on the other hand, it may be said that the insurer intended to stand on the literal language used, then it follows that it must be charged with a desire to entrap not only its unwary policy holders but even those who were quite cautious. We are loath to believe that a company of the size and character here involved would stoop to such a practice. The logical and proper place for all provisions as to due proof was in the paragraph dealing with due proof, and not in the one dealing with the computation of the instalments to be paid.

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[2] "Under the terms of the Group Policy mentioned on page one of this Certificate, any employee shall be considered totally and permanently disabled who furnishes due proof to the Company that, while insured thereunder and prior to his sixtieth birthday, he has become so disabled as a result of bodily injury or disease as to be prevented permanently from engaging in any occupation or from performing any work for compensation or profit.

"Three months after receipt of such proof, the Metropolitan Life Insurance Company will pay to such employee, in lieu of the payment of the insurance under said Policy at his death, equal monthly instalments, the number and amount of such instalments to depend upon the amount of insurance in force on the life of such employee at such date, as shown in the following table. * * *"

[2-4] However, it must be conceded that a careful reading of the second paragraph, read alone, makes it clear that the literal language thereof, in direct conflict with the language of the first paragraph, requires, if it may be permitted to control the language of the first paragraph, a holding that the insurer has no obligation to pay the insured anything where he does not submit his due proof of disability while the policy is in full force. Giving full and controlling effect to such an interpretation would require a holding that an insured employee, who through accident became totally and permanently disabled a few minutes or hours before midnight of the day the policy lapsed, would be wholly without redress even though it had not been humanly possible to submit due proof, at the home office of the insurer in New York, before midnight of the day of the injury. As harsh as such a rule would be, it would accord with the literal language of the second paragraph of the policy of insurance. Such a ruling, if it may be said there is no ambiguity in the language involved, could be sustained on the ground that a policy of insurance, like any other contract, should be construed, in the absence of any ambiguity, according to the plain, ordinary and proper sense of the words used. However, it is plain that the provisions in the second paragraph directly, or at least essentially, conflict with the finality of the language used in the first paragraph. In that situation an insurance contract, like any other contract, is to be construed against the party who is responsible for the contradictory language used. While courts often say that the same rules of construction govern in the interpretation of policies of insurance as in any other contract, it must be admitted that ambiguities are often too easily found in insurance contracts. This is accounted for, perhaps, by the fact that many policies of insurance particularly group insurance, are regarded merely as manufactured commodities—as easily and quickly purchased as a legal form in a stationery store, or a ready-to-wear suit in a clothing store, represented to be all wool and no shoddy.

So far we have discussed the language of the policy in the light of general rules of law, without referring to precedents. As the contract was issued in Missouri, its interpretation is governed by the laws of that state, and so we turn to the decisions of that state for support of what we have said. The only decision from that jurisdiction, on the point here involved, which has come to our attention is that of an intermediate court of appeal. In the absence of any conflicting decision by any other intermediate court of appeal or by the Supreme Court of that state, and we know of none, the decision must be accepted by the parties as well as by this court as stating the law of Missouri. Six Companies of California v. Joint Highway, etc., of California, 311 U.S. 180, 61 S.Ct. 186, 85 L.Ed. 114; Stoner v. New York Life Ins. Co., 311 U.S. 464, 61 S.Ct. 336, 85 L.Ed. 284; Fidelity Union Trust Co. v. Field, 311 U.S. 169, 61 S.Ct. 176, 85 L.Ed. 109; West v. American Telephone & Telegraph Co., 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139, 132 A.L.R. 956. This is a universal rule. The Supreme Court of the United States has made it plain in the above cited cases that it regards a decision of an intermediate court of appeal of a state as stating the law of the state, unless it is in conflict with the decision of another co-ordinate court, even though such decision is not binding on the highest court of appeal of the state, so long as that court has not pronounced otherwise. In view of that holding the full faith and credit clause would require us to follow it, even if we were of a different view, which we are not.

[5, 6] In Corcoran v. Metropolitan Life Ins. Co., Mo.App., 93 S.W.2d 1027, 1029, the Missouri court, in construing the language of a Metropolitan group insurance policy evidently the same as the one before

as, said: "Defendant further contends that plaintiff's recovery should be defeated because of his delay in making his claim for benefits under the policy. Inasmuch as there is no provision in the policy requiring proof to be made within a specified time after disability arises, we can see no merit in this contention." In view of the foregoing quotation we take it that the Missouri courts would hold that liability is not dependent on the policy-holder's having given due proof while the policy is in force, and at all events that it is not a condition precedent. But regardless of what the Missouri courts would hold on that particular point, we think they would decide that Metropolitan waived the requirement that due proof be made while the policy was in effect. Moreover, as Metropolitan did not make the point below—and that involves a question of procedure governed by the laws of this state—it has no standing to raise the point in this court.

[7] Second: The record discloses that appellant submitted due proof of his disability to the insurer on July 9, 1934. Insurer shortly thereafter denied liability on the ground that insured had not become totally and permanently disabled during the currency of the policy, but it made no claim that the proof tendered was not timely within the terms of the policy. Moreover, the record discloses that when counsel for appellant sought to offer from the files of Metropolitan his letter to it dated July 9, 1934, opposing counsel objected to it because of certain statements contained in it, but stated he had "no objection to the document going in as proof that due proof was made to Metropolitan." In his opening statement to the court counsel for appellant stated that the case would turn on the question as to when the plaintiff became totally and permanently disabled. We think it significant that at no time during the progress of the case did counsel for Metropolitan challenge this statement or make any motions indicating that it was necessary for the insured to allege and prove that due proof of his disability had been given during the period the insurance was in force; nor did it demur to the complaint or raise the point in its answer. The complaint itself alleged that due proof had not been given until July 9, 1934, and that the proof was to that effect. It was not until the court's findings were prepared for signature that there was improperly incorporated therein a negative finding—not within the scope of the issues—that due proof had not been given while the insurance was in effect. As Metropolitan made no issue on the point in the court below it cannot for the first time make it here.

[8] Third: The evidence in behalf of appellant was ample to have sustained a finding that he had become totally and permanently disabled while the policy was in force. The only evidence offered by respondent that tended to contradict it consisted of two items. Accordingly we turn to respondent's evidence to ascertain whether it raised a substantial conflict with the evidence of the appellant. A neurologist called by it, basing his opinion on a recital of factual matters, testified that appellant was not totally and permanently disabled prior to a certain date in 1936. On cross-examination the witness disclosed that he was of the opinion that appellant was totally disabled from October 4, 1932, to the latter part of February, 1933, but that he was not so disabled from the latter date to a date in 1936, as he had made sporadic and futile attempts in that interval to resume his work, without success, and so was not totally and permanently disabled until the effort completely failed. The witness further indicated that his answer to the hypothetical question was predicated on the fact that in his opinion one could not be said to be totally and permanently disabled as long as he made an attempt to, and did, do some minor work. This is not a correct definition under Missouri law, and so the testimony must be held to be inadequate to raise a substantial conflict with the testimony of the witnesses for appellant. It is altogether too vague and inconclusive to support the judgment.

[9, 10] The only other item of evidence produced on the issue by respondent was a report made by government doctors to the Federal Veterans' Bureau. The introduction of the report was objected to on the ground it was hearsay. When that objection was made counsel for respondent stated that his purpose in offering the report was to rebut an inference that appellant was being paid disability benefits by the Veterans' Administration for a condition of total and permanent disability existing prior to 1938. Whether the insured under some other policy was receiving disability benefits, on the theory that he was or was not totally and permanently disabled while respondent's policy was in force, was not admissible evidence. Much

less would the trial court have been privileged to draw any inference from the fact. The objection was overruled and the record admitted in evidence. In support of the ruling respondent argues (1) that the record was admissible in evidence as an exception to the hearsay rule, in that it was a public record made by public officials under an act of Congress; (2) that as counsel for respondent indicated the purpose for which he offered the record, it must be assumed that the trial court considered the record only for such limited purpose for which it was admissible; and (3) that as the evidence was merely cumulative its admissibility did not constitute prejudicial or reversible error. We see no merit in any of these contentions. In the first place, the record was not a public record. By the statute (38 U.S.C.A. § 456) it may be disclosed only in proceedings in the nature of an inquest of competency or in judicial proceedings when the Director deems such disclosure necessary and proper. Such a restriction on its disclosure completely annuls the contention that it is a public record. The record was in every respect hearsay and not one within an exception to that rule, and should have been so viewed by the court below.

[11, 12] The further contention that we must assume the trial court admitted the record in evidence for a limited purpose and considered it in evidence only so far as the law permits it, is utterly untenable. The trial court overruled the objection generally, and so did not purport to limit the evidence for a particular purpose. Moreover, respondent did not by a mere statement of its purpose, without restricting his offer, limit the evidence. Accordingly, as the trial court did not announce he was receiving the evidence for a limited purpose, we may not assume it did not consider the record in evidence for all purposes. The notion that a trial court when it admits evidence admits it and considers it only so far as it is admissible under the law is not true, either theoretically or practically. However, as respondent by its argument concedes it was not evidence, it follows there is no evidence to support the findings. The further contention that the admission of the record was not prejudicial or reversible error accordingly need not detain us; this for the reason that without it there was no evidence to sustain the judgment. Accordingly, whether the record was or was not considered on the vital issue in the case becomes immaterial, as it was inadmissible and there is no other evidence to sustain the findings and the judgment.

[13] A further contention of respondent, that the trial court was entitled to infer that appellant was not totally and permanently disabled while respondent's policy was in force, because he admitted he had claimed and received disability benefits under the later business men's policy, is demolished on the reef of respondent's own argument. Such an argument is equally as unmeritorious and equally as futile as the argument that because one sues only one of two joint tort-feasors he admits the other was not a tort-feasor. The rules of logic do have their limits.

[14] From the foregoing discussion it is clear that the finding that the insured was not totally and permanently disabled on or prior to February 28, 1933, is not sustained by the evidence. Accordingly, the judgment must be reversed for a new trial on that issue, and that alone.

Judgment reversed.

W. J. WOOD, Acting P. J., and McCOMB, J., concurred.

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50 Cal.App.2d 558

PEOPLE v. ROBERTS.

Cr. 3548.

District Court of Appeal, Second District, Division 1, California.

March 19, 1942.

1. Criminal law ⟹553

Before testimony can be strictured as inherently improbable or unbelievable per se, it must appear therefrom that something has been done which could not possibly be done under the circumstances described.

2. Criminal law ⟹1159(2)

In prosecution for rape and commission of lewd act upon body of child under 14 years of age, with defense of alibi, where accused offered no evidence upon his previous reputation for chastity and morality, evidence was not so inherently improbable as to require reversal of conviction on ground of apparent impossibility of commission of crimes described. Pen.Code, § 261, subd. 1; § 288.

3. Criminal law 🔑741(1), 742(1)

The jury has the exclusive right and duty to evaluate evidence and determine credibility of witnesses based upon such considerations as bias and candor of a witness, the reasonableness of his story, and his relation to or interest, if any, in the case or the parties thereto. Code Civ.Proc. §§ 1847, 2061.

4. Criminal law 🔑737(1)

In prosecution for rape and commission of a lewd act upon body of child under 14 years of age with defense of alibi, sufficiency of identification of accused was for the jury in the first instance and for the trial court on motion for new trial. Pen.Code, § 261, subd. 1; § 288.

5. Criminal law 🔑338(1), 419(1)

In prosecution for rape and commission of a lewd act upon body of child under 14 years of age, testimony by accused of identification of policeman by unknown child, not connected with case or produced as witness, at police station on occasion accused was identified by a victim was inadmissible as irrelevant and "hearsay". Pen.Code, § 261, subd. 1; § 288.

See Words and Phrases, Permanent Edition, for all other definitions of "Hearsay".

6. Criminal law 🔑768(1)

In prosecution for rape and commission of a lewd act upon body of child under 14 years of age where testimony of prosecutrix was corroborated by direct and circumstantial evidence, refusal of cautionary instructions admonishing jury of dangers with which the prosecutions were fraught and of opportunity for malice and private vengeance and fact accused was almost defenseless was not prejudicial error. Pen.Code, § 261, subd. 1; § 288.

7. Criminal law 🔑768(1)

A cautionary instruction is proper where testimony of child prosecutrix in prosecution for sexual offenses is uncorroborated.

8. Bail 🔑44

Where accused had been properly convicted of rape and commission of a lewd act upon body of child under 14 years of age, denial of application for admission to bail pending appeal was not an abuse of discretion. Pen.Code, § 261, subd. 1; § 288.

◆

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

Harold W. Roberts was convicted of rape and the commission of a lewd act upon the body of a child under 14 years of age, and he appeals.

Affirmed.

Willard W. Burgess, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and R. S. McLaughlin, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was charged in count 1 thereof with a violation of section 288 of the Penal Code and in count 2 with a violation of subdivision 1 of section 261 of the same code. Following the entry of not guilty pleas to each count of the information, defendant was tried before a jury, which returned a verdict finding him guilty on both counts and fixing the punishment under count 2 as imprisonment in the county jail. Following the denial of his motion for a new trial, defendant was sentenced to the state prison for the offense charged in count 1 and to the county jail for that alleged in count 2. From both the judgment of conviction and the order denying his motion for a new trial defendant prosecutes this appeal.

Appellant concedes that the evidence, if believed, was sufficient to show that the offenses charged were in fact committed, but argues that the identification of appellant as the perpetrator thereof was insufficient. In view of appellant's concession aforesaid, it becomes unnecessary to detail the evidence, except so far as the same is necessary to show what if any testimony was given upon which the jury could predicate a verdict against the defendant.

There is in the record evidence that on the late afternoon of July 30, 1941, about 5:30 o'clock, the complainant in count 1, a girl nine years of age, was walking on the north side of Calaveras Street, in Altadena, in Los Angeles County. She was with her brother, aged five years, who was riding his tricycle. As they approached the intersection of El Molino and Calaveras Streets, the girl saw defendant driving west in his car; he drove past her and her brother, turned his car around at the intersection of Catherine and Calaveras Streets, and brought the same to a stop alongside the complainant and her brother. Defendant, who was alone in the car, told the children that he had lost his pocketbook on the school grounds and asked them to go with him in an effort to find it. Complainant told him that she would rather go home and ask her mother, but by this time defendant had gotten out of his car; he took hold of the complainant by the arm and told her he would not let her go home. She then told her brother to return home, but he refused. According to the testimony, the defendant then took the two children behind his car, across the street, up the lawn of the school, behind a deodar tree, to the steps leading to the school, and went through the corridor between the wall and the fence. At this point defendant told the complainant's brother to go up to the tennis court, which was in back of the playground, and look for the lost purse. The little boy demurred, but when defendant gave him a dime he acquiesced, and went toward the tennis court. Defendant then took the girl to another corridor, with high walls on each side, near some steps. It was there on the steps that the acts of perversion alleged in count 1 took place. During the commission of the offense the defendant told the girl that he would not hurt her, because he had a little girl of his own. About that time complainant's brother returned, and defendant pushed the girl down the stairs and slapped her in the face, making a mark under her left eye. She started to scream, whereupon defendant told her to desist or he would kill her; nevertheless she continued to scream. Finally he gave her a quarter, but notwithstanding she continued to scream louder than ever. Thereupon defendant ran in an easterly direction to the fence around the school yard. By that time the complainant had her brother by the hand and together they ran down the corridor and steps to the lawn in front of the school, where they met Mrs. Carrie G. Christie and Mr. Charles L. Walters. Accompanied by Mrs. Christie, the complainant went across the street to the automobile out of which defendant had come when he accosted the children. Each of them noted the California state license number 4W592. The complaining witness also testified that she saw the defendant as he ran to his car.

On the following afternoon at the sheriff's substation in Altadena, the complainant was asked to go into a room and see if the man she had seen the day before was in there. At that time there were five or six men in that room, including the defendant, the latter of whom had his hat on and his head down, and was reading a newspaper. The child returned, stating that the man she had seen the preceding afternoon was not in the room. Shortly thereafter she went back and looked at the man who had been reading the newspaper and identified him as her assailant.

The witness Mrs. Christie, who lived across the street from the complainant, was working in her kitchen on the afternoon in question. She saw the little girl and her brother playing along Calaveras Street. She observed a very light gray-colored club coupe drive up to the curb and stop. She saw a man come around the back of the car holding the complainant by her left arm. She saw the man and the child cross the street on to the school grounds, where they disappeared from her view. She was 75 feet from them and could not recognize the man's features. Shortly thereafter Mrs. Christie heard screams coming from the direction of the school and caught the words "Johnnie," "Mother," and "kill." Mrs. Christie looked about for help and saw three high school students riding bicycles, and observed Mr. Walters, a neighbor, approaching in his automobile. Hailing them, she accompanied Mr. Walters toward the steps on the west side of the school. She saw the man who had previously crossed the street with the complainant running along the open corridor of the school. At that time she observed him quite plainly before he turned and ran back into the school. She then saw the complainant and her brother coming down the steps on the other side of the building toward her. She took them across the street to the car and noted the license number of the car parked at the curb, which was the heretofore-mentioned club coupe. Mrs. Christie took the children into her kitchen, where she wrote down the license number. It was then about ten minutes before six o'clock. Looking out of her breakfast room window, Mrs. Christie saw the automobile in question going east on Calaveras Street and heard a screech of brakes as the car swerved around Mr. Walters, who was out in the middle of the street with his arms outstretched attempting to halt the automobile. Mr. Walters jumped to one side as the car swerved.

It further appears in the testimony that when Mrs. Christie hailed Mr. Walters, the latter parked his car. As he approached the school building, he saw the children coming down the steps, and also saw the figure of a man retreating through the school corridor. He gave pursuit, but could not overtake him. When he returned to the front of the school he saw a man running to a light-colored two-door car parked in front of the school. This man was about the same general build as the defendant. The man got in the car and drove east toward Mr. Walters, who was standing in the middle of the street with his arms outstretched. The car passed to the north of him, almost striking Mr. Walters' parked automobile. As this car passed him, Mr. Walters turned and read the number on the rear of the car. It was California 1941 state license number 4W592.

Another witness was Betty Lou Goldwater, who was with two other high school students. Her testimony was substantially the same as the foregoing, except that she saw the man cut across the intersection from the church to the south side of Calaveras Street. She saw Mr. Walters coming down the steps and she called to him. The man turned and looked at her and then started to run toward his car. She testified that man was this defendant. She further testified that she had an opportunity to look at the defendant when his car swerved around Mr. Walters, as she was standing in the street at that time. She noticed that his hair was gray.

About six o'clock, Mrs. Belle Robison was driving south on Santa Rosa Street, approaching Alameda Street. This intersection is one block south and west of the intersection of Calaveras and El Molino. The defendant, who was driving his automobile, failed to make a boulevard stop while traveling 40 miles per hour, and struck Mrs. Robison's automobile. He proceeded down the street without stopping, but turned east on a dead-end street, and a Mr. Fay, who had heard the crash, pursued him. Mr. Fay took the license number on the car, which was 4W592. He saw defendant get out of the car; the defendant was the only occupant thereof. Defendant at that time told Mr. Fay his name was W. Case, and inquired if the lady driving the other car was all right. Mr. Fay took the defendant back to the corner to see Mrs. Robison. The witness present on that occasion testified concerning the defendant: "He had no coat on; he had on a shirt, and I believe they were gray trousers; his shirt was just like he had been under a shower bath; and he got out all red in the face and he was terribly upset, scared or something, or whatever it was, but he was in an awful—well, in an unsettled mood. He told the ladies that it was all his fault. He just took all the blame himself and said that he would pay for everything and he wanted to go someplace and settle the matter."

At approximately 25 minutes after six, defendant telephoned his home, saying to his wife, "Don't wait for me to come home to eat. You folks go on. I will be tied up with the boys, and I will call you later in the evening." Defendant was wearing a light gray suit that day. The record also contains testimony to the effect that on the following day, when the defendant, accompanied by his attorney, called on Undersheriff Jewel of the Los Angeles County Sheriff's office, where a conversation was had, the undersheriff asked the defendant "what caused him to do this," to which defendant replied, "Captain, I have been fighting this since I was in high school."

As to count 2, it appears that on a Sunday morning in August, 1940, the prosecutrix, aged 14 years, and her brother, aged 11, were walking through a park located at Washington and Raymond Streets in Pasadena, about 9:30, on their way to church. The prosecutrix saw defendant seated on a bench near the tennis courts. Returning from church, she again saw defendant sitting on the same bench. As she and her brother approached Washington Junior High School, she saw defendant standing in the driveway leading to the school. He stopped them and asked them if they had seen a gray pocketbook and if they would like to help him find it. After some protest on their part, he instructed the boy to go around the driveway. When the prosecutrix started to go with her brother, defendant insisted that she go with him, taking her by the hand and leading her through various corridors of the school. When she started to scream, he slapped her in the face several times. Since appellant does not attack the sufficiency of the evidence to show that the crime charged was not in fact committed, we will not set forth the details thereof. The child started to scream again, whereupon defendant slapped her and she fell, striking her head. Finally, he knelt beside her, gave her a dollar, told her not to tell her mother and walked down the steps and across Raymond Avenue. When the child arrived home she was hysterical, her face was red, and her clothing was badly soiled. Her mother called police, who took the child to a hospital. Upon being returned to the school grounds, she found a barrette which she had been wearing. Upon that morning a medical examination disclosed recent tears in the child's hymeneal ring, the same having been inflicted, in the opinion of the physician, within less than 24 hours. It was the opinion of the same physician that the child had had a recent act of sexual intercourse. The prosecutrix named in court 2 positively identified the defendant as the man who outraged her person.

[1, 2] Appellant first urges a reversal because of the claimed inherent improbability that he committed the offenses charged, in view of his long and prominent association with outstanding musical and civic organizations in this community, as well as the normality of his family life. In this connection, however, it should be borne in mind that although entitled to offer evidence touching upon his previous reputation for chastity and morality, traits involved in the offenses charged against him, defendant did not choose to do so, notwithstanding his long residence in Los Angeles County. The ground advanced by appellant in support of the claimed inherent improbability in the testimony of his accusers is not the true test. Before testimony can be strictured as inherently improbable or unbelievable per se, it must appear therefrom that something has been done that it would not seem possible could be done under the circumstances described. Neither the direct nor the circumstantial evidence which we shall later discuss, nor the inferences deducible therefrom, can be thus indicted. While the arguments here advanced as to the improbability of the testimony identifying the defendant as the perpetrator of the assaults charged afforded opportunity for a persuasive argument to the jury, we find in them nothing that would justify a reviewing court in concluding that such testimony is per se unbelievable and that it was therefore the duty of the jury not only to wholly disregard it, but to accept the alibi evidence offered by the defendant, or at least find that the defendant's guilt had not been proved by the evidence to a moral certainty and beyond a reasonable doubt. As this court has often heretofore stated, reviewing judges are obviously in no position to determine the credit which should be accorded witnesses or to weigh their testimony. With undoubted recognition of this fact, and in accord with the constitutional provision, the legislature has declared that the jurors are the exclusive and final arbiters of the credibility of witnesses (Code Civ. Proc., sec. 1847), and are the judges of the effect and value of evidence addressed to them, except in those cases where it is ordained by the law that it shall be conclusive proof of the fact to which it relates. Code Civ.Proc., sec. 2061.

Appellant next attacks the sufficiency of the testimony identifying him as the man who committed the crimes charged. We are satisfied that the evidence touching upon the identification of the defendant was amply sufficient and that his challenge to it is without merit. In the first place, we must remember that the defendant was present near the scene of the crime charged in count 1. The positive identification of his automobile demonstrates that fact. Then we have the positive identification by the prosecutrix named in each count and that of a third witness, Betty Lou Goldwater, in connection with count 1. The conduct of the defendant following the automobile accident in which he figured furnished grounds for an inference that the rate of speed at which he was traveling and his disregard of a boulevard stop signal constituted an effort to flee from the scene of the criminal attack made upon the victim named in count 1. The correctness of the description of defendant's automobile and his general appearance and dress also furnished circumstantial evidence of the correctness of the child's testimony identifying him as her assailant. As to count 2, the complainant positively identified the defendant. She had seen him on her way to church and again when she returned, and was in his company and custody during the time he committed the assault upon her. The jury was also authorized to consider the identical modus operandi resorted to in the commission of both offenses, viz., the claim by the defendant to the children that he had lost a wallet or purse, coupled with the request, on both occasions that the intended victim aid him in finding it. Added to the foregoing is the fact that at the time of his arrest, when being questioned by Undersheriff Jewel, with whom the defendant had enjoyed a friendship extending over a long period of years, the latter, in answer to a question as to "what caused him to do this," replied, "Captain, I have been fighting this since I was in high school."

[3, 4] With reference to the claimed inconsistencies in the testimony of some of the witnesses, we might observe that it rarely happens that a case is presented on appeal in which some inconsistency in the testimony of some of the witnesses may not be discovered. Seldom does a case arise upon the circumstances of which the

witnesses precisely agree in all respects, but it does not follow of necessity in such cases that some one or more of the witnesses have willfully given false testimony in relation to the matters about which they have testified. Some one or more may be mistaken or some might have observed circumstances that others did not. Therefore, as we have heretofore pointed out, the law leaves to the triers of fact the exclusive right and duty to evaluate the evidence, determine its inherent value and to award to each witness the credibility which in the judgment of the jury the witness is entitled, based upon such considerations as the bias or prejudice, the candor or lack of candor of the witness, the reasonableness of his story, his relation to or interest, if any, in the outcome of the case, or the parties thereto. It therefore follows that in the case before us the jury was authorized, if it conscientiously felt warranted in so doing, as apparently it did, to reject the testimony of the defendant and the members of his family as to where he was at the time the offenses charged were committed, and to accept as true the testimony of the witnesses who positively identified the defendant, as well as the testimony given by other witnesses, circumstantial in nature, but productive of inferences upon which corroboration of the direct testimony of certain witnesses could be predicated. Uncertainties and discrepancies in the testimony of witnesses, if any there were, the strength or weakness of the identification testimony. all were matters committed to the observation and sound consideration of the jury in the first instance and to the consideration of the trial court on a motion for a new trial. The latter has approved the conclusion reached by the jury, and we being unable to say as a matter of law that substantial evidence is lacking to support the conviction, cannot disturb the same. People v. Farrington, 213 Cal. 459, 463, 2 P.2d 814.

[5] Appellant next complains of the action of the trial judge in his ruling upon the admissibility of evidence concerning what took place at the sheriff's substation at Altadena on the occasion of the identification of defendant by the children who were complainants against him and by Betty Lou Goldwater. In this connection appellant testified that there were 15 or 18 school children present at the time. Appellant's counsel then propounded to him this interrogatory: "Well, without calling it unusual, I ask you if you recall anything that happened as any of these—any one child may have come to the door of the room with the other group there while you and the police officer, your attorney and the two newspaper men were on the inside; what did you see any of them do?" To this question defendant answered: "Well, I saw them come in and point to the police officer sitting next to me and identify him and a big uproar of laughter went out." The foregoing referred to an identification made by a child who was not identified and who was not connected with the case and did not appear as a witness therein. Upon motion of the district attorney the answer was stricken. In so ruling the trial court was correct. The record is barren of any evidence as to who the other 15 or 18 children were, or what their connection was, if any, with the instant case. The reason for their presence at that time is unexplained. Whether the witness who identified a police officer was asked to point out a person in the room in connection with the charges made against defendant, or in connection with other or similar crimes, or in connection with any crimes, does not appear. As was cogently pointed out by the learned trial judge in ruling upon the motion to strike the aforesaid answer, "we haven't the slightest idea as to what was in the mind of that person when he went to the door, what he identified the individual for, whether he in fact made any identification, or what the meaning was of his pointing. In other words, all we have is an unknown person walking in the door of a room, pointing to a police officer, and what is left? We know nothing of the context, and the matter apparently is disconnected with the case, because the witness, so far as the record now shows, is a witness disconnected with this case." Thereupon appellant's counsel said, "Yes, your Honor, I don't know the name of any such witness." Had the witness who made the mistaken identification of the police officer at the substation been called as a witness at appellant's trial and there identified him, then for the purpose of impeachment such witness could have been questioned as to the erroneous identification made upon another occasion. But under the circumstances here appearing, the proffered testimony was irrelevant, immaterial and hearsay.

[6] Appellant next suggests prejudicial error upon the part of the trial court in its refusal to give to the jury, at the request of the defendant, certain cautionary instructions in which the jury would have been admonished of the dangers with which the class of prosecutions here involved is fraught; of the ample opportunity therein for the free play of malice and private vengeance; of the fact that in such prosecutions the accused is almost defenseless. We are in accord with the expression of our Supreme Court in the case of People v. Benson, 6 Cal. 221, 223, 65 Am.Dec. 506; but in that case the prosecution was based solely upon the testimony of the prosecutrix, unsupported by facts or circumstances corroborating it, and in itself so inherently improbable as to challenge belief by reasonable men. However, where as here, the testimony of the prosecuting witness is amply corroborated by direct and circumstantial evidence, it is not prejudicial error to refuse such cautionary instructions. People v. Rangod, 112 Cal. 669, 672, 44 P. 1071; People v. Adams, 14 Cal.2d 154, 162, 164, 93 P.2d 146; People v. Stangler, 18 Cal. 2d 688, 693, 117 P.2d 321; People v. Corey, 8 Cal.App. 720, 730, 97 P. 907; People v. Currie, 16 Cal.App. 731, 735, 117 P. 941; People v. Scott, 24 Cal.App. 440, 443, 141 P. 945; People v. Caldwell, 55 Cal. App. 280, 298, 203 P. 440; People v. Vaughan, 131 Cal.App. 265, 274, 21 P.2d 438; People v. Agullana, 4 Cal.App.2d 34, 38, 40 P.2d 848; People v. Garrett, 27 Cal.App.2d 249, 252, 81 P.2d 241.

[7] That a cautionary instruction is not only proper but wholesome in the interests of justice in cases where the testimony of a child prosecutrix in cases such as this is uncorroborated, is practically the unanimous holding of our courts. As was said in People v. Lucas, 16 Cal.2d 178, 182, 105 P.2d 102, 104. 130 A.L.R. 1485, "As pointed out in the Adams case, supra, '"There is no class of prosecutions attended with so much danger, or which afford so ample an opportunity for the free play of malice and private vengeance. In such cases the accused is almost defenceless, and Courts, in view of the facility with which charges of this character may be invented and maintained, have been strict in laying down the rule which should govern the jury in their finding."' * * * However, because of some unfortunate language in the case of People v. Anthony, 185 Cal. 152, 159, 196 P. 47, trial judges in some instances have felt justified, as here, in refusing such an instruction. The Anthony case is contrary to the uniform rule of decisions in this state to the effect that such an instruction is not improper. Moreover, the objection there voiced to such an instruction, that it contains 'statements of fact, not of law', would appear to have spent much of its force in view of the recent amendment to section 19 of article VI of the Constitution authorizing a trial court to comment on the facts.

"We therefore expressly disapprove of the language in the Anthony case tending to suggest the propriety of refusing cautionary instructions in cases of this character. * * *"

Because the testimony of the prosecutrix in both counts of the information before us was credibly and impressively corroborated, we would not be justified in directing a reversal herein because of the refusal of the trial court to give the requested instructions of a cautionary nature. It should also be noted that the trial court admonished the jury that in deciding the case they were to be governed exclusively by the evidence and were not to be swayed by any motives of sympathy, passion or prejudice.

A reading of the rather voluminous transcript in this case impresses us that the learned trial judge was fair and just to both the prosecution and the defense. Throughout the rather long trial he was patient and kindly disposed toward all the parties and counsel for both sides. Appellant has been fairly tried and justly convicted of the offenses charged against him.

[8] Since this cause was placed upon the calendar of this court appellant has presented an application for admission to bail pending appeal. That application was ordered submitted February 24, 1942. For the reasons herein stated, we find no abuse of discretion in the action of the trial court refusing to admit appellant to bail pending his appeal.

The application for admission to bail is denied. The judgment and the order denying defendant's motion for a new trial are, and each is, affirmed.

YORK, P. J., and DORAN, J., concurred.

GUDGER v. MANTON et al.*

Civ. 11900.

District Court of Appeal, First District,
Division 1, California.

March 18, 1942.

Rehearing Denied April 17, 1942.
Hearing Granted May 14, 1942.

1. Trial 🔑397(1)

In action for slander of title tried by the court where evidence supported allegation of malice of defendant in causing execution to be levied, finding thereon should have been made by the trial court.

2. Libel and slander 🔑135

A valid lien may not be the basis of an action for slander of title and, if the lien is invalid though the cloud may be removable, the damaging effect on the property in the meantime is measurable, depending upon the facts of the case, and fact no cloud actually existed, standing alone, does not mean there was no damage to the title.

3. Libel and slander 🔑132

The gist of any action for "slander of title" is the besmirching of the title which may be accomplished by wrongfully attempting to impose on property a charge for the obligation of another.

See Words and Phrases, Permanent Edition, for all other definitions of "Slander of Title".

4. Libel and slander 🔑132

A person is not always liable in damages for an effort judicially to assert what he believes to be true, but filing and continuing a lien the falsity of which is ascertainable to annoy and vex property owner to a point where he might consent to pay an illegal demand gives rise to action for slander of title.

5. Libel and slander 🔑136

Recordation and continued maintenance of a levy imputing actual interest in property to one known by party responsible for levy to have no such interest is not "privileged".

See Words and Phrases, Permanent Edition, for all other definitions of "Privileged".

6. Libel and slander 🔑131

Filing or recording an instrument such as a lien not actionable per se, but in fact maliciously levied and producing actual damage, is a "defamation against title" and actionable as such.

See Words and Phrases, Permanent Edition, for all other definitions of "Defamation Against Title".

7. Libel and slander 🔑139

Evidence showing a plan to secure payment of judgment against wife, by levying execution on property of husband as that of wife and that plan was conceived maliciously and pursued malevolently, justified recovery for "slander of title".

8. Attorney and client 🔑29
Libel and slander 🔑138

Where New York attorney without direct authority employed California attorneys to collect judgment of New York attorney's client with implied suggestion that pressure be brought on judgment debtor's husband to effect settlement for fee based upon percentage of New York attorney's contingent fee, New York attorney was a "principal" and not a "forwarding attorney", and was liable for "slander of title" committed by California attorneys who remained record attorneys in local suit on New York judgment in levying execution on property of husband as that of judgment debtor.

See Words and Phrases, Permanent Edition, for all other definitions of "Forwarding Attorney" and "Principal Attorney".

9. Attorney and client 🔑102
Execution 🔑462

A principal may be responsible for actual damage caused by wrongful levy of execution by his agent, but is not liable in a suit for damages for agent attorney's malicious conduct, except upon proof of authorization or ratification.

10. Libel and slander 🔑131

Malice, express or implied, is an essential element of any action based upon slander of title.

11. Appeal and error 🔑994(3)

Where case was tried by the trial court without a jury, credibility of the evidence was for the court.

12. Libel and slander 🔑139

Evidence showing the recording of an apparent lien against plaintiff's property for the debts of his wife, offers during the pendency thereof to buy for stated amount, failure to purchase when informed of the lien, market value of the property, and repeated demands for release of the lien, justified an award of damages for slander of title representing the difference between one of the offers and the price that could have been obtained for the property following the release of the levy.

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* Subsequent opinion 134 P.2d 217.

13. Libel and slander ⚷135

Contention that plaintiff was not entitled to recover for slander of title of property because of a lien, in that he brought the damages on himself by informing prospective purchasers of the existence of the lien, could not be sustained, since the "proximate cause" of damages to plaintiff's title was the slander of title and not his acknowledgment of the existence of the lien.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

14. Appeal and error ⚷886

In action for slander of title tried by the court where evidence supported and pleading alleged malice of defendant but there was no finding of that fact by the trial court, findings were amended to cover that fact by appellate court and judgment was affirmed. Code Civ.Proc. § 956a.

◆

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action to quiet title and for alleged slander of title by Francis A. Gudger against Lucile Pugh and Mabel Manton and others. From a judgment for plaintiff, Lucile Pugh appeals.

Findings amended and judgment affirmed.

Harold A. Fendler and Bertin Weyl, Jr., both of Los Angeles, for appellant.

Eckman & Lindstrom, Ralph G. Lindstrom, Arthur W. Eckman, and Robert L. Moore, all of Los Angeles, for respondent.

WARD, Justice.

This is an appeal from a judgment in favor of plaintiff for damages for alleged slander of title to certain real property belonging to him, rendered in an action brought against defendants Manton and a number of attorneys, including appellant, to quiet title to the property and to recover said damages. No question is raised on the appeal with respect to that part of the judgment quieting title in plaintiff as prayed.

The facts of the case are as follows: In 1932 a default judgment in the sum of $40,166.45 was entered in the state of New York against plaintiff's wife and in favor of Mabel Manton, growing out of a premarital tort of the former. As the result of a contingent agreement for payment of services appellant, who had represented Mrs. Manton in the action, had a "substantial interest" in the judgment. On December 6, 1934, she wrote Hamilton and Hoornaert of Los Angeles, non-appealing defendants herein, to "immediately institute proceedings for the collection of the judgment in this matter." This direction was without authorization from Mrs. Manton. Following communications between them, appellant wrote Hamilton and Hoornaert on January 10, 1935, in part as follows: "I also note your verification of our understanding upon which you are handling this matter, namely, that you are to receive 20% or 1/5 of my 40% contingent fee. * * * Of course, while the property of the husband is not subject to this judgment, nevertheless, the husband's social and financial position is a factor to be considered." On January 7, 1935, a complaint upon the New York judgment was filed in the superior court of the state of California in and for the county of Los Angeles against plaintiff's wife. Some negotiations were conducted among the parties directed toward a compromise of the suit but when no satisfactory progress was made, appellant on February 11th advised the Los Angeles attorneys to "return the papers * * * with your bill." On February 14th, Hamilton and Hoornaert complied with this direction, advising appellant at the same time that they had requested the entry of a default judgment. This was entered February 18th in favor of Mabel Manton and against Mrs. Gudger, plaintiff's wife, in the sum of $48,296.76. The appellant never paid the bill of Hamilton and Hoornaert. For several years thereafter, purporting to act for her client Mrs. Manton, appellant had other attorneys working on the case, consulted them with reference to a substitution of attorneys—which she attempted to procure—and various other phases of the litigation, including the payment to them of percentages of her contingent fee. During this time she also continued to correspond with her original Los Angeles representatives with reference to the litigation, and neither as a party interested in the Manton judgment, nor as the purported attorney for Mrs. Manton, did appellant cause other attorneys to be substituted for Hamilton and Hoornaert. C.C.P., sec. 284.

In the meantime, having attempted to obtain from appellant her authority to proceed with the collection of the default judgment, but without success, Hamilton and Hoornaert communicated with plaintiff Manton direct and received authority from her to collect the judgment against Mrs. Gudger. To this end, without advice to appellant, they gave Sadicoff, another of the defendants herein, authority to levy a writ of execution and, pursuant thereto, the sheriff levied upon "all right, title and interest of defendant * * * in and to" certain real property standing in the name of plaintiff herein, her husband. This writ appears of record in the office of the county recorder of the county of Los Angeles. Immediately thereafter the attorney for the plaintiff herein advised Sadicoff, Hamilton and Hoornaert that Mrs. Gudger had no interest in the property attached and that he would look to each of said parties for "full legal accountability." Following several months' investigation, which included the taking of depositions, the inspection of a safe deposit box, conferences, etc., Sadicoff advised Hamilton and Hoornaert that he was convinced Mrs. Gudger had no interest in any of the property attached; that she "had never had any right, title and interest whatsoever therein" and that the attachment should be released. This was not, however, done, notwithstanding much urging of Hamilton and Hoornaert by the attorney for the plaintiff herein, and the present action was commenced, as above stated, to quiet title to the property and to recover damages for slander of title, appellant Pugh being named as one of the defendants and being served with summons and complaint in New York. After a considerable lapse of time, Hamilton and Hoornaert did release the attachment.

[1] Plaintiff's complaint alleges that the claims of defendants to his property were maliciously made, and that in refusing to cause the levy of the writ of attachment to be released, although they knew it to be inoperative so far as Mrs. Gudger was concerned, defendants acted maliciously, with intent to vex and harass plaintiff, and with full knowledge that their actions would result in a cloud upon, and a slander of the title to plaintiff's property. Damages were predicated upon the malicious and wrongful acts of defendants. Appellant's answer was in effect a general denial, thereby putting in issue the allegations of the complaint. Trial by jury having been waived, the case was tried by the court as a slander of title action, but no findings were made upon the issue of malice, although the evidence is ample to support the allegations of the complaint in this particular. Such a finding should have been made, at least in so far as the appellant herein is concerned. Upon this theory appellant's further contentions will be considered.

The court found that two bona fide offers to purchase plaintiff's property were made during the period of the existence of the lien thereon; that the prospective buyers would have made such purchase for $32,500 and $35,000 respectively but for the cloud upon the title; that the value of the property on the date of the release of the attachment was not in excess of $16,500.

Appellant's initial contention is that the levy of a writ of execution upon "all the right, title and interest" of a judgment debtor in and to real property standing in the name of the judgment debtor's husband does not constitute either a lien against, nor a cloud upon, nor a slander of title to real property, but that even assuming it constituted defamation it may not be designated as a slander of title, for the reason that such levy and such defamation, if any, are privileged.

[2, 3] The validity of a lien depends upon the legality of its foundation. If valid, it may not be the basis of an action for slander of title. If invalid, the "cloud" may be removed by proceedings to quiet title, but the damaging effect, if any, on the property in the meantime is measurable in damages, depending upon the facts of the case. The fact that it may be determined there was no "cloud," may not, standing alone, be the basis of a logical argument that there was no damage to the title. The gist of any action for slander of title is the besmirching of the title, which in this case was accomplished by attempting wrongfully to impose on the property a charge for the obligation of another.

[4] A person is not always liable in damages for an effort judicially to assert what he believes to be true, but if a lien is false, and its falsity ascertainable, and the continuance thereof is prompted by an intention to annoy and vex plaintiff to a

point where he might consent to pay an illegal demand, the filing and continuance of such lien is wrongful, and gives rise to an action for slander of title to the property. Ezmirlian v. Otto, 139 Cal.App. 486, 34 P.2d 774.

[5, 6] Needless to say, such defamation could not be privileged. In Coley v. Hecker, 206 Cal. 22, 29, 272 P. 1045, 1048, the court said: "It was the filing, maliciously and falsely, of a document which clouded the title of respondent that caused the injury. The effect would be the same had said document been a forged deed, rather than an unauthorized abstract of judgment." The allegations of pleadings in a proceeding to be tried in a court of justice are sometimes privileged, but this rule does not extend to the recordation and continued maintenance of a levy imputing actual interest in property to one who is known by the party responsible for the levy to have no such interest. It is the imposition, without probable cause, of the cloud of an apparent lien, which defames the title until it is dissolved, that constitutes slander of title to real property. The filing or recording of an instrument, such as a lien, not actionable per se, but which is in fact (Davis v. Hearst, 160 Cal. 143, 116 P. 530; Fitzpatrick v. Clark, 26 Cal.App.2d 710, 80 P.2d 183) maliciously levied and produces actual damage, is a defamation against title and actionable as such. Coley v. Hecker, supra; 37 C.J., p. 130, § 594; Fearon v. Fodera, 169 Cal. 370, 148 P. 200, Ann.Cas.1916D, 312.

[7] The evidence shows that there was no justification for the retention of the lien against plaintiff's property after a clear showing that his wife had no interest therein. This fact, plus defendant's opinion as expressed, that the "social and financial position" of plaintiff was a factor to consider are amply sufficient to demonstrate that the plan was conceived maliciously, and pursued malevolently, in the hope of exacting tribute for the release of the lien.

In the findings, in determining the liability of the parties, the defendants, except in a few instances, were referred to as a group. The appealing defendant was not differentiated from the others, all being referred to as "defendants and each of them." Appellant contends that there was no evidence to justify a finding that she caused the writ of execution to be levied or recorded, or that demand was made upon her for its release, or that she refused to act in that regard.

[8] The first claim in this respect is that a forwarding attorney is not liable for wrongful acts committed by correspondent attorneys in a foreign jurisdiction. It is true that the documents filed do not disclose the name of Lucile Pugh either as a party to the action or as attorney therein. The fact that Pugh, without the knowledge of her client Mrs. Manton, or the authority of Mrs. Manton's then legal representative or attorney in fact, employed Hamilton and Hoornaert to take all steps necessary to collect the judgment against plaintiff's wife for a fee based upon a percentage of Pugh's contingent interest arising from the action in New York, Mrs. Manton's interest in such judgment being in no way involved for the payment of the fee, places appellant outside of the sphere of a forwarding attorney, and legally classifies her as a principal, employing attorney agents directly for herself. The fact that incidentally the employment may have been of advantage to Mrs. Manton in no way changes the relationship of Pugh and her legal representatives. It is true that at one time appellant notified Hamilton and Hoornaert that "it was useless for your office to proceed further in the matter," and instructed them to return the papers "with your bill." The bill for services, $200, seems to have been ignored. Several months later, Hamilton wrote Pugh: "In accordance with your instructions the above entitled matter has been lying dormant." That appellant was interested in prosecuting the claim is indicated by her reply in which she requested the Los Angeles attorneys to kindly advise "what will insure collection after the first execution is levied." As stated, Pugh discussed with Hamilton and Hoornaert the matter of their fee to be paid from her contingent interest; she also communicated with other attorneys relative to execution on the judgment, and fees to be paid them for proposed participation in the action, although her client Mrs. Manton never gave her direct authority to attempt to collect the judgment outside of the state of New York. She left Hamilton and Hoornaert as attorneys of record, however, and never caused other attorneys to be substituted for them notwithstanding that subsequently such substitution was signed by Mrs. Manton. Incidentally, this substitution was permitted to remain unused in appellant's

office files. Subsequently Pugh visited Los Angeles, but even then no action was taken to substitute other attorneys.

The delay in the issuance of execution was principally caused by Hamilton and Hoornaert's insistence that their contingent fee should be enlarged as it was found necessary to pay "others." Under a separate agreement with Mrs. Manton, the fee was increased and the levy of execution followed. There should be no hesitancy, is so far as appellant is concerned, in approving findings that "the defendants and each of them caused a writ of execution * * * to be levied," and that after demand by plaintiff or his attorney the defendants other than Sadicoff "refused to release said levy of execution."

[9, 10] Appellant contends "In any event a principal is not liable for a slander of title committed by an agent." The general rule is that a principal may under the circumstances of the particular case be responsible for actual damage caused by a wrongful levy on the part of his agent, but is not liable in exemplary damages for the agent attorneys' malicious conduct except upon proof of authorization or ratification. 7 C.J.S., Attorney and Client, p. 852, § 68. In the present case only compensatory damages were awarded. Proceedings in California upon the New York judgment originated with appellant Pugh as a principal, without the knowledge of Mrs. Manton, her client; she communicated by letter and wire with attorneys in Los Angeles, finally making a journey to California in connection with the matter, and, although she knew that "the property of the husband is not subject to this judgment," she maliciously called attention to plaintiff's property as a factor for consideration, based upon his social and financial position. Though there is evidence from appellant as a witness herein that she had no direct knowledge of the levy, the record is replete with documentary evidence that she intended to maliciously harass and annoy respondent Gudger to the point, if possible, of forcing him to pay the pre-marital tort judgment against his wife. Malice, express or implied, is an essential element of any action based upon slander of title. Fearon v. Fodera, supra. The trial court failed to make a finding thereon. The malicious intent of appellant will be disposed of in the order affirming the judgment.

[11, 12] The briefs of appellant discuss at great length the sufficiency of the evidence, the bona fides of the offers of purchase and the paucity of evidence touching the question of the market value of the property. The complaint and the evidence sufficiently conform. The attack is primarily aimed at the weight and not the admissibility of the evidence. The evidence is not inherently improbable and, if believed—a matter for consideration of the trial court—sufficient to sustain the findings. Russell v. Ramm, 200 Cal. 348, 254 P. 532; Cottingham v. Smith, 28 Cal.App.2d 345, 82 P.2d 479; Coley v. Hecker, supra. The evidence shows the recordation of an apparent lien; offers during the pendency thereof to buy for stated amounts; failure to purchase when informed of the lien; the market value of the property on various dates, taking into consideration the period of recordation; the repeated demands for release following a full investigation of ownership, and the date of release. The amount of damages awarded represents the difference between one of the offers and the price that could have been obtained for the property following the release of the levy.

[13] Other points raised by appellant are without merit, including the contention that plaintiff brought the damages on himself by informing the offerors of the existence of the lien. We cannot subscribe to the doctrine that the owner of property should enter into a contract to sell without disclosing to the purchaser the existence of a cloud against its title. The proximate cause of damages to plaintiff was the slander of title of his property and not his acknowledgment of the existence of the lien.

[14] In conformity with the provisions of section 956a, Code of Civil Procedure, a trial by jury having been waived in the above entitled matter, an additional finding should be and is hereby made. In accordance with the pleadings, the evidence and the views herein expressed, a finding numbered XV on pages 33 and 34 of the clerk's transcript filed for this appeal is hereby amended to read as follows: "That it is true that defendant, Lucile Pugh, employed defendants Hamilton and Hoornaert for the purpose of 'instituting' in California 'necessary proceedings for the collection of the judgment' obtained in New York as aforesaid, and said action numbered 382124 was instituted for that purpose. That in causing the lien to be levied, recorded and continued, defendant Lucile Pugh acted wrongfully and with malicious

intent to oppress, vex and annoy the plaintiff Francis A. Gudger." With this amendment to the findings the judgment is affirmed.

PETERS, P. J., and E. P. MURPHY, Justice pro tem., concurred.

50 Cal.App.2d 604

KARN v. WILLS et al.

Civ. 12804.

District Court of Appeal, Second District,
Division 1, California.
March 20, 1942.

1. Principal and surety 🔑179

Under the statute relating to action by surety against his debtor after an obligation becomes due and before surety has paid it himself, the principle underlying the statute is of equitable origin and cognizance and is based upon the duty of every person to perform his agreements, and, acting upon such consideration, a court of equity enforces the actual accomplishment of a thing stipulated for on the ground that what is lawfully agreed to be done ought to be done. Civ. Code, § 2846.

2. Courts 🔑92

Where Supreme Court held that the cause sued upon was an action ex delicto for fraud, the statement by the court that, under the statute, a writ of attachment could not be granted in actions where equitable relief was sought, was not controlling. Code Civ.Proc. § 537.

3. Attachment 🔑5

Where $4,000 worth of tires were delivered to a partnership in reliance upon contract of guaranty by the terms of which guarantor was to receive 10 per cent. of profits of partnership which allegedly defaulted on contract of purchase, action brought by guarantor to compel payment of purchase price or return of tires to seller, and for an accounting was an action for the recovery of a specific sum of money upon an "express contract", and hence an attachment would issue regardless of the fact that the exercise of equitable powers of the court was also incidentally involved. Code Civ. Proc. § 537.

See Words and Phrases, Permanent Edition, for all other definitions of "Express Contract".

4. Attachment 🔑5

Under statute providing for attachment, phrase "direct payment of money" does not mean direct to plaintiff, since by the use of the word "direct" the Legislature intended merely to exclude causes of action for unliquidated sums of money and not to exclude collateral contracts, for a collateral contract or promise may be for the "direct payment of money" as well as the principal promise. Code Civ.Proc. § 537; § 538, subd. 1.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by B. G. Karn against Howard W. Wills and others, wherein a writ of attachment was issued. From an order denying the motion of Anthony A. Alphier and another for the discharge of the writ of attachment, Anthony A. Alphier and another appeal.

Order affirmed.

William E. Empey, Jr., of North Hollywood, for appellants.

No appearance for respondent.

YORK, Presiding Justice.

This appeal is prosecuted by Anthony A. Alphier, individually, and Alphier and Wills Tire Company, a copartnership, from an order denying their motion for the discharge of a writ of attachment. Respondent Karn has made no appearance in this court, and the following statement of facts is taken from appellants' brief and the clerk's transcript, which two documents comprise the record on appeal.

On March, 1940, defendants Alphier and Wills formed a copartnership under the name of Alphier and Wills Tire Company, for the purpose of conducting a general retail tire business. In connection therewith, respondent Karn and defendant Wills (on behalf of himself and his partner Alphier) entered into an agreement whereby Wills promised to pay to Karn ten per cent of the profits made from the business, in consideration for which Karn agreed to "have a consigned stock of tires delivered to the above address, the total amount not to exceed at any time $4,000.-

00." Pursuant thereto, respondent Karn entered into a written contract with defendant Fisk Tire and Rubber Company under the terms of which he guaranteed payment for all goods sold by said company to the partnership. The Fisk Company thereafter sold and delivered to the partnership a stock of tires of the value of $4,000, which sum Wills and Alphier agreed to pay in monthly installments of $400, and executed and delivered to the Fisk Company their promissory note for $4,000. Upon default in their first monthly payment to the Fisk Company, respondent Karn brought action against Wills and Alphier, joining the copartnership and the Fisk Company, and prayed that Wills and Alphier be compelled to pay to the Fisk Company the sum of $4,000, or in the alternative, to return the stock of tires to said company; that Wills and Alphier render an accounting of the profits made from the business, and that he be awarded a judgment against the partners for an amount equal to ten per cent of the profits realized from the business, it being alleged in the amended complaint that "said Fisk Co. has orally agreed to accept said tires so sold to defendants, as aforesaid, in satisfaction of said obligation, but that said defendants Wills and Alphier have failed and refused to return said tires to said Fisk Co."

A writ of attachment issued in connection with said suit, but none of the steps taken to procure its issuance appears in the record before this court. On June 29, 1940, the trial court denied appellants' motion to discharge the said writ of attachment.

Upon this appeal from the order denying such motion appellants present the statement of the question involved as follows: "May an attachment properly issue in an action by a surety or guarantor to compel the principal obligors to pay and satisfy the principal obligation due another, when the surety or guarantor has not paid the principal obligation, and where there is no allegation of any indebtedness due and payable to plaintiff?"

While it is admitted that section 2846 of the Civil Code permits a surety to maintain an action against his debtor after an obligation becomes due and before such surety has paid it himself, appellants maintain that such action is wholly equitable in nature, and will not support an attachment. It is further argued that "direct payment of money" under section 537 of the Code of Civil Procedure means that plaintiff must be suing on a money demand or indebtedness due to him.

[1] With respect to section 2846, supra, which provides that a surety may compel his principal to perform the obligation when due, it is stated in 23 Cal.Jur. 1072: "The principle underlying this statute is of equitable origin and cognizance, and is based upon the duty of every person to perform his agreements; acting upon this consideration a court of equity enforces the actual accomplishment of a thing stipulated for on the ground that what is lawfully agreed to be done ought to be done. (Williams v. Coleman, 70 Cal.App. 400, 233 P. 397; Josephian v. Lion, 66 Cal.App. 650, 227 P. 204.) Under this rule a surety may bring an action to enforce payment of the obligation by the principal without first making payment himself. (Kreling v. Kreling, 118 Cal. 413, 50 P. 546; Los Angeles Rock & Gravel Co. v. Coast Construction Co., 185 Cal. 586, 197 P. 941, stating that a surety against whom a judgment has been rendered, may, without making payment himself, proceed in equity against the principal to subject the estate of the latter to the payment of the debt; Williams v. Coleman, supra, holding that a surety need not defer his action until the creditor has obtained judgment against him, or until he has paid the debt.)" See, also, Eastin v. Roberts, Carpenter & Co., 19 Cal.App.2d 567, 571, 66 P.2d 224.

[2] In support of their contention that an equitable action does not authorize an attachment, appellants cite the case of Hallidie v. Enginger, 175 Cal. 505, 166 P. 1, 2, in which it was stated: "And, finally, let it be remembered that our statute, and statutes like ours grant a writ of attachment only in cases ex contractu, and therefore deny it, both in actions ex delicto and in actions where equitable relief as such is sought." It should be noted, however, that the Supreme Court in that case held that the cause there sued upon was an action ex delicto for fraud, and the decision, therefore, is not controlling here.

In Bennett v. Superior Court, 218 Cal. 153, 160, 21 P.2d 946, 948, it is stated:

"The weight of the decisions of this state is to the effect that, where the foundation of the action is a demand for equitable relief the attachment will not issue, but, as the authorities state, where some exercise of equitable powers, as in settling accounts and striking a balance, is incidentally involved in the action, the writ will issue if the pleadings warrant it. Hallidie v. Enginger, 175 Cal. 505, 166 P.1; De Leonis v. Etchepare, 120 Cal. 407, 52 P. 718; Kohler v. Agassiz, 99 Cal. 9, 33 P. 741.

"Stanford Hotel Co. v. M. Schwind Co., 180 Cal. 348, 181 P. 780, 782, disposed of questions very similar to those presented in the instant case. One of the reasons assigned as grounds for discharging the attachment was that it was an action in equity. In that case the prayer of the complaint was for a temporary restraining order enjoining defendants from selling or otherwise disposing of the property involved in the bill of sale, and that the sale be declared void, and that it be decreed that the defendant held the property charged with the payment of plaintiff's claim in the sum of $3,617.60, that the property be sold, and for further and proper relief. The court points out that in that case, as in the instant case, there was no suggestion that fraud entered into the making of the contract. In discussing whether or not an attachment would lie, the court said: 'If a recovery upon such a contract is the purpose of the suit, so far as the right of attachment is concerned, it is immaterial whether the action be regarded as strictly legal or strictly equitable, or partly legal and partly equitable. The subdivision [Subd. 1, sec. 537, Code of Civ.Proc.] does not in terms prescribe that the action must be one in law, or that it may not be one in equity, or that it may not be one of either law or equity, or of both. Hence it is not necessary in order to uphold the writ of attachment to establish the proposition that the action is either legal or equitable. *What must be established is that the action is based upon contract, either express or implied, for the direct payment of money.* It is clear that this action addresses itself to both the legal and the equitable powers of the court. But that circumstance will not operate to deny the plaintiff a writ of attachment if he is seeking recovery upon the breach of such contract. * * * Consequently, even if such an action may properly be regarded as partially legal and partially equitable, it will make no difference. The plaintiff is nevertheless entitled to a writ of attachment by virtue of the fact that he is suing for a recovery upon the contract which is the gravamen of the action.' * * * The rule is established upon well-considered authority that, if upon the examination of the complaint the gravamen of the action forces the conclusion that it is an action for the recovery of a specific sum of money upon a contract, express or implied, an attachment will issue regardless of the fact that the exercise of equitable powers of the court are also incidentally involved." (Emphasis added.) See, also, McCall v. Superior Court, 1 Cal.2d 527, 36 P.2d 642, 95 A.L.R.1019.

The reasoning of the Bennett case, supra, especially the reference and quotation from the Stanford Hotel Co. v. M. Schwind Co. opinion, is particularly applicable to the facts presented by the case here under consideration.

[3] The contract between respondent Karn and the partnership for the delivery to the latter of a consignment of tires provides that the total amount of such consignment shall not exceed the sum of $4,000 at any time. Thereafter, the Fisk Tire and Rubber Company delivered to the partnership $4,000 worth of tires, relying upon its contract of guaranty with respondent Karn by the terms of which the latter guaranteed payment for all goods sold by said company to such copartnership. An examination of the amended complaint herein forces the conclusion that it is an action for the recovery of a specific sum of money upon an express contract, and that, therefore, an attachment will issue regardless of the fact that the exercise of equitable powers of the court are also incidentally involved.

[4] Appellants' contention that "Direct payment of money under Code Civ.Proc. § 537, means direct to plaintiff," cannot be sustained because while the language "direct payment of money" has been held to be obscure and uncertain, nevertheless when construed in connection with subdivision 1, section 538 of the same code, the courts of this state have come to the conclusion that by the use of the word "direct," the legislature "intended merely to exclude causes of action for unliquidated sums of money, and not to exclude collateral contracts, for a collateral contract or promise may be 'for the direct payment of money' as well as the principal promise." 3 Cal.Jur. 415, citing Willett & Burr v. Alpert, 181 Cal. 652, 185 P. 976; Dunn v. Mackey, 80 Cal. 104, 22 P. 64; Hathaway v. Davis, 33 Cal. 161.

For the reasons stated, the order appealed from is affirmed.

DORAN, and WHITE, JJ., concurred.

20 Cal.2d 65

COHN v. COHN et al.

S. F. 16564.

Supreme Court of California.
March 25, 1942.

1. Taxation 🔑856, 889

Generally, the state assesses privilege of succeeding to property and computes the tax upon interests of legatees and the degree of relationship, if any, to decedent.

2. Wills 🔑736

The inheritance tax is not one of the "expenses of administration" or a charge upon general estate of decedent, but rather it is collectible out of each specific share or interest to which the beneficiary succeeds.

See Words and Phrases, Permanent Edition, for all other definitions of "Expense of Administration".

3. Wills 🔑736

Under Inheritance Tax Act, the personal representative of estate of decedent is primarily liable for payment of inheritance tax, and tax is chargeable against money and other property of the estate in his hands, but fact that personal representative must pay the tax and is authorized to deduct amount assessed against distributive share of each person succeeding to estate does not change the nature of the tax as one upon the right to inherit. Gen.Laws 1923, Act 8443, §§ 3, 9.

4. Wills 🔑736

The provisions of Inheritance Tax Act concerning collection of the tax are "administrative" in character, and they do not fix liability for tax upon the estate. Gen.Laws 1923, Act 8443, §§ 3, 9.

See Words and Phrases, Permanent Edition, for all other definitions of "Administrative".

5. Wills 🔑736

The heirs and legatees of a decedent may agree among themselves as to apportionment of inheritance tax, but tax becomes fixed at date of decedent's death and accrues against shares of legatees in accordance with terms of will, and the agreement of heirs and legatees does not affect state's right to the tax or change basis upon which tax is to be computed.

6. Wills 🔑736

In absence of a contrary intent clearly expressed, a contract by which beneficiaries under a will agree to divide estate differently than testator provided does not shift the responsibility for inheritance tax, but each beneficiary must pay amount assessed by state upon value of property bequeathed to him, instead of upon share which he has agreed to accept under terms of the contract.

7. Contracts 🔑152

The terms used in a written contract are to be construed according to ordinary and usual meaning of the language, unless an intent that they should be interpreted otherwise plainly appears.

8. Executors and administrators 🔑289

An estate of a decedent is "available for distribution" only if it is legally capable of being distributed and under state inheritance tax laws an estate is not distributable until all such taxes have been paid. Probate Code, § 1024.

See Words and Phrases, Permanent Edition, for all other definitions of "Available for Distribution".

9. Wills 🔑230

Where agreement in settlement of a will contest provided that contestants would accept 55 per cent. of the estate available for distribution, the remaining 45 per cent. thereof to be distributed to respondent individually, the phrase "available for distribution" would be construed as indicating intention of parties to divide amount remaining in estate after payment of all taxes. Probate Code, § 1024.

10. Contracts 🔑154

Where one construction would make a contract unreasonable and another construction equally consistent with the language would make it reasonable, the latter construction is the one which must be adopted.

11. Action 🔑6

In action for declaratory relief to construe contract entered into by beneficiaries under a will in settlement of will contest, documents offered by defendants for purpose of showing that plaintiff had admitted that she was obligated under the agreement to pay inheritance tax upon the 80 per cent. interest devised to her assignor rather than upon the 45 per cent. interest which she agreed to accept, were properly rejected, where none of the documents showed any material facts sought to be established by defendants.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Robert L. McWilliams, Judge.

Action by Bertha Cohn, as assignee of Levi Cohn, against Alfred Cohn and others, for a declaratory judgment construing a contract entered into in settlement of a will contest. From an adverse judgment, the defendants appeal.

Affirmed.

Joseph A. Brown, O'Connor, Neubarth & Moran, Tobin & Tobin, M. L. Choynski, Milton D. Sapiro, Norman A. Eisner, Frederick W. McNulty, and Joseph T. O'Connor, all of San Francisco, for appellants.

James K. Abercrombie, of Visalia, and Gregory, Hunt & Melvin and Wallace Sheehan, all of San Francisco, for respondent.

EDMONDS, Justice.

After certain heirs of Charles Cohn filed a contest of his will, they entered into a contract with Levi Cohn, a brother of the deceased, by which each agreed to accept a stated amount in settlement of his interest in the estate. Subsequently a dispute arose among the parties to the contract concerning the apportionment of the inheritance tax between them, and the respondent, as the assignee of Levi Cohn, brought this action for declaratory relief. The trial court construed the contract as an agreement upon the part of each heir to take a stated percentage of the amount remaining in the estate after the payment of all taxes, and the appeal is from the judgment rendered accordingly.

The will of Charles Cohn devised and bequeathed four-fifths of his estate to his brother, Levi Cohn. The remaining one-fifth was divided between the appellants, who are five brothers and sisters and the issue of a deceased brother and sister. Under the contract made by the heirs, the appellants agreed to accept "fifty-five (55) per cent of the estate available for distribution," the remaining "forty-five (45) per cent thereof to go to and be distributed to * * * [Levi Cohn] individually * * *." Following the execution of this contract, the will was admitted to probate, and all claims, expenses of administration, the federal estate tax and inheritance taxes were paid in full.

As the agreement of the heirs did not affect their liability for the inheritance tax, the state assessed and collected approximately $100,000 based upon the provisions of the will. Of this amount, $94,886 was charged against the interest of Levi Cohn and the balance charged ratably against the appellants. The respondent successfully contended in the trial court that, in determining the share of each of the heirs under their agreement of compromise, the tax paid upon all of the interest should be deducted from the value of the estate, and the remainder, or the amount "available for distribution" apportioned as agreed upon. The position of the appellants is that the contract makes no provision for the payment of the inheritance tax and that the interest of Levi Cohn is chargeable with four-fifths of the amount paid to the state. If this theory is correct, the appellants will pay only one-fifth of the tax although they receive 55 per cent of the estate.

[1-4] Generally speaking, the state assesses the privilege of succeeding to property, and computes the tax upon the interests of the legatees or devisees and the degree of relationship, if any, to the decedent. In re Estate of Wilmerding, 117 Cal. 281, 49 P. 181; In re Estate of Miller, 184 Cal. 674, 195 P. 413, 16 A.L.R. 694; In re Estate of Watkinson, 191 Cal. 591, 217 P. 1073; In re Estate of Bloom, 213 Cal. 575, 2 P.2d 753; In re Estate of Rath, 10 Cal.2d 399, 75 P.2d 509, 115 A.L.R. 836. The tax is not one of the expenses of administration or a charge upon the general estate of the decedent; it is collectible out of each specific share or interest to which the beneficiary succeeds, and not from the general property of the estate. In re Estate of Wilmerding, supra; In re Estate of Kennedy, 157 Cal. 517, 108 P. 280, 29 L.R.A.,N.S., 428; In re Estate of Chesney, 1 Cal.App. 30, 81 P. 679; 24 Cal.Jur. 460. Under the Inheritance Tax Act of 1921 (Stats.1921, p. 1503, sec. 3; Deering's Gen.Laws, 1923, Act 8443), which was in effect at the date of Charles Cohn's death, the inheritance tax constitutes a lien upon the property passed or transferred, and executors and administrators are liable for it. By Section 9 of the Act, any executor or administrator having in charge any legacy or property for distribution, is directed to deduct the tax therefrom, or, if the property be not money, he is di-

rected to collect the tax thereon from the legatee. Under these sections, therefore, the personal representative of the estate is primarily liable for the payment of the tax and it is chargeable against the money and other property of the estate in his hands. However, the fact that the executor or administrator must pay the tax and is authorized to deduct the amount assessed against the distributive share of each person inheriting or succeeding to the estate does not change the nature of the tax as one upon the right to inherit. The provisions concerning collection of the tax are administrative in character; they do not fix the liability for it upon the estate. Hostetter v. United States, 3 Cir., 113 F.2d 64.

[5, 6] Admittedly, the heirs and legatees of a decedent may agree among themselves as to the apportionment of the inheritance tax, but it becomes fixed at the date of death and accrues against the shares of the legatees in accordance with the terms of the will. Such an agreement does not affect the right of the state to the tax or change the basis upon which it is to be computed. In re Estate of Rossi, 169 Cal. 148, 146 P. 430; In re Estate of Holt, 61 Cal.App. 464, 215 P. 124; Kelso v. Sargent, 11 Cal.App.2d 170, 54 P.2d 26. And in the absence of a contrary intent clearly expressed, a contract by which the beneficiaries under a will agree to divide the estate differently than the testator provided, does not shift the responsibility for the inheritance tax. Each beneficiary must pay the amount assessed by the state upon the value of the property devised or bequeathed to him by the will instead of upon the share which he has agreed to accept under the terms of the contract. Kelso v. Sargent, supra. Although the present compromise agreement makes no reference to the inheritance tax, the contracting parties agreed to accept certain percentages of the estate "available for distribution," and the controversy which has arisen centers upon the meaning of these words. The appellants contend that they simply paraphrase the language used by the testator in his will and were intended to identify the property described by him as: "All my estate of every kind and character whatsoever and wheresoever situate and not required for the payment of funeral expenses, expenses of last illness, properly proven debts, and expenses of administration, * * *." But thus construed, the phrase would be superfluous. The heirs could only agree upon a division of the amount remaining in the estate after the payment of all debts and expenses of administration; these deductions would have to be made regardless of any contract between them.

[7] Terms used in a written contract are to be construed according to the ordinary and usual meaning of the language unless an intent that they should be interpreted otherwise plainly appears. Scudder v. Perce, 159 Cal. 429, 114 P. 571; Alderson v. Houston, 154 Cal. 1, 96 P. 884.

[8, 9] An estate is "available for distribution" only if it is legally capable of being distributed, and under the inheritance tax laws of this state an estate is not distributable until all such taxes have been paid. Furthermore, section 1024 of the Probate Code, which superseded former section 1669 of the Code of Civil Procedure, declares that before any decree of distribution is made, the inheritance tax must be paid. See In re Estate of Cohn, 20 Cal.App.2d 550, 67 P.2d 362. Only when these statutory requirements have been satisfied may the estate be distributed, and the language used by the parties to the compromise agreement clearly indicates an intention to divide the amount remaining in the estate after the payment of all taxes.

The case of In re Estate of Chesney, supra, relied upon by appellants, merely holds that in determining the amount of money in the hands of an executor available for the payment of a particular legacy, the court was not required to take into consideration the amount of the inheritance tax imposed upon other bequests. Instead of being of any aid to appellants, the decision is contrary to their position, for it implicitly recognizes that a bequest is not available for distribution until the inheritance tax levied thereon is paid.

[10] Another factor which is entitled to consideration in construing the agreement is that if the contention of the appellants were correct and $94,886 of the tax is deducted from the interest of Levi Cohn under the will, the respondent will receive only about 30 per cent of the estate, based upon a market value of $650,000. On the other hand, if the entire tax is deducted from the value of the estate before it is apportioned among the heirs, the respond-

ent will receive 45 per cent of the amount "available for distribution." Where one construction would make a contract unreasonable or unfair, and another construction, equally consistent with the language, would make it reasonable, fair and just, the latter construction is the one which must be adopted. Stein v. Archibald, 151 Cal. 220, 90 P. 536; Yeremian v. Turlock, etc., Co., Inc., 30 Cal.App.2d 92, 85 P.2d 515.

[11] The appellants complain that the trial court committed prejudicial error in rejecting certain documents which they offered in evidence. By these documents, it is asserted, the respondent admitted that she was obligated to pay the tax assessed upon the 80 per cent interest of Levi Cohn, and they should have been admitted in evidence as conduct upon the part of the respondent consistent only with a construction of the compromise agreement contrary to that now advanced by her.

The documents, however, do not support the appellants' statements concerning them. In the first of them, which is entitled, "Objections of Bertha Cohn to Confirmation of the Report of the Inheritance Tax Appraiser and to the Fixing of the Inheritance Taxes in Accordance Therewith, and Petition for Adjudicating said Tax," the respondent claimed that the inheritance tax should be based upon the interests allocated by the settlement and that she is liable only for 45 per cent of the tax. This pleading is in accord with her present position.

The second document is a stipulation entered into between the attorneys for the respondent and those representing the state controller by which the amount of the inheritance tax was levied upon the interests of the legatees as set forth in the will. This stipulation may not be construed as an admission that the respondent is liable for 80 per cent of the tax. She had previously objected to the basis upon which the inheritance tax was levied, and the stipulation was intended only as an agreement establishing the total tax to be paid to the state by the executor. Neither the compromise agreement nor the manner in which the tax should be ultimately charged to the respective parties in interest was in any way involved.

The final document is a petition by the respondent for partial distribution of the estate. This was filed in 1935. In it, the respondent asked that the court order the executor to deliver 45 per cent of the estate to her. No mention whatsoever is made of inheritance taxes being charged against her share of the partitioned property. As none of the three documents shows any material fact sought to be established by the appellants, they were properly excluded from evidence.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.

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20 Cal.2d 71

RITTENHOUSE v. SUPERIOR COURT OF LOS ANGELES COUNTY.

L. A. 18096.

Supreme Court of California.

March 26, 1942.

As Modified on Denial of Rehearing April 23, 1942.

1. Prohibition 🔑27

In proceeding for a writ of prohibition to restrain superior court from trying deputy sheriff for accepting a bribe from operator of bookmaking joint, evidence showed that grand jury investigation at which petitioner testified was held for sole purpose of determining whether petitioner had accepted money to protect persons guilty of violating state gaming laws and hence petitioner was not entitled to immunity granted by statute to witnesses testifying in investigation of gaming. Pen.Code, §§ 68, 330, 334, 337a.

2. Witnesses 🔑304(4)

No protection is afforded a witness testifying in an investigation when the subject of the investigation is bribery, but protection is confined solely to those witnesses who testify in a case where the defendant is charged with gaming or in an investigation of the offense of gaming. Pen.Code, §§ 68, 330, 334, 337a.

HOUSER, J., dissenting.

In Bank.

Proceeding by Charles J. Rittenhouse for a writ of prohibition directed to the Superior Court of Los Angeles County to restrain such court from trying a certain criminal action therein pending against petitioner, or from making any order or taking jurisdiction in such action, except to dismiss it, and for a writ of review of an order entered by the court denying petitioner's challenges of its jurisdiction.

Petition for writ of prohibition denied, and alternative writ discharged, and petition for writ of review denied.

Rehearing denied; EDMONDS and CARTER, JJ., dissenting.

Morris Lavine, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, Harold W. Kennedy, Asst. Co. Counsel, John F. Dockweiler, Dist. Atty., and W. E. Simpson, Deputy Dist. Atty., all of Los Angeles, for respondent.

CURTIS, Justice.

Petition for a writ of prohibition directed to the Superior Court of the State of California, in and for the County of Los Angeles, to restrain said court from trying a certain criminal action therein pending against petitioner, or from making any order or taking jurisdiction in said action except to dismiss said case.

Petitioner was charged in the indictment with the crime of bribery in violation of section 68 of the Penal Code. Said indictment contained 61 counts, each of which was in the same language excepting as to dates. Petitioner during the entire time embraced within the accusations of said indictment was a deputy sheriff of the county of Los Angeles, and it was charged in Count One of said indictment that defendant on the 26th day of September, 1938, "did wilfully, unlawfully, corruptly, knowingly and feloniously, ask, receive, and agree to receive of and from John R. Osborne, a bribe, to-wit: the sum of One Hundred Dollars ($100.00), lawful money of the United States, for the purpose of corruptly influencing the action of said defendant, Charles Rittenhouse, and upon an agreement and understanding that the action of said defendant, Charles Rittenhouse, upon a matter then and there pending, and which was then and there before, and which might be brought before said defendant, Charles Rittenhouse, in his official capacity, to-wit, the arrest of the said John R. Osborne, and his agents and employees, for violations and a violation of various subdivisions of Section 337a of the Penal Code of the State of California, should be unlawfully and corruptly influenced thereby, said defendant, Charles Rittenhouse, being then and there an executive officer, to-wit, a duly appointed, commissioned and acting Deputy Sheriff of the County of Los Angeles, State of California."

Respondent filed a demurrer and answer to said petition. In view of the conclusion which we have reached, the issues raised by the answer become immaterial.

The indictment was returned on May 28, 1941. Prior thereto and on May 14, 1941, petitioner, in response to a subpoena issued and served on him, testified before the grand jury of said county in an investigation then being made by said grand jury. In his petition for said writ petitioner has set forth certain matter occurring before the grand jury, on the occasion of his appearance as a witness before that body and has made the reporter's transcript of his testimony taken at that time a part of his said petition. It is petitioner's contention that at said session of the grand jury he testified to matters concerning gaming in the county of Los Angeles, and particularly with reference to gaming at a place operated by one John R. Osborne in the so-called West Hollywood strip, which is not within the limits of any city and is therefore under the police jurisdiction of the county of Los Angeles. He accordingly claims that he was given statutory immunity under section 334 of the Penal Code, "and that such statutory immunity has removed the jurisdiction of said superior court to try the petitioner on the charge on which he was indicted."

On the other hand, respondent contends that petitioner testified voluntarily before said grand jury and expressly waived any immunity afforded him by the terms of said section 334. As a further defense to said petition, respondent urges that the immunity provided for by said section of the Penal Code attaches only in those cases in which the investigation concerns gaming violations, and that it may not be invoked when, in an investigation of another class of offense, testimony respecting gaming is received because it is relevant to such other offense under investigation. In view of the conclusion we have reached in respect to this last-mentioned contention, we deem it unnecessary to consider the argument of respondent that petitioner voluntarily testified before said session of the grand jury and expressly waived the immunity afforded by the terms of section 334 of the Penal Code.

Respondent's position, as indicated by the language of its second contention stated above, is that the investigation at which petitioner testified was one to determine whether section 68 of the Penal Code [Receiving a Bribe by a Public Officer] had been violated by petitioner, and not whether section 337a or any other section of the Penal Code concerning the offense of gaming had been violated. In the case of In re Critchlow, 11 Cal.2d 751, at page 760, 81 P.2d 966, 971, this court, speaking of the immunity granted under section 334 of the Penal Code, held: "The protection is afforded only when the testimony is given in investigations of offenses which are the subject of the statute, viz., gaming; and not when for any reason the investigation is of a different class of offense."

The record before us, and particularly the reporter's transcript, clearly indicates and shows that the investigation at which the petitioner testified concerned the offense of bribery. While there was testimony which related to violations of the gaming laws of the state, this was necessarily admitted to prove the charge for which petitioner was indicted, which was accepting money from John R. Osborne to protect the latter from arrest for violating the gaming laws of the state. In the first place, these alleged violations of the gaming laws occurred during the years 1938 and 1939, and the testimony of the petitioner was given before the grand jury on May 14, 1941, from two to three years after the asserted violations of the gaming laws by Osborne, the alleged bribe-giver. The record before us not only fails to show that any proceedings were pending against Osborne based upon those violations, but the reporter's transcript shows that Osborne never was prosecuted for said offenses. The whole tenor of petitioner's testimony before the grand jury indicates that the investigation was made for the purpose of determining whether he had accepted money from Osborne to protect the latter from arrest. We shall note only a few passages from the reporter's transcript in support of the foregoing statement.

Petitioner testified that on one occasion in the early part of 1941, he had a conversation with a deputy district attorney, who stated to him: "Let me speak very frankly. After all, we are on the other side of the fence right now. In about ten days I am going before the Grand Jury, and if I do you are going to the penitentiary." To which petitioner replied: "I have played the game squarely down there. I am taking a lot of stuff that has not been coming to me because I have been played in the center with Contreras." Further on petitioner stated: "I hadn't finished my statement about what I meant by being put in the center. So Utley and Coyne then started a campaign of smear, in West Hollywood and Sunset Boulevard with my name and Contreras' name tied together, and Mr. Biscailuz's name, and they enumerated a lot of places that had been knocked over for over a year or two years. That is what I mean by saying I have been kicked around. I was constantly being called on to explain this and that report."

In his testimony petitioner admitted that there were many places where illegal gaming was carried on; in fact, they were wide open. In this connection we quote from his testimony as follows: "I mean wide open like the place over the Home Ice Company ran for over a year without ever being bothered. That's what I mean by running wide open, and there are lots of places. When Contreras said not to knock them over, I followed orders." By the expression "knock them over" petitioner evidently meant that he closed them up and arrested the operators.

In his testimony petitioner referred to a number of other places where illegal gaming was being carried on and where no arrests were made due to orders from his superiors. He said that in some instances he was instructed not to make an arrest until he saw a bet made, and that he spent long intervals of time in some of these places "until a bet would come in." He did not state whether he made an arrest or closed the place after he witnessed the making of a bet.

Petitioner testified in some detail as to the operations of Osborne, but, as stated above, that Osborne was never prosecuted as there was not evidence on which to prosecute him. He was asked whether he received "$100 a week from Mr. Osborne for protection for his bookmaking joint," to which he replied: "I received nothing from Mr. Osborne or any one else for protection or anything else at any time." At another place in his testimony, referring to a man named Utley, petitioner stated: "He also told me he knew where somebody had given me money. I told him at that time he knew where to go. There isn't a person who can say they have ever given me a cent."

After the deputy district attorney had finished questioning the petitioner, the latter made the following statement: "There is one statement I would like to make. I want you ladies and gentlemen to know that as a citizen and as a father of two boys long in the service of this country—one is a sergeant who received an appointment to Annapolis—and I have been a conscientious officer. I want you to weigh those facts and where these other facts are coming from—this Osborne with his record, a man who robbed widows and orphans at Valhalla and the Government sent him away; a man who has constantly violated every law since he has been here, even coming to Mr. Cooper and telling him that there was a corrupt officer. I want you to consider Mr. Utley and the man I have mentioned, Mr. Coyne. That is all I asked you. I believe when you weigh those things you will arrive at the right result, and that is all I ask you. Thank you for your courtesy."

[1, 2] Reading the reporter's transcript from one end to the other, we find nothing therein, or from any other source, that would indicate that the purpose of the investigation in which the petitioner testified before the grand jury was to ascertain whether the laws of the state against gaming were being violated. All acts which purported to be violations of the gaming laws of the state were shown to have been committed long before petitioner gave his testimony before the grand jury. No prosecutions for such violations were then pending. On the other hand, the record before us, and particularly the reporter's transcript, shows that the investigation at which petitioner testified was being held for the purpose, and for the sole purpose, of determining whether petitioner had accepted money to protect parties guilty of violating the gaming laws of the state. The evidence given by the petitioner concerning the offense of gaming was merely incidental and preliminary to the proof of the charge of bribery then under investigation. It goes without saying that a public officer could not be found guilty of accepting money for protecting a person guilty of violating the gaming laws of the state without some evidence to show that said laws were being violated and that the officer had knowledge of such violation. Insofar as any evidence concerning gaming was given by the petitioner before the grand jury, it was confined to proof that illegal gaming existed within his district to his knowledge. As we have seen, this evidence was offered not for the purpose of prosecuting the person guilty of violating the gaming laws, but as a foundation upon which to predicate the charge of bribery, for which crime petitioner was subsequently indicted. No protection is afforded a witness testifying in an investigation when the subject of the investigation is bribery. It is confined solely to those witnesses who testify in a case where the defendant is charged with gaming or in an investigation of the offense of gaming. In re Critchlow, supra. Petitioner's testimony was not given in either of such proceedings. He is therefore not protected from prosecution based upon the indictment charging him with the crime of bribery.

For the reasons herein stated the petition for a writ of prohibition is denied and the alternative writ is discharged. Petitioner also asked for a writ of review of the order denying his challenge to the jurisdiction of the court to try him upon said indictment in case his petition for a writ of prohibition should be denied. The petition for a writ of review is denied for the same reasons upon which we base our denial of the petition for a writ of prohibition.

GIBSON, C. J., and SHENK, CARTER, and TRAYNOR, JJ., concurred.

HOUSER, J., dissented.

50 Cal.App.2d 736

SHORE v. CRAIL.

Civ. 12853.

District Court of Appeal, Second District,
Division 3, California.
March 26, 1942.

1. Building and loan associations 🔑10

Where purchaser of building and loan association's capital stock from sole owner granted an option to seller to repurchase the stock for $1 plus a consideration to be computed under contract requiring purchaser to render personal services during existence of option, minimum salary advanced to be paid out of earnings "if and when collected," and there were no net earnings prior to exercise of option, the minimum salary paid as advance was not recoverable and hence seller could not offset amount of such salary paid against money owing to purchaser on exercise of the option.

2. Pleading 🔑37

A defendant will be presumed to have pleaded his case as favorably as the facts permitted.

3. Appeal and error 🔑909(5)

On appeal from judgment for plaintiff who sued for money due under option to purchase contract, it would be presumed that plaintiff did not breach the provision which required plaintiff to deliver to defendant a statement of assets and liabilities where only breach claimed by defendant was that plaintiff drew more as salary than he was entitled to under contract.

4. Appeal and error 🔑907(3)

When appeal is on the judgment roll, it must be presumed that the evidence supports a finding.

5. Trial 🔑404(1)

A finding will be construed with other findings to support a judgment.

6. Estoppel 🔑90(6)

Where purchaser of building and loan association's capital stock from sole owner granted option to seller to repurchase stock for $1 plus a consideration computed under contract which required purchaser to deliver to seller monthly statements of assets and liabilities and income and expenses, seller who authorized withdrawal by purchaser of more than minimum salary to which purchaser was entitled in absence of profits, was "estopped" in purchaser's action to recover money due under option, from setting up withdrawal as a breach of the contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

7. Appeal and error 🔑907(3)

On appeal on the judgment roll, the appellate court was bound by trial court's implied finding.

8. Appeal and error 🔑1033(1)

An alleged error in favor of defendant could not be considered on appeal from judgment by defendant only.

9. Interest 🔑19(2)

Under contract requiring seller on exercise of option to repurchase building and loan association stock to pay to purchaser 1 per cent. on investments in certificates in excess of existing certificates, where amount of certificates outstanding on day of contract was reflected in books of association and amount of certificates on day option was exercised was a fixed quantity, amount due purchaser was mathematically calculable and hence interest was properly allowed thereon. Civ.Code, § 3287.

10. Interest 🔑19(2)

Under contract requiring seller on exercise of option to repurchase building and loan association stock to pay to purchaser 1 per cent. on all investments in certificates in excess of existing certificates, the amount owing to purchaser was not rendered "unliquidated" so as to preclude recovery of interest thereon, because an offset against amount recoverable was allowed, where ownership of such offset might have been acquired by seller from the association subsequent to seller's exercise of option. Civ. Code, § 3287.

See Words and Phrases, Permanent Edition, for all other definitions of "Unliquidated".

11. Interest 🔑19(2)

A claim for amount mathematically calculable was not rendered "unliquidated" so as to preclude recovery of interest thereon, because an offset against such amount was allowed, where offset was itself liquidated in amount. Civ.Code, § 3287.

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Egerton Shore against Joe Crail, Jr., to recover money allegedly due under an option to purchase contract after exercise of the option by defendant, wherein defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Affirmed.

Crail, Shearer & Waters, of Los Angeles, for appellant.

Warren E. Libby and Paul C. Hill, both of Los Angeles, for respondent.

SCHAUER, Presiding Justice.

This is an appeal, on the judgment roll alone, by defendant from a judgment in favor of plaintiff in an action to recover money allegedly due under an option to purchase contract after exercise of the option by defendant. The following material facts are disclosed by the findings: On or about December 1, 1936, defendant, who was then the owner of all the outstanding capital stock of the Hollywood Building & Loan Association, sold and delivered the same to the plaintiff in consideration of the execution by plaintiff of an agreement with defendant whereby plaintiff granted defendant an option, for the period of twenty-five years, to repurchase all of such stock for the sum of $1 plus a consideration to be computed as therein provided and

PROVISIONS APPLICABLE DURING TERM OF OPTION

whereby plaintiff also covenanted that during the existence of the option he would render personal services to the association, including its active management "under the advice, counsel and supervision" of defendant; that he would "endeavor to obtain additional private investment in the certificates of said association;" that all profits should inure to the benefit of the association; that he would on or before the tenth of each month deliver to defendant "a full and complete statement of the assets and liabilities of the association as of the last day of the preceding month and of its income and expenses during the preceding month;" that he would "take as salary or other compensation for my services not to exceed the following sums, which are to come only out of earnings, except that the first One Hundred Fifty Dollars ($150.00) of my salary shall be payable regularly out of future anticipated earnings whether the earnings are yet sufficient to pay the same or not, but my salary if so advanced is to be finally paid out of earnings, if and when collected.

"One Hundred Fifty Dollars ($150.00) per month until the monthly net earnings exceed Three Hundred Dollars ($300.00) per month. * * *

"I will submit a budget to Joe Crail, Jr. [defendant], and no expense shall exceed a budget approved by him until he has approved a revised budget including such items. * * *

[PROVISIONS APPLICABLE ON EXERCISE OF OPTION]

"In addition to the dollar above provided for, provided the above provisions and obligations on my part have been fully complied with, I shall also receive upon the exercise of this option an adjustment if necessary which, combined with my salary, will make my total earnings from the association and its business one-quarter of net earnings plus my salary. * * *

"I shall also receive one per cent (1%) on all investments in certificates or shares of the association in excess of present certificates."

It will be noted at this point that of the provisions applicable on exercise of the option as above set forth those in the first paragraph call for an adjustment of plaintiff's *salary or earnings from the association* while that stated in the second paragraph is *no part* of his "total earnings from the association and its business" but is exclusively *a part of the consideration to be paid plaintiff by defendant* upon the latter's purchase of the stock in exercise of his option.

On January 21, 1939, defendant exercised the option and paid plaintiff the sum of $1 but no more, asserting that under the factual conditions and a proper construction of the contract no further payment was due. Plaintiff thereupon brought this action, alleging among other things that under his management substantial profits had been earned by the association entitling him to certain salary adjustments provided for pursuant to a sliding scale specified in the contract and that additional investments in association certificates had been made, on the excess of which over the certificates outstanding at the date of the contract there was due him from defendant an allowance or commission of one per cent. Defendant filed an answer and a cross-complaint denying that the association had earned any profits during the term of the option and charging that plaintiff had withdrawn more than the $150 per month minimum "advance" or salary to which he was entitled pursuant to the contract in the absence of earned and collected profits and that defendant's stock in the association had thereby been depreciated in value to defendant's damage.

The trial court found that the association achieved no net earnings during the option term but that the public investment in certificates had increased some $264,192. On the basis of that finding it concluded that plaintiff was entitled to no salary adjustment but that he was entitled to receive $2,641.92 (being one per cent of the certificate investment excess) from defendant. It further found that plaintiff had withdrawn *from the association* $800 more than the minimum salary to which he had been entitled and allowed this sum *in favor of defendant* as an offset against the $2,641.92 found due from him to plaintiff. It also specifically found that "it is not true that by reason of withdrawal of funds by plaintiff or any act of plaintiff that the value of stock was decreased and/or that defendant was damaged thereby." In view of the last-mentioned finding it is difficult to see on what theory defendant was allowed the benefit of the $800 overpaid by the association to plaintiff. The record shows no assignment of the claim for that amount from the association to defendant. However, we are not here concerned with possible error *in favor of defendant,* there being no appeal by plaintiff.

Defendant contends (1) that under the correct construction of the contract the minimum salary paid to plaintiff was a mere advance against earnings, that plaintiff should be required to reimburse the association for all money so advanced and that the amount *due the association* as reimbursement should be offset against any *money accruing to plaintiff from defendant* on exercise of the option; (2) that plaintiff breached the option agreement by drawing more than $150 per month salary while no profits were being earned and hence that under the provisions applicable on exercise of the option he either forfeited or there did not accrue to him the right to any compensation other than the $1 which was paid; (3) that the amount awarded plaintiff was not previously liquidated and hence that the court erred in awarding interest thereon to plaintiff. We conclude that none of such contentions is tenable.

SALARY PAID AS ADVANCE AGAINST EARNINGS NOT RECOVERABLE

[1] (1) By the language of the contract hereinabove quoted the *payment* of the $150 per month *to plaintiff* was *unconditional*; there was a *conditional provision* by which under certain circumstances the salary so paid would be charged against the *association's earnings.* That condition would arise only upon earnings by the association "if and when collected." The court found that during the pertinent period there were no net earnings; hence, obviously, the condition never arose.

It may be remarked in passing that while no California case on this subject has been called to our attention it appears to have been held in several other jurisdictions, in cases on contracts providing in various forms for advances by an employer to an employee on account of commissions to be earned subsequently, that the use of the word "advance" does not imply the creation of a debt in the first instance and generates no obligation of repayment except out of commissions earned, where none is expressly stated or fairly to be implied from provisions which are so stated (see Kane v. Auto Laks Mfg. Co., Sup. (1918), 172 N.Y.S. 275; Schlesinger v. Burland (1903), 42 Misc. 206, 85 N.Y.S. 350; Arbaugh v. Shockney (1904), 34 Ind. App. 268, 276, 277, 71 N.E. 232 (Opinion on Rehearing), 72 N.E. 668; Northwestern Mut. Life Ins. Co. v. Mooney (1888), 108 N.Y. 118, 15 N.E. 303; Minnesota Mut. Life Ins. Co. v. Fraser (1924), 128 Wash. 171, 222 P. 228; 2 C.J.S., Advance, p. 496). As already suggested, there is nothing in the contract here which on any contingency whatsoever imports an obligation on plaintiff to repay to the association (or to defendant) the minimum salary paid him.

DEFENDANT ESTOPPED TO CLAIM AS BREACH ACT PREVIOUSLY APPROVED BY HIM

(2) As to the second proposition, it is true that the court found as hereinabove related, that plaintiff caused the association to make him overpayments of salary aggregating $800. But it is also true that the contract in question was a bilateral agreement, executed by both plaintiff and de-

fendant, which gave rights to, and imposed reciprocal obligations upon, both parties. Among other things it provided that plaintiff would undertake "the active management of the association under the advice, counsel and supervision" of defendant; that each month plaintiff would deliver to defendant a statement of assets and liabilities and of income and expenses; that he would submit a budget and that no expense should exceed a budget approved by defendant.

[2-8] In addition to alleging overpayment of salary, defendant pleaded breach of the contract by plaintiff in several particulars, none of which is upheld in the findings. He did not plead any failure of plaintiff to deliver monthly the statement of assets and liabilities and of income and expenses; it is to be presumed that defendant pleaded his case as favorably as the facts permitted (Gruwell v. Seybolt (1889), 82 Cal. 7, 9, 22 P. 938; Whittemore v. Davis (1931), 112 Cal.App. 702, 708, 297 P. 640; see also Page v. City of Santa Rosa (1937), 8 Cal.2d 311, 314, 65 P.2d 775), and since the execution of the contract and its performance generally, except as assertedly breached, are averred and relied upon by both plaintiff and defendant, and since each is, in effect, permitted to recover, it will be presumed on this appeal that there was no breach by plaintiff by way of failure to deliver such monthly statements of income and expenses. Furthermore, on the issue of expenses, the court, in negating defendant's claim in that regard, specifically found that it was "not true that plaintiff caused the expenses of the operation of the * * * Association * * * to be in excess of amounts approved by the defendant." As this appeal is on the judgment roll, it must be presumed that the evidence fully supports such finding (Coyne v. Spellacy (1938), 12 Cal.2d 284, 286, 83 P.2d 715); a proper inference from that finding, construed with the others to support the judgment (Anglo-California T. Co. v. Oakland Rys. (1924), 193 Cal. 451, 460, 461, 225 P. 452), is that defendant, in performing his duty under the contract to give "advice, counsel and supervision" to plaintiff, and in passing on the budget, expressly authorized and approved the withdrawal of the extra $800. The fact that plaintiff was building up the public investment in certificates of the association in a substantial amount (an increase of more than $264,000 as of the date the option was exercised) and that he was entitled, on exercise of the option, to receive one per cent upon such amount, may well have been considered by defendant as a proper basis for permitting the withdrawal of the excess salary. Under such circumstances the defendant is estopped in an action between himself and plaintiff, from setting up the withdrawal as a breach of the contract. In any event, since the trial court impliedly found the withdrawal not to be a breach of the contract we are, on this record, bound by such finding. As noted above, if there was error *in favor* of defendant in allowing the $800 as an offset against the amount due *from him* it cannot be considered on this appeal; only plaintiff could be aggrieved thereby and he has not appealed.

INTEREST ALLOWANCE PROPER ON AMOUNT MATHEMATICALLY CALCULABLE

[9-11] (3) Lastly, there was no error in awarding interest on the amount found due to plaintiff. By the terms of section 3287 of the Civil Code "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day * * *." A mere mathematical calculation was all that was required to determine the amount due plaintiff on the claim which was allowed. The amount of certificates outstanding on the day he took over control was reflected in the books of the association; likewise, the amount of such certificates on the day the option was exercised was a fixed quantity. One per cent of the excess of the latter over the former thereupon became due plaintiff from defendant. The suggestion that such amount was nevertheless rendered unliquidated because an offset was allowed is not tenable. If we assume that the offset was properly allowed to defendant (which we do not decide) we are still confronted with the possibility that the ownership of such offset (including the right to interest on it, if any) may have been acquired by defendant from the association subsequent to his exercise of the option and the creation of his ensuing debt to plaintiff. The record is entirely silent as to how or when defendant acquired title to such claim from the association; the finding previously

quoted does determine that the value of defendant's stock was not impaired and that defendant was not himself damaged by any act of plaintiff. Furthermore, the offset appears itself to have been liquidated in amount and hence would not operate to make plaintiff's claim unliquidated. (See Hansen v. Covell (1933), 218 Cal. 622, 629-632, 24 P.2d 772, 89 A.L.R. 670.) In any event, in the absence of the evidence, we are unable to ascertain error in the judgment as rendered.

The judgment is affirmed.

SHINN, J., and SHAW, J. pro tem., concurred.

* * *

SUBLETT v. HENRY'S TURK & TAYLOR LUNCH et al.[*]

Civ. 11768.

District Court of Appeal, First District, Division 2, California.

March 25, 1942.

Hearing Granted May 21, 1942.

1. **Appeal and error 🔑1010(1)**

A finding of fact by trial court supported by uncontradicted evidence of plaintiff cannot be disturbed on appeal.

2. **Master and servant 🔑3(1)**

Where employer required employee to "kick-back" part of each payment of his wages, the repayment was not against "public policy" so as to justify recovery of amount so paid by employee on ground of violation of alleged minimum wage agreement between employer and employee's labor union. Civ. Code, § 1667, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

3. **Master and servant 🔑3(1)**

Where employer required employee to return part of each payment of his wages as a condition of employment, the agreement was not made under "duress" or "menace" so as to justify recovery of sums so paid by employee.

See Words and Phrases, Permanent Edition, for all other definitions of "Duress" and "Menace".

4. **Master and servant 🔑80(9)**

In action by employee for wages repaid employer pursuant to contract of employment based on alleged violation of collective bargaining agreement between employer and employee's labor union, evidence was insufficient to raise implication of execution of such agreement.

5. **Contracts 🔑187(1)**

The rights of a third person to sue on contract made for his benefit depend on terms of the contract and are no greater than granted by the contract as intended by the parties, or, if the contract were enforced between the nominal parties, the beneficiary being in no better position than the promisee; and to recover, the beneficiary must bring himself within the terms of the contract. Civ.Code, § 1559.

6. **Master and servant 🔑80(6)**

In action by employee, for wages repaid employer pursuant to contract of employment on ground of violation of collective bargaining agreement between employer and employee's union, when employee failed to sustain burden of proof of execution of alleged agreement, he was not entitled to recover.

7. **Master and servant 🔑73(8)**

Where employee agreed to condition of employment requiring him to "kick-back" a portion of his wages to the employer and accepted and retained the reduced amount, parties modified the amount of wages prescribed, and employee "waived" any right to recover sums so repaid on ground that repayment violated a collective bargaining agreement between employer and employee's union.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Raymond Sublett against Henry's Turk and Taylor Lunch and others for amount allegedly due as wages. From a judgment for plaintiff, defendants appeal.

Reversed.

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[*] Subsequent opinion 131 P.2d 369.

Milton Marks, of San Francisco, for appellants.

Belli & Leahy and Melvin M. Belli, all of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiff alleged in his complaint a cause of action for a balance due for wages earned under a contract evidenced by three written instruments. The defendants filed an answer denying there was any balance due the plaintiff for wages earned and denying there was any written instrument executed by the parties. After a trial before the court sitting without a jury the court made findings in favor of the plaintiff and from the judgment based on said findings the defendants have appealed.

[1] In his complaint the plaintiff, among other things, alleged: "That on or about the first day of February, 1936, defendants and each of them, by written instruments, contracted and agreed with said Waiters' and Dairy Lunchmen's Union, Local No. 30, for the benefit of the members of said Waiters' and Dairy Lunchmen's Union, Local No. 30, and particularly for the benefit of said Raymond Sublett, plaintiff, and in consideration of said Waiters' and Dairy Lunchmen's Union, Local No. 30, leasing and renting to defendants, and each of them, for the purpose of their display, a Union House card, said card by common practice, custom and usage signifying to the public that said defendants, and each of them, conformed to Union Wages, hours and practices and held themselves out to the general public as so doing, to pay plaintiff as an employee * * *" The trial court among others made a finding as follows: "That on or about the first day of February, 1936, defendants, and each of them, by written instruments, contracted and agreed with said Waiters' and Dairy Lunchmen's Union, Local No. 30, in consideration of said Waiters' and Dairy Lunchmen's Union, Local No. 30, leasing and renting to defendants, and each of them, for the purpose of their display a union house card, to pay the union scale of wages as provided in said written instruments; * * *" Said allegation in the complaint was, in short, that defendants promised to pay the union wage. The finding in response was to the same effect. The plaintiff supported his complaint by his own testimony. The defendants offered no evidence. Clearly the finding, except regarding a lease, may not be disturbed on appeal. But that conclusion does not dispose of all the points presented.

In his complaint the plaintiff alleged that the defendants paid him union wages and at the same time required him to return a part of each payment. He repaid certain sums and the judgment appealed from was for said sums together with interest. Such repayments in labor disputes are called (and will hereinafter be called) "kick-backs." The defendants assert they paid union wages. To that assertion the plaintiff replies that the defendants made such payments but required a "kick-back" of a part of the payment; that the "kick-back" was against public policy; that the "kick-back" was induced by duress and menace; and that the "kick-back" was in violation of the terms of a "collective bargaining agreement." That reply brings us to the real issues presented by the record.

[2-4] The "kick-back" was not against public policy. Civ.Code, sec. 1667, subd. 2; Jones v. Hanna, 81 Cal. 507, 22 P. 883. As the employer was entitled to say what net sum he would pay as a wage and to refuse to pay more even though the employee refused to accept it and quit and although the employer knew such would be the result the determination of the employer was within his legal rights and was not duress or menace. Santa Ana Sugar Co. v. Smith, 116 Cal.App. 422, 427, 2 P.2d 866. As to the claim that the "kick-back" was in violation of the express provisions of a "collective bargaining agreement" executed between employers and employees, the defendants assert there is no evidence that such an agreement was ever executed. That assertion we think must be sustained. The plaintiff makes no claim that there was direct evidence of the existence of a "collective bargaining agreement." However, he relies on the recitals contained in certain written instruments which he introduced in evidence as his exhibits 1, 2, and 3. The first was a union house card, or union sign as it is sometimes called in the record. The defendants had one posted in their restaurant. It was signed by no one. Among others it contained the following provisions:

"This card is the property of the hotel and restaurant employees' International Alliance and Bartenders' International League of America and cannot be bought, sold or transferred.

"The person or persons displaying this card do so in accordance with the contract entered into with a subordinate Local Union, located in the city where card is displayed, and it is agreed that he or they will give peaceable possession of same to the local union in whose jurisdiction it is displayed, or to a duly appointed or elected representative, thereof, also, that the same will be given to the president or secretary-treasurer of the H. & R. E. I. A. & B. I. L. O. A., or a duly appointed representative, on demand.

"The holder of this card agrees to comply at all times with the laws, rules, and regulations of the local union which issued said card to him."

The second exhibit was a list of union wages. The heading of the list was "Joint Wage Scale for Dairy Lunches, Cafeterias, Class B Restaurants and Class B Taverns. Waiters' and Dairy Lunchmen's Union Local No. 30 * * * Approved by Local Joint Executive Board San Francisco Labor Council and International Union * * * 6. House Managers or men in charge of establishments 7 * * * 24. No more than eight hours shall constitute a day's work * * *" It was signed by no one. There was no evidence the defendants ever saw it until it was produced at the time of the trial.

The third instrument was a licensing agreement. It was signed by no one. In form it was drawn to be signed by the employer only but there was no evidence these defendants ever signed one except the testimony of the witness who said such a document, under union rules, is required to be signed and delivered before a house card is delivered. That document, in part, was as follows:

"No. 1652

"Union Label License Agreement H. & R. E. I. A. and B. I. L. of A.

"Received of the Local Joint Executive Board of Culinary Workers, of San Francisco, Calif., International Union House Card No. . Said card is delivered to, received and held by the undersigned at No. Street, San Francisco, Calif., subject to the following conditions: * * *

"2. All employees shall receive not less than the rate of wages, and shall work within the hours and time specified by the respective wage scales adopted and approved by the said Local Joint Executive Board, and it is expressly understood that the said Board reserved the right to alter or modify or change the said scales from time to time. * * *"

The plaintiff was a member of Waiters' and Dairy Lunchmen's Union Local No. 30. Exhibits 1 and 3 are concerned with Hotel and Restaurant Employees' International Alliance and Bartenders' International League of America. There was no evidence that Local No. 30 was in any way connected with the league. There was no evidence of any kind that defendants executed a lease of any kind or nature. Looking at one and all of said exhibits it is clear that at most it may be said they contain admissions of a promise to pay union wages. But they contain nothing showing or tending to show that a "collective bargaining agreement" as to wages was ever executed. On the contrary said instruments suggest that the agreement, if any, was one between these employers only and the Waiters' and Dairy Lunchmen's Union of which plaintiff was a member. When such contract was made, what its terms were, who were covered by it when it was made, who were to be covered by it, are all matters not disclosed by any evidence whatever. Summing up the evidence there was not introduced in evidence the original or a copy of a "collective bargaining agreement," nor a bilateral agreement between these employers and the Waiters' and Dairy Lunchmen's Union Local No. 30.

[5] Section 1559 of the Civil Code provides: "When contract for benefit of third person may be enforced. A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Other states have a similar statute. 17 C.J.S., Contracts, § 519, p. 1124. However, there are certain well defined limitations to the rule. In 17 C.J.S., Contracts, § 519, p. 1137 the author states: "The rights of a third person to sue on a contract made for his benefit depend on the terms of the agreement and are no greater than those granted by the contract as intended by the parties thereto. *To recover the beneficiary must bring himself within its terms, and construction of the contract is involved.* Since recovery on a third person beneficiary contract is a recovery on the contract itself, the right of the beneficiary is no greater than if the contract were enforced between the nominal parties, the beneficiary being in no better position than the promisee."

(Italics ours.) The text is abundantly supported by authority. See Dayton v. White, Sup., 182 N.Y.S. 902; Fidelity & Casualty Co. of New York v. Plumbing Department Store, 117 Fla. 119, 157 So. 506; Marianna Lime Products Co. v. McKay, 109 Fla. 275, 147 So. 264. In the case last cited, at page 266 of 147 So., the Supreme Court of Florida said: "The real party in interest statute, supra, is permissive, not mandatory. Its effect is not to change the contract, but to allow it to be enforced by a benefited party who is a stranger to its execution. The real party in interest would not be entitled to sue on a contract to which he is a nominal stranger but for the permissive effect of the statute. *So a recovery by the real party in interest is a recovery on the contract itself.* The right to such recovery is no greater under the statute than the contract would warrant if enforced in a suit at law between the nominal parties." (Italics ours.)

[6] However, as we have shown above there was no evidence that the contract, between plaintiff's employers and plaintiff's union, contained any covenant on the subject of wages and in particular on the subject of "kick-backs." The burden was at all times on the plaintiff. In the absence of such evidence he has not shown that the wages paid him were in violation of the terms of any contract between his employers and his union. Therefore he was not entitled to recover.

[7] Moreover, whether a contract between his employers and his union was in existence he waived any right by the oral contract he made with his employers when accepting the employment. The sole evidence on that subject was given by the plaintiff. He was employed by Mr. Torlkerson to work for defendants. He testified in substance as follows: "I walked up one afternoon, he happened to be standing on the sidewalk, he told me to come to work. That was in February of 1936. He told me he had a relief manager's job open and asked me how I would like to have it. I said I would like to have it very much. He said, 'The scale calls for $27.50 but I will only pay you $25.' When he said he would only pay me $25 I understood by that it was the firm would pay the $25. I told him I would take the job. At that time I knew what the union scale was. I knew that the amount being offered to me was less than the union scale was. I knew that the amount being offered to me was less than the union scale. I told him I would come to work. I did not agree how long I would work. The job which Mr. Torlkerson offered me was a better job than I had previously had. It called for more pay. The amount $25 then offered to me was $2.70 more per week than I had been receiving. He said if I took the job I would have to kick-back $2.50 a week. I understood what the words 'kick-back' mean. I told him I would take the job." During the term of the plaintiff his position was changed at different times. In each position he received a wage which he now claims was less than the union scale. However, down to the date when he left the employment of the defendants, he accepted and now retains the reduced amount. Obviously the parties by their oral contract modified the amount of the wage prescribed by the union scale. The plaintiff is bound by the terms of the contract as so modified. Yazoo & M. V. R. Co. v. Sideboard, 161 Miss. 4, 133 So. 669, 672; Yazoo & M. V. R. Co. v. Webb, 5 Cir., 64 F.2d 902, 905.

The judgment appealed from is reversed.

NOURSE, P. J., and SPENCE, J., concurred.

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50 Cal.App.2d 726

NORRIS v. NORRIS.

Civ. 11982.

District Court of Appeal, First District, Division 2, California.

March 26, 1942.

Rehearing Denied April 25, 1942.

Hearing Denied May 21, 1942.

1. Divorce ⇨130

In action by wife for divorce on ground of extreme cruelty and desertion wherein husband filed a cross-complaint for divorce on ground of extreme cruelty, evidence sustained findings and judgment granting divorce to husband.

2. Divorce ⇨184(5)

The trial court has a wide discretion in determining whether either spouse in action for divorce was guilty of extreme cruelty.

3. Divorce ⚷184(5)

Where, in action for divorce, the findings that wife was guilty of extreme cruelty entitling husband to divorce were substantially supported by the evidence, appellate court was required to hold that trial court did not abuse its discretion in awarding divorce to husband.

4. Divorce ⚷301

Where husband obtained divorce on ground of extreme cruelty, award of custody of children to husband on theory that it was for the best interest of the children was sustained by the evidence.

5. Divorce ⚷312

In divorce action involving custody of minor children, credibility of witnesses was one within the exclusive province of the trial court whose determination was conclusive on the appellate court.

6. Divorce ⚷296, 312

Under codal provision for awarding custody of children in divorce action, trial court is allowed a wide latitude in exercise of its discretion, and the question should be decided wholly on basis of best interests of children and appellate court will not interfere except in clear case of abuse of discretion. Civ.Code, § 138.

7. Divorce ⚷296

In divorce action involving custody of minor children where husband was granted divorce on ground of extreme cruelty, award of children to husband in view of the evidence did not constitute an abuse of discretion. Civ.Code, § 138.

8. Husband and wife ⚷278(1)

Property settlements between husband and wife are valid, subject to the general rules which control the actions of persons occupying confidential relations in which the highest good faith must be observed. Civ. Code, §§ 158, 2228, 2234.

9. Husband and wife ⚷36

"Confidential relations" are presumed to exist between husband and wife and, if the husband obtains any advantage over his wife, he must stand unimpeached of any abuse of the confidence presumptively reposed in him, and failing in this he bears the burden of showing that the transaction was fair and just and fully understood by the party from whom the advantage was obtained. Civ.Code, §§ 158, 2228, 2234.

See Words and Phrases, Permanent Edition, for all other definitions of "Confidential Relation".

10. Husband and wife ⚷36

A husband is bound to highest of good faith in dealings with wife and must make full and fair disclosure to her of all that she should know for her protection concerning nature and effect of transaction, or else must deal with her at arm's length and as he would with a stranger, all the while giving her opportunity of independent advice as to her rights. Civ.Code, §§ 158, 2228, 2234.

11. Contracts ⚷94(1)

One will not be relieved from a fraudulent contract unless he has been injured by it.

12. Divorce ⚷249(2)

Where husband was granted divorce on ground of extreme cruelty, property settlement confirmed by court would not be set aside on ground of husband's fraud in obtaining it in view of provisions for monthly payments of $225, payment of $4,000 incumbrance on wife's property, provision for $150 monthly payment in event of husband's death, and doubt whether wife who would not be entitled to alimony but only an equitable division of the community property could obtain any more if the settlement were set aside. Civ.Code, §§ 146, 158, 2228, 2234.

13. New trial ⚷93

Under codal provision providing for new trial in case phonographic report of trial cannot be transcribed due to death of reporter, trial court has a wide discretion. Code Civ.Proc. § 953e.

14. Divorce ⚷151

Where notes of counsel in divorce proceeding were substantially complete as to the evidence adduced and bill of exceptions prepared in three volumes seemed to contain all the necessary testimony, refusal to grant new trial on account of reporter's death before transcription of notes taken by him was not an abuse of discretion. Code Civ.Proc. § 953e.

15. Divorce ⚷182

In divorce proceeding where wife was without funds to prosecute appeal or to pay attorneys' fees and husband was able to pay

a reasonable sum therefor, and appeal was taken in good faith and presented debatable questions which were not without substantial merit or controversy, order of trial court in denying application for reasonable allowance for costs and counsel fees on appeal would be reversed.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action for divorce by Gladys L. Norris against William J. Norris, who filed a cross-complaint for divorce. From a judgment granting defendant and cross-complainant a divorce, and from an order denying plaintiff's motion for a new trial and from an order denying her application for costs and attorneys' fees on appeal, the plaintiff appeals.

Judgment affirmed; appeal from order denying a new trial dismissed and order denying costs and attorneys' fees reversed for further proceedings in accordance with opinion.

Hanna & Morton, of Los Angeles, for appellant.

Wood, Crump & Rogers, Francis Petit, and Guy Richards Crump, all of Los Angeles, for respondent.

NOURSE, Presiding Justice.

In this action for divorce plaintiff and cross-defendant appeals from an interlocutory judgment awarding defendant and cross-complainant a divorce, from an order denying her motion for a new trial and from an order denying her application for costs and attorneys' fees on appeal.

Plaintiff married defendant, a practicing physician and surgeon, on October 25, 1922, and the parties resided in the city of Los Angeles. On February 14, 1924, a daughter, Nancy, was born and on May 1, 1930, a second daughter, Gladys Virginia, was born. The defendant was successful in his practice and the parties prospered financially, but the history of their marital life reveals that it was fraught with difficulties, friction and unhappiness. The parties resided together until February, 1934, except for five months from October, 1928, to March, 1929. The record shows that plaintiff suffered from various illnesses subsequent to the marriage culminating in a nervous breakdown as a result of which she was confined in a sanitarium from February 27, 1934, to June 18, 1934. While plaintiff was in the sanitarium defendant notified her that he intended to terminate the marriage and negotiations were commenced for the purpose of bringing about a settlement of the property rights of the parties. The property settlement agreement which provided for the division of the community property, for the maintenance and support of the plaintiff and for the custody of the children was executed on January 8, 1935, and affirmed in a supplemental agreement made in July of the same year.

On April 7, 1938, the plaintiff filed the instant action for divorce on the ground of extreme cruelty; she subsequently filed an amendment to her complaint containing a second cause of action on the ground of desertion. Defendant answered and filed a cross-complaint for divorce on the ground of extreme cruelty. After a rather extensive trial at which many witnesses testified for both sides, the court entered numerous findings in favor of defendant and cross-complainant in accordance with the allegations of the cross-complaint. The interlocutory judgment awarded the defendant a divorce from the plaintiff, gave the defendant the care and custody of the minor children, confirmed the property settlement agreement, ordered defendant to pay the sum of $225 per month to plaintiff in accordance with the property settlement agreement and assigned all of the community property not disposed of by the agreement to the defendant as his separate property. The plaintiff appeals from this judgment. The plaintiff moved for a new trial, one ground for the motion being that the death of the shorthand reporter who reported the proceedings during the early part of the trial rendered it impossible to obtain a complete transcript of the testimony and proceedings. The trial court denied the motion and plaintiff also appeals from this order. Finally, the plaintiff appeals from the order denying her application for an allowance on account of costs and attorneys' fees on appeal.

[1] Taking these appeals in the order presented, we consider first the appeal from the judgment. It is appellant's contention that the evidence does not sustain the findings of fact upon which the court granted the respondent a divorce. The findings made by the trial court upon the subject upheld the allegations of the cross-complaint in general and of necessity they can-

not be set out here verbatim. It was found that the allegations were true to the effect that appellant left the family home in 1923, that she uttered expressions of hatred towards her husband and children, that on numerous occasions in 1928 she again stated her hatred for respondent and her wish that she might leave him, that she refused to assume the responsibilities normally expected of a wife and refused to take care of her children, that she became emotionally upset and hysterical as a result of various incidents occurring in the home, and that her actions were without justification causing respondent great mental anguish and suffering. The testimony presented at the trial of the case was very extensive and in conflict concerning many of the incidents described by the witnesses. It would serve no purpose to review the evidence in support of each and every finding, but a careful study of the record indicates that in spite of the conflict in the testimony the evidence is sufficient to support all of the essential findings of fact made by the trial court. Appellant's complaint that the court failed to find on certain affirmative allegations of her answer in response to the allegations of the cross-complaint on the subject of cruelty is without merit. The findings entered by the court on the subject, when read as a whole, were full and complete and covered all of the essential facts and allegations presented on the matter.

[2, 3] The findings of fact which we have alluded to above support the conclusions of law and the judgment granting respondent a divorce. From our review of the record it would appear that the married life of the parties was one burdened with friction and unhappiness and that the trial court could arrive at no other conclusion than that the marriage should be dissolved. In justice to appellant we must state in passing that the evidence would have been sufficient to sustain a divorce in her favor had the trial court concluded that such was proper. The trial court has a wide range of discretion in determining whether either spouse was guilty of "extreme cruelty" and in view of the evidence which substantially supported the findings and conclusions of law we must hold that the trial court did not abuse its discretion in awarding the divorce to respondent. Andrews v. Andrews, 120 Cal. 184, 187, 188, 52 P. 298.

Appellant also attacks the judgment upon the ground that the court erred in awarding the custody of the minor children of the parties to the respondent. The trial court entered numerous findings of fact relative to appellant's conduct with the children and concluded that the best interest of the children would be subserved by awarding their custody and control to respondent; in the judgment the court decreed that appellant could visit the children and take them on trips within the state. Appellant's attack on this award of custody is based on her contentions that the witnesses were friends of the respondent, that respondent had prejudiced the children against appellant and that appellant was the proper person to have the care and custody of the children.

[4, 5] Here again although much of the testimony was in conflict there was substantial evidence to support the findings and the judgment. During the time when the parties were living together appellant had much difficulty in managing and controlling the children and because of her many illnesses was unable to devote the proper attention to them. Appellant's attack upon the testimony to this effect is merely an attack against the credibility of the witnesses which question was clearly one within the exclusive province of the judge of the trial court (Burrows v. Burrows, 18 Cal.App.2d 275, 278, 63 P.2d 1135, 2 Cal.Jur. 916), whose determination is conclusive on the appellate court. Bellandi v. Park Sanitarium Association, 214 Cal. 472, 480, 6 P.2d 508.

[6, 7] Under section 138 of the Civil Code the court may, in a divorce action, make such order for the custody of minor children as may seem necessary or proper. That section provides that the court is to be guided by "what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare;" and, other things being equal, if the child is "of an age to require education and preparation for labor and business, then to the father." Under this statute the trial court is allowed a wide latitude in the exercise of its discretion and the question should be decided wholly on the basis of the best interests of the child; the appellate court will not interfere with the determination except in a clear case of abuse of discretion by the trial court. Taber v. Taber, 209 Cal. 755, 290 P. 36. At the time of the trial of the instant case the children were of an age at which their edu-

cation was of paramount importance to their future development, and the evidence shows that respondent could provide for this education better than could appellant. The trial court had the benefit of having the children and their parents before it; the trial judge could observe the entire situation and in view of the evidence on the issue we find no abuse of discretion in the award of custody to the respondent.

Appellant's final attack upon the judgment is based on the contention that the court erred in finding and concluding that the property settlement agreement was fair and just and in assigning to respondent all of the community property not disposed of by the agreement. The property settlement agreement provided that respondent was to have the custody of the children for two years after which time appellant could apply to the court for an order awarding their custody to her; the respondent agreed to pay $200 per month to appellant for her support for a period of two years and thereafter to pay her the sum of $225 per month until she remarried; respondent agreed to pay an incumbrance on appellant's house and lot; appellant was to receive the sum of $4,000; and, finally, respondent agreed to pay premiums on certain life insurance which would provide appellant with $150 per month subsequent to his death. The court entered numerous findings relative to the agreement to the effect that respondent had not made any misrepresentations to appellant, had taken no advantage of her and had concealed no facts from her in regard to the community property. It then concluded that the agreement was fair, reasonable and just, and in the interlocutory decree of divorce ordered respondent to pay $225 per month to appellant in accordance with the agreement, confirmed the agreement and assigned all of the community property not disposed of by the agreement to respondent as his separate property.

The evidence produced in the lower court shows that at the time of the execution of the property settlement agreement the net worth of the community property held by the parties totaled approximately $35,000, and that at the time of the trial the net worth of respondent's estate amounted to about $98,000, though a portion of this was presumably his separate property. In 1934, the year immediately preceding the execution of the agreement, respondent's net income from his professional practice amounted to over $21,000, and by 1937 this net income had increased to about $33,000. The evidence further shows that on April 24, 1934, respondent borrowed $4,300 from an insurance company on his insurance policies which money was deposited in a bank account in his brother's name. On April 25, 1934, respondent transferred his stocks on deposit with a stock brokerage firm and his credit balance with that company to his brother. It was also established that from June, 1934, until December, 1934, only a portion of the collections received from respondent's professional practice were entered in his cash book and deposited in his regular bank account, the remainder being used to purchase cashier's checks in the sum of $6,618.50 payable to himself and his office nurse. These items were concealed from appellant, and it was under these circumstances that appellant signed the property settlement agreement on January 8, 1935, after having been recently released from a hospital where she had suffered serious illness.

[8-12] Property settlements of this character are valid, subject "to the general rules which control the actions of persons occupying the confidential relations with each other, as defined by the title on trusts." Section 158 of the Civil Code. Turning to the title on trusts we find section 2228 of the Civil Code which provides: "In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind." Every violation of the section is declared to be a fraud against the beneficiary of the trust. Section 2234 of the Civil Code. It is established law that confidential relations are presumed to exist between husband and wife; if the husband obtains any advantage over his wife he must stand unimpeached of any abuse of the confidence presumptively reposed in him, and failing in this he bears the burden of showing that the transaction was fair and just and fully understood by the party from whom the advantage was obtained. In re Estate of Cover, 188 Cal. 133, 143, 204 P. 583; Locke Paddon v. Locke Paddon, 194 Cal. 73, 80, 227 P. 715. The policy of the law in respect to such transactions can be best enunciated by quoting from In re Estate of Cover, supra, 188 Cal. at page 144, 204 P. at page

588: "In short, a husband, by reason of the marital relation, is bound in his dealings with his wife to the highest and best of good faith, and as a consequence is obligated in such dealings not to obtain and retain any advantage over her resulting from concealment or adverse pressure, and he must, if he would avoid the presumption of undue influence emanating from the procurement of any advantage over her, make full and fair disclosure to her of all that she should know for her benefit and protection concerning the nature and effect of the transaction, or else he must deal with her at arm's length and as he would with a stranger, all the while giving her the opportunity of independent advice as to her rights in the premises." See also McKay v. McKay, 184 Cal. 742, 747, 195 P. 385, where it was held that this presumption of undue influence in transactions between husband and wife prevails over other presumptions. Though we should reject the finding that the agreement had not been procured through undue influence and concealment by the respondent as not supported by the evidence, this would not dispose of the issue. It is the settled rule that one will not be relieved from a fraudulent contract unless he has been injured by it. Here the evidence does not show that any material injury resulted to the appellant. With the decree of divorce awarded to respondent on the ground of the appellant's cruelty she would not be entitled to alimony. The most that she could expect, if the settlement agreement should be set aside, would be an equitable division of the community property as provided in section 146 of the Civil Code. What that division might have been if the settlement agreement had been rejected it is not possible to say. But it is true that the property received by the appellant and the awards made by the decree are all substantial payments, and it is altogether possible that in the final analysis they will exceed whatever might have been awarded appellant under the code section.

We conclude, therefore, that though we cannot concur in the trial court's finding that this agreement was wholly free from undue advantage and concealment on the part of the respondent, we are not convinced that under all the circumstances the approval of the agreement was prejudicial to the appellant or that there is any reasonable ground to assume that a reversal of the judgment upon that issue would be beneficial to her.

[13, 14] The appeal from the order denying appellant's motion for a new trial on account of the inability to obtain a reporter's transcript because of the death of the reporter who reported a portion of the proceedings is without merit. Appellant admits that the notes of counsel "were substantially complete as to the testimony adduced" and the bill of exceptions prepared in three volumes would seem to contain all the necessary testimony of the witnesses in the trial court. Section 953e of the Code of Civil Procedure provides: "When it shall be impossible to have the phonographic report of the trial transcribed by a stenographic reporter as provided by section 953a of this code because of the death or other disability of a reporter who participated as a stenographic reporter at the trial, the court or a judge thereof shall have power to set aside and vacate the judgment, order or decree from which an appeal has been or is to be taken and to order a new trial of the action or proceeding." Under this code section the trial court is vested with a wide discretion to refuse or grant the motion for a new trial. Moore v. Specialty Oil Tool Co., 128 Cal.App. 662, 664 to 666, 18 P.2d 82. In view of the complete record presented to this court we cannot see that appellant has been prejudiced and the order denying the motion was, under such circumstances, within the discretion of the trial court.

[15] The final appeal is from the order denying appellant's application for an allowance for costs and attorneys' fees on appeal. From appellant's affidavit and the evidence in the record it appears to be uncontroverted that appellant did not have the funds necessary to prosecute the appeal or to pay attorneys' fees, that respondent is able to pay a reasonable sum therefor, and that the appeal was taken in good faith and presented debatable questions which were not without substantial merit or controversy. Under these circumstances it must be held that the court erred in denying appellant's application for a reasonable allowance for costs and counsel fees on appeal. Coleman v. Coleman, 23 Cal.App. 423, 426, 138 P. 362.

The judgment is affirmed. The appeal from the order denying a new trial is dismissed. The order denying costs and attorneys' fees is reversed and remanded for further proceedings in accordance herewith.

STURTEVANT, J., and SPENCE, J., concurred.

MAASKANT et al. v. MATSUI et al.

Civ. 2676.

District Court of Appeal, Fourth District, California.

March 27, 1942.

Rehearing Denied April 23, 1942.

Hearing Denied May 25, 1942.

1. Appeal and error 🔑930(1)

On appeal from judgment on jury's verdict, all conflicts in evidence must be resolved in respondent's favor and all legitimate and reasonable inferences must be indulged to uphold verdict, if possible.

2. Appeal and error 🔑989

When jury's verdict is attacked on appeal as unsupported by evidence, appellate court has power only to determine whether there is any substantial evidence supporting jury's conclusion.

3. Appeal and error 🔑996

When two or more inferences can reasonably be deduced from facts in evidence, reviewing court is without power to substitute its deductions for those of jury or trial court.

4. Automobiles 🔑244(29)

In action for death resulting from collision between automobile operated by deceased and automobile driven by one of defendants while on his way to stop crew of laborers, supplied by him to codefendant, from continuing certain work, as instructed by codefendant's foreman, evidence *held* sufficient to support jury's finding that defendant driver was "employee" of codefendant, not "independent contractor".

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Independent Contractor".

5. Evidence 🔑89, 265(10), 589, 591, 594

A fact is proved as against a party when established by his own or his witnesses' uncontradicted testimony under circumstances affording no indication that testimony is product of mistake or inadvertence, and, when such fact is wholly irreconcilable with a presumption sought to be invoked, such presumption is dispelled and disappears from case.

6. Automobiles 🔑246(60)

In action for death of driver of automobile colliding with automobile driven by defendant at road intersection, testimony of plaintiffs' witnesses that intersection was obstructed one and that decedent approached it at high rate of speed was insufficient to establish facts so irreconcilable with presumption of decedent's due care as to dispel such presumption and render instruction thereon erroneous. Code Civ.Proc. § 1963, subd. 4.

7. Death 🔑104(2)

In death action, instruction that deceased is presumed to have exercised ordinary care is proper, unless testimony as to his acts and conduct proves facts wholly irreconcilable with such presumption under circumstances affording no indication that such testimony is product of mistake or inadvertence. Code Civ.Proc. § 1963, subd. 4.

8. Automobiles 🔑246(60)

In action for death of automobile driver as result of collision with automobile driven by defendant, instruction that presumption is that decedent was exercising ordinary care for his own safety and that such presumption is species of evidence and must prevail and control jury's deliberations until overcome by satisfactory evidence, was proper. Code Civ.Proc. § 1963, subd. 4.

9. Trial 🔑260(8)

In action for death of automobile driver as result of collision with automobile driven by defendant, where jury was fully instructed on contributory negligence and court gave defendants' requested instruction that decedent's negligence, however slight, barred recovery by plaintiffs, if it directly and proximately contributed to happening of accident, refusal of defendant's requested instruction that any negligence of decedent, however slight, which directly and proximately contributed to happening of accident, barred recovery, was not error.

10. Trial 🔑305

Counsel in a case should be solicitous at all times to preserve not only substance of justice, but every appearance of propriety, and should keep away from jurors during recesses and have no conversation with them beyond usual salutations.

11. Trial 🔑305

In death action, statement of plaintiffs' attorney in answer to a juror's question, in presence of defendants' attorney during recess, as to a map introduced in evidence, that testimony of engineer who drew map covered that, was not "misconduct" entitling defendants to mistrial.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

◆

Appeal from Superior Court, Kings County; Glenn L. Moran, Judge Assigned.

Action by Norman Maaskant, a minor, and others against George Matsui and others, for the death of Harry Maaskant. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Chester O. Hansen, John Said, and William C. Crossland, all of Fresno, for appellants.

Rae B. Carter and John D. Chinello, both of Fresno, and John F. Pryor, of Hanford, for respondents.

SCHOTTKY, Justice pro tem.

Defendants appeal from a judgment entered on a verdict rendered against them in an action for the death of Harry Maaskant, arising out of an automobile accident in which an automobile operated by said deceased collided with an automobile owned by appellants Shinagawa and Matsui and operated by appellant Matsui. Appellant M. D. Hopper was named as a co-defendant and judgment was entered against said appellant upon the theory that at the time of the fatal accident appellant George Matsui was an employee and agent of appellant Hopper, and appellant Hopper was therefore liable under the doctrine of respondeat superior.

No brief has been filed by appellants Matsui and Shinagawa, but by stipulation said appellants are resting their appeal upon the briefs of their co-appellant Hopper. No claim is made in the briefs filed that the evidence is insufficient to support a finding of actionable negligence on the part of appellant Matsui, but it is claimed by appellants that the undisputed evidence shows that at the time of the accident appellant Matsui was not in the employ of appellant Hopper but was an independent contractor.

[1-3] Before proceeding to consider this contention it is well to quote from Juchert v. California Water Service Co., 16 Cal.2d 500, at page 503, 106 P.2d 886, at page 888, where our Supreme Court said: "As is always true on such appeals, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences must be indulged in to uphold the verdict, if possible. It is elementary that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. And when two or more inferences can reasonably be deduced from the facts, the reviewing court is without power to substitute its deductions for those of the jury or trial court. Crawford v. Southern Pac. Co., 3 Cal.2d 427, 45 P.2d 183; Treadwell v. Nickel, 194 Cal. 243, 228 P. 25; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157; Wing v. Kishi, 92 Cal.App. 495, 268 P. 483."

[4] Appellants quote numerous excerpts from the testimony which, they assert, show that Matsui was not an employee but was an independent contractor. They contend that the testimony shows that appellant Matsui merely supplied a Japanese crew of laborers to appellant Hopper and other farmers, and was free to come and go as he pleased; that he was not told by appellant Hopper as to the manner in which the work should be done but merely that there was a certain piece of work to be done and the number of men needed; and that on the morning of the accident appellant Hopper's foreman told appellant Matsui that it was too windy to continue sulphuring, and that the Japanese crew should be put to some other work, and while Matsui was on his way to stop the crew from sulphuring the accident occurred.

Appellants then proceed to quote numerous authorities stating the well-settled rules as to the distinction between an employee and an independent contractor. It is not necessary to refer to these because the most casual reading of the record shows that appellants have omitted to refer to testimony which clearly gave the jury the right to infer that appellant Matsui was an employee of appellant Hopper, and we are, of course, not concerned here with mere conflicts in the testimony.

The following appears in the testimony of appellant Matsui:

"Q. Now, on the 7th day of May, 1940, you were working as foreman of the Japanese crew on the Lucerne Vineyard, weren't you? A. Yes, I was. * * *

"Q. At the time this accident happened you were on your way to take the men off of the sulphuring job, weren't you? A. Yes.

"Q. And that was because of a wind that had come up that morning, wasn't it? A. Yes.

"Q. Those were Japanese laborers that you were going to, weren't they? A. Yes.

"Q. They were men that were doing work on the Lucerne Vineyard, weren't they? A. Yes. * * *

"Q. Just before you left on that trip you talked to Mr. Oscar Hinton, the foreman of the Lucerne Vineyard, didn't you? A. Yes.

"Q. You talked to him at or near the blacksmith shop on the Lucerne Ranch, didn't you? A. Yes.

"Q. And it was at his direction that you went down there to tell these men to stop sulphuring, wasn't it? A. Yes. * * *

"Q. How many Japanese laborers were at work on the Lucerne Vineyards that day, May 7th, 1940? A. I believe twelve. * * *

"Q. And you were paid the same rate as the other employees, weren't you? A. Yes. * * *

"Q. It was part of your duty to supervise the work of the Japanese laborers on the Lucerne Vineyards, wasn't it? A. That's correct. * * *

"Q. * * * When you did any work on the place you got paid by the hour for that and that went in separately, didn't it, on your time sheet? A. Well, that's the way I got paid, I used to do my work, so many hours a day.

"Q. But on the day of this accident you didn't do any work, did you? A. Yes, I was working on the day of the accident.

"Q. Did you turn in any time for yourself to Mr. Hinton or Mr. Adams on the day of this accident? A. Well, I put down my time up to the time of the accident. * * *

"Q. Mr. Matsui, what is your business or occupation? A. I am foreman at the Lucerne Ranch.

"Q. Were you so employed on the 7th day of May, 1940? A. Yes. * * *

"Q. And how much were you being paid per day for the work that you were doing? A. I was paid the same prevailing wages.

"Q. That is twenty-five cents an hour? A. Yes. * * *

"Q. Now, Mr. Matsui, at the time of this accident you were on your way from one ranch belonging to the Lucerne Vineyards, or Mr. Hopper, to another ranch, is that correct? A. I was going to a ranch of Lucerne Vineyards to stop the boys from working.

"Q. That was on account of too much wind to be sulphuring? A. Yes.

"Q. And you were under instructions from Mr. Hinton, is that correct? A. Yes."

It is quite apparent from the foregoing that the evidence is sufficient to support the finding that appellant Matsui was an employee of appellant Hopper.

[5, 6] Appellants next contend that the trial court committed error in giving an instruction on the presumption of due care. The instruction given was as follows: "Since you may accept a presumption satisfying your minds rather than spoken testimony which does not produce conviction in your minds, you are further instructed that there is a presumption that every man obeys the law and takes ordinary care of his own concerns; therefore, the presumption in this case is that the decedent Harry Maaskant was traveling at a lawful rate of speed and was on the proper side of the highway at all times, and was at all times exercising ordinary care for his own safety. This presumption is in itself a species of evidence, and it shall prevail and control your deliberations until, and unless it is overcome by satisfactory evidence."

Appellants argue that the giving of this instruction was error "for the reason that from the testimony of plaintiffs' own witnesses, the presumption of due care on the part of decedent Harry Maaskant was dispelled and disappeared from the case entirely". Appellants then quote testimony of respondents' witnesses to show that the intersection at which the accident occurred was an obstructed intersection, and then quote testimony which, they assert, shows that decedent was approaching at a high rate of speed. There was no testimony as to the rate of speed at which decedent was traveling, but appellants refer to the testimony of a witness who heard the roar of the exhaust of decedent's automobile as indicating a high rate of speed. There is, however, testimony of the same witness ascribing the roar to a hole in the muffler. No witness produced by plaintiffs saw the accident, the only testimony of plaintiffs' witness being that he saw the top of decedent's automobile the instant of the collision, but had not seen it before.

In the case of Mar Shee v. Maryland Assurance Corporation, 190 Cal. 1, at page 9, 210 P. 269, at page 273, our Supreme Court said: "* * * a fact is proved as against a party when it is established by the uncontradicted testimony of the party himself or of his witnesses, under circumstances which afford no indication that the testimony is the product of mistake or inadvertence; and that, when the fact so proved is wholly irreconcilable with the presumption sought to be invoked, the latter is dispelled and disappears from the case."

The testimony of plaintiffs' witnesses in this case falls far short of establishing by uncontradicted testimony that the facts proved are so irreconcilable with the presumption of due care on the part of the deceased as to dispel the presumption and cause it to disappear from the case.

[7] In the case of Westberg v. Willde, 14 Cal.2d 360, at page 367, 94 P.2d 590, at page 594, the court said: "We think it well to state here that in our opinion there is a substantial difference in the situation before a court where the question of the plaintiff's negligence is in issue, and both plaintiff and his witnesses testified to all his acts and conduct at the time of his alleged negligence, from a situation where the acts and conduct of a decedent are the issues before the court. In the first instance, all possible facts both in favor of and against the alleged negligence of the plaintiff are before the court, and it is difficult for us to perceive how any presumption as to his conduct can add to or detract from this evidence. Surely if this evidence conclusively supports the claim that he was negligent, then, according to our decisions cited above, the presumption as to his conduct has been dispelled. On the other hand, if the plaintiff has testified respecting his acts and conduct, and his testimony and that of his witnesses showed that he used ordinary care for his safety, an instruction to that effect would not be of any assistance to him; but if such evidence did not clearly and unmistakably clear him of the charge of negligence, then an instruction which would place his testimony in a more favorable light than it would be without such instruction would seem to be uncalled for, if not improper. In such a case the giving of any instruction as to the presumption of plaintiff's conduct would seem to be of doubtful propriety. It has, however, been held that the giving of such an instruction under the circumstances just related was not prejudicial. Tuttle v. Crawford, 8 Cal.2d 126, 63 P.2d 1128; Rogers v. Interstate Transit Co., 212 Cal. 36, 38, 39, 297 P. 884. But in the other situation, where the acts and conduct of a deceased person are the subject of inquiry, and the testimony respecting such acts and conduct necessarily must be produced by witnesses other than the deceased, unless such testimony meets the requirement of the rule in the Mar Shee case, and other cases decided by this court following the Mar Shee case, an instruction that the deceased is presumed to have exercised ordinary care for his own concerns is not only proper but this court in an unbroken line of decisions, has sustained the giving of such an instruction. Ellison v. Lang Transp. Co., [12 Cal.2d 355, 84 P.2d 510]."

In the case of Stroh v. Bauman, 37 Cal. App.2d 241, at page 244, 99 P.2d 337, at page 338, this court said: "There has been some confusion in the decisions on the propriety of instructing the jury on the substance of section 1963, subdivision 4, of the Code of Civil Procedure. That confusion has been settled by the case of Westberg v. Willde, [14 Cal.2d 360], 94 P.2d 590, 594. That case holds that such an instruction should not be given where the party attempting to invoke it is still living and all circumstances are proved and where 'all possible facts both in favor of and against the alleged negligence of the plaintiff are before the court' because 'it is difficult for us to perceive how any presumption as to his conduct can add to or detract from this evidence'; that it is in a case where a party has died that the presumption may come into play."

[8] The instruction now challenged by appellants contained the qualification that the presumption was a species of evidence and "shall prevail and control your deliberations until and unless it is overcome by satisfactory evidence". The jury was clearly told that the presumption could be overcome by satisfactory evidence. Under the

authorities cited the instruction was properly given by the court.

[9] Appellants' third contention is that the court erred in refusing to give the following instruction offered by them: "You are instructed that any negligence, however slight, on the part of Harry Maaskant, which directly and proximately contributed to the happening of the accident involved in this case, bars a recovery by the plaintiffs."

This contention is utterly lacking in merit because the jury was very fully instructed upon the subject of contributory negligence, and furthermore, at the request of appellants, the court gave the following instruction: "You are instructed that if you find from the evidence that at the time and place of the accident involved in this case Harry Maaskant drove and operated the Chevrolet pickup automobile, then and there being operated by him, in a negligent manner, and if you further find that such negligence, however slight, directly and proximately contributed to the happening of the accident, then I charge you that such negligence, however slight, on the part of Harry Maaskant bars a recovery by the plaintiffs in this case."

[10, 11] Appellants' final contention is that one of the counsel for respondents was guilty of prejudicial misconduct in conversing with a juror during a recess, and that the court erred in denying appellants' motion for a mistrial. It appears that during the recess a juror, who remained in the courtroom, asked counsel, in the presence of one of the co-counsel for appellants, a question regarding a map which had been introduced in evidence, and was told that the testimony of the engineer who drew the map covered that. The matter was called to the attention of the trial court and the court heard the matter in the absence of the jury and denied the motion and thereafter properly instructed the jury to disregard it. While we, of course, feel that counsel in a case should at all times be solicitous to preserve not only the substance of justice, but every appearance of propriety, and should keep away from jurors during recesses and should have no conversation with them beyond the usual salutations, yet it is quite clear to us that there was no misconduct in this case. The incident was in fact precipitated by the juror who asked the question and it appears that counsel was merely endeavoring to answer the juror without seeming to be discourteous. He said nothing that could have given the juror any information which he did not already possess.

The judgment is affirmed.

BARNARD, P. J., and MARKS, J., concurred.

50 Cal.App.2d 743

FERRILL v. ELLIS et al.

Civ. 6739.

District Court of Appeal, Third District,
California.
March 26, 1942.

1. Mandamus ⇨72

While mandamus will not lie to compel an officer to perform a purely discretionary act in a particular manner, if the facts as admitted or proved be susceptible of but one conclusion, the right to the writ becomes a matter of law and the officer may be compelled to act accordingly.

2. Mandamus ⇨168(4)

In mandamus proceeding to require municipal civil service commission to afford petitioner a physical examination to determine whether petitioner was in ordinary good health without regard to his false upper plate and if so found to place petitioner on eligible list for position of patrolman, evidence showed that petitioner was in excellent health.

3. Municipal corporations ⇨184(2)

Under municipal charter requiring applicants for police duty to be in "ordinary good health", to be ascertained in such manner as the civil service commission may deem advisable, commission had power to determine manner in which fact of good health should be ascertained, but could not inject into the proceeding a physical requirement not affecting applicant's health or his physical ability to discharge the duties called for and reject him without affording him a complete physical examination to determine possession of ordinary good health.

See Words and Phrases, Permanent Edition, for all other definitions of "Ordinary Good Health".

4. Municipal corporations 🔑184(2)

Under municipal charter requiring applicant for police duty to be in "ordinary good health", the fact applicant for position as probationary patrolman otherwise qualified used a false upper plate did not constitute "ill health" so as to justify denial of a physical examination to ascertain whether applicant was in ordinary good health.

See Words and Phrases, Permanent Edition, for all other definitions of "Ill Health".

5. Municipal corporations 🔑184(2)

Where applicant for position as patrolman had complied with all rules laid down by municipal civil service commission and applied for physical examination in accordance with the then existing rules, he may not be rejected for having a false upper plate, a reason not specified in the rules, and later required to submit to examination under a new rule requiring 20 natural teeth which upon its face would bar him from participating.

6. Municipal corporations 🔑184(2)

Where applicant had complied with all rules laid down by a municipal civil service commission and applied for physical examination in accordance with the then existing rules, he may not be rejected for some reason not specified in the rules and later required to submit to examination under a new rule, setting up a standard which upon its face would bar him from participating.

◆

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Mandamus proceeding by Ross Myron Ferrill against W. Fred Ellis, and others, as members of the Civil Service Commission of the City of Stockton, California, to compel respondents to afford petitioner a physical examination limited to determination whether petitioner was in ordinary good health without regard to his possession of artificial teeth and if found in good health, to certify petitioner to eligible list of appointees for the position of probationary patrolman of the police department of the City of Stockton. From an adverse judgment, respondents appeal.

Affirmed.

Joseph C. Tope, City Atty., and H. C. Stanley, Asst. City Atty., both of Stockton, for appellants.

O. C. Parkinson, of Stockton, for respondent.

STEEL, Justice pro tem.

This is a proceeding in mandamus wherein petitioner, respondent here, obtained in the court below a peremptory writ commanding appellants as members of the Civil Service Commission of the City of Stockton, as follows: "* * * that they afford to petitioner Ross Myron Ferrill a physical examination, that such examination be limited to the determination of whether petitioner is in ordinary good health, without regard to his possession of certain artificial teeth in place of natural teeth, and that if found in ordinary good health, with the consideration of his artificial teeth in place of natural teeth excluded, they certify said Ross Myron Ferrill to the eligible list of appointees for the position of Probationary Patrolman of the Police Department of the City of Stockton."

From the record before us it appears that the City of Stockton is governed by a Freeholder's Charter, which includes the police department as subject to civil service regulations and rules.

Respondent, who it is conceded, was possessed of the requisite qualification of age, residence and citizenship, applied for examination for the position of police officer of the City of Stockton, and fully passed all requirements of both the charter and commission rules, which included height, weight, chest expansion, etc., up to the question of inquiry as to the condition of his health, the requirement in this regard being that all applicants must be in ordinary good health. The duty of determining this question was assigned by the commission to the city surgeon, a practicing physician, who at the outset of such physical examination disqualified petitioner by reason of the fact that his upper teeth had been extracted and replaced with a plate. This ruling was upheld by the commission, and they thereupon refused to afford him a further physical examination. The instant proceeding was then instituted by petitioner, resulting in the order set forth above, from which the commission prosecutes this appeal.

Appellants assign as error the trial court's decision to the effect that the examining physician was not justified in arriving at the conclusion that the lack of natural teeth in the upper jaw standing alone was sufficient to warrant the rejection of petitioner as lacking good health.

The main issue, therefore, is whether or not the commission, in the reasonable exercise of its discretion was justified in concluding that the petitioner was not in ordinary good health solely because he was not possessed of his natural upper teeth.

Under the City Charter the commission may make suitable rules and regulations not inconsistent with the provisions of the act, and in respect to the health of an applicant the matter is left to the examining physician. Section 32-4 of article XXXII contains the following:

"All tests shall be practical and shall consist only of subjects which will fairly determine the capacity of persons examined to perform duties of the position to which appointment or promotion is to be made."

And section 32-6 reads in part as follows:

"In addition to the above, all applicants must be in ordinary good health, of good moral character, and of temperate and industrious habits, these facts to be ascertained in such manner as the commission may deem advisable. This section applies to original appointment only."

[1] While the rule is well recognized that mandamus will not lie to compel an officer to perform a purely discretionary act in a particular manner (16 Cal.Jur. 809) there is, however, an exception to this general rule in that if the facts as admitted or proved be susceptible of but one construction or conclusion the right to the writ becomes a matter of law and the officer may be compelled to act accordingly. Bank of Italy v. Johnson, 200 Cal. 1, at page 31, 251 P. 784 and cases cited.

Considering now the record before us the evidence discloses that respondent, approximately two years prior to the examination, had called upon his dentist Dr. Chalmers of Stockton, who testified at the hearing, and requested the doctor to put his mouth in good condition. At that time it appears that seven of his upper teeth were missing and the remaining nine were so situated that the installation of a partial plate or bridge would have been impracticable and therefore they were extracted and a full denture or plate put in. The doctor testified that the nine teeth which he extracted were "absolutely in good condition" and had no abscesses or anything from which poison might enter the system.

[2] Several experts, medical and dental, were called by the respective parties and testified as to the relative efficiency of artificial dentures as compared with natural teeth in masticating food, and the possible ill results that might occur to one's general health if they were abscessed, such ailments as indigestion, arthritis and heart trouble being mentioned. Most of this testimony was highly speculative and based upon assumptions entirely outside the facts in the instant case. The evidence shows without conflict that the petitioner is in excellent health. He was under thirty years of age and had been employed for eight years last past as a private patrolman, working long hours, and with the exception of a kidney ailment or attack in 1936, and also the removal of his tonsils, he had lost no time from his work nor had he suffered any illness.

[3, 4] Appellants cite numerous authorities to the effect that courts should not interfere with administrative boards and officers in the proper exercise of their discretionary powers. This unquestionably is the settled law as heretofore indicated. However, the facts here under consideration present a somewhat limited situation in that the provision in the charter for physical requirements for police duty is that the applicant be in ordinary good health, such fact "to be ascertained in such manner as the commission may deem advisable" or in other words, the power given the commission in this regard is to determine the manner in which the fact of good health or lack of it may be ascertained. And in determining whether an applicant is in good health it may not inject into the proceeding a physical requirement which does not affect his health at all or his physical ability to discharge the duties called for and then ipso facto reject him without affording him a complete physical examination to determine the ultimate fact, to-wit: does he possess ordinary good health. This apparently is the conclusion arrived at by the trial court in framing the order appealed from which is hereinabove set forth. Obviously the mere fact that one uses a false plate does not of itself

constitute ill health. One of the doctors testified as follows:

"Q. You have studied and practiced in regard to the effect of a plate of that kind on a person's ordinary health, have you? A. Yes.

"Q. Would you state, then, Doctor, whether in your opinion the possession of a plate of that kind is detrimental to a man's ordinary health? A. Not to his general health, no.

"Q. If he was otherwise in ordinary good health would you say that he was rendered not in ordinary good health by reason of his having an upper plate such as Mr. Ferrill has? A. I think he is in good physical condition.

"Q. And the fact that he has that plate would not make that opinion any different? A. No."

And again another witness, testifying as to petitioner's physical condition, testified as follows:

"Q. In your opinion, Doctor, did that take him out of the class of one in ordinary good health? A. No.

"Q. In your opinion does it have any detrimental effect on his general health? A. No, it has no detrimental effect on the general health. As a matter of fact, it is often done, so far as the M.D. standpoint is concerned, to get the man in better health or to keep him from going into bad health. Because one of the most common sources of infection and consequent disability in middle or later life is infected teeth. So, if there is any indication for that, why, the man is far better off both at present and in the future to have his teeth out. I had my own taken out for backache. The only effect I have had is that I can't keep my weight down now because my health is so much better.

"Q. Then would you say, Doctor, that a denture such as Mr. Ferrill has does not take a man out of the classification of being in good health, or ordinary good health, then? A. Not only doesn't take him out of the classification, but it is possibly a protection to keep him in that classification over a longer period."

[5] Appellants next assign as error the trial court's refusal to permit them to file a supplemental answer in the proceeding wherein is set forth an amendment to the rules and regulations of the commission as follows:

"Mouth: Pyorrhea, enlarged tonsils, adenoids, or nasal obstruction will reject. Teeth must be in good shape. Missing teeth may be supplied by crown or bridge work. At least twenty natural teeth must be present."

And also a resolution which reads as follows:

"Resolution No. 113

"It Appearing to the Commission from the medical report heretofore made of the applicant that a full medical examination was not made of applicant, and Good Cause Appearing to the Commission why a full examination of applicant in this case should be made; now therefore,

"Be It Resolved by the Civil Service Commission of the City of Stockton, As Follows:

"That Ross Myron Ferrill be, and he is hereby referred to Dr. H. S. Chapman, City Surgeon for the City of Stockton, for a full and complete medical examination.

"Dated: June 20th, 1941. (Signed)
"H. A. Gibson
"W. Fred Ellis."

The record shows that petitioner was rejected because of his upper plate in March, 1941, and that he instituted the instant proceeding on May 2, 1941, the return date being May 19th, at which time appellants requested a continuance, which was granted, until June 20, 1941. In the meantime appellants promulgated the new set of rules and regulations, supra, specifically requiring every applicant to have at least twenty natural teeth in his mouth. This requirement would automatically exclude petitioner, and an examination would have been an idle act insofar as petitioner is concerned.

Appellants cite the case of Jones v. O'Toole, 190 Cal. 252, 212 P. 9, as authority in support of their right to amend the rules and as so amended apply them retroactively to petitioner. The case cited is not controlling, as there the petitioner was not complaining of being deprived of anything himself but sought to have cancelled the action of the commission in giving additional points of rating to another and thereby placing him higher on the eligible list than petitioner whose own rating on the list was not disturbed.

[6] We are constrained to hold that when an applicant has complied with all of the rules laid down by the commission

and has applied for a physical examination in accordance with the then existing rules, he may not be rejected for some reason not specified in the rules and then later required to submit to an examination under a new rule setting up a standard which, upon its face, would bar him from participating.

The judgment and order appealed from are affirmed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

NEWKIRK v. LOS ANGELES JUNCTION RY. CO.*

Civ. 12905.

District Court of Appeal, Second District, Division 2, California.

March 25, 1942.

Rehearing Denied April 13, 1942.

Hearing Granted May 21, 1942.

1. Commerce 🔑27(2)

A state operating railroad which had track connections with at least three interstate carriers and several industrial concerns, which did business only with railway carriers, and whose services consisted wholly of switching over its own line for which railroad made a flat charge per car to the carrier served, was a "common carrier" engaged in "interstate commerce" within Employers' Liability and Safety Appliance acts. Safety Appliance Act, 45 U.S.C.A. § 1 et seq.; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Common Carrier" and "Interstate Commerce".

2. Commerce 🔑27(7)

Where tank car had been billed from Arizona to consignee in California, its interstate character did not cease while car was on state operating railroad's tracks for switching operation preparatory to delivery to consignee, and hence such railroad and switchman who was injured in operation of hand brake of the car were engaged in "interstate commerce" and hence subject to jurisdiction of Federal Employers' Liability Act. Safety Appliance Act, 45 U.S.C.A. § 1 et seq.; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

3. Trial 🔑203(1)

In action under Federal Employers' Liability Act for injuries to switchman, wherein evidence was not disputed that both parties were engaged in interstate commerce at time of accident, it was unnecessary to instruct on the issue. Safety Appliance Act, 45 U.S.C.A. § 1 et seq.; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

4. Master and servant 🔑111(1)

The Safety Appliance Act is a substantive and not a remedial law and imposes an absolute liability for all damages sustained by a person which are the proximate result of some defect in railway vehicle against the common carrier, interstate or intrastate, who is in possession thereof, or on whose line vehicle is being used. Safety Appliance Act, 45 U.S.C.A. § 1 et seq.

5. Master and servant 🔑276(5), 278(6)

Under Safety Appliance Act, which makes carrier an insurer as against enumerated defects in vehicle regardless of knowledge thereof or of any negligence, evidence must pointedly disclose that there is a defect as claimed and that it proximately caused injury. Safety Appliance Act, 45 U.S.C.A. § 1 et seq.

6. Courts 🔑97(5)

The decisions of federal courts and not those of state courts are controlling in construing the Safety Appliance Act. Safety Appliance Act, 45 U.S.C.A. § 1 et seq.

7. Commerce 🔑8(4)
Courts 🔑97(5)

Under Safety Appliance Act, the character and amount of evidence required to sustain a claim of defect in instrumentality, that defect was proximate cause of injury, that evidence is sufficient to warrant a verdict, and other evidential matters, are governed by standards adopted by federal courts and not by the laws or decisions of jurisdiction in which the case is tried. Safety Appliance Act, 45 U.S.C.A. § 1 et seq.

8. Evidence 🔑589, 591

In action under Federal Employers' Liability Act for injuries to switchman caused by allegedly inefficient handbrake on tank car, while jury could disbelieve all testimony produced by defendant, jury was not entitled to infer that the pawl overrode the ratchet when physical fact was that it could not have done so on the evidence produced by plaintiff. Safety Appliance Act, 45 U.S.C.A. § 1 et seq.; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

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* Subsequent opinion 131 P.2d 535.

9. Evidence ⚷380

In action under Federal Employers Liability Act for injuries to switchman caused by allegedly inefficient handbrake, pictures of brake assembly which were taken more than a year after accident occurred were inadmissible where conditions were not shown to be sufficiently similar. Safety Appliance Act, 45 U.S.C.A. § 1 et seq.; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

10. Master and servant ⚷286(13)

In action under Federal Employers' Liability Act for injuries to switchman who slipped on tank car because of alleged inefficient handbrake which switchman was holding, evidence was insufficient for jury on issue whether railroad supplied an efficient handbrake as required by Safety Appliance Act. Safety Appliance Act, 45 U.S.C.A. § 1 et seq.; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

11. Master and servant ⚷291(4)

In action under Federal Employers' Liability Act for injuries to switchman caused by alleged inefficiency of handbrake, instructions which dealt with the case as though it were an ordinary negligence case were improperly given, since, if act was violated, railroad was liable whether or not it was negligent. Safety Appliance Act, 45 U.S.C.A. § 1 et seq.; Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

W. J. WOOD, Acting P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Parker Wood, Judge.

Action by George W. Newkirk against the Los Angeles Junction Railway Company, under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., to recover damages for personal injuries. From a judgment for plaintiff defendant appeals.

Reversed.

Rehearing denied; W. J. Wood, Acting P. J., dissenting.

Lyndol L. Young, of Los Angeles, for appellant.

James E. Martin, of Los Angeles, and Clifton Hildebrand and James A. Myers, both of Oakland, for respondent.

HANSON, Justice pro tem.

This is an action under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., brought by plaintiff against the defendant railway company to recover damages for his personal injuries. The injuries are alleged to have resulted from a violation of that provision of the Safety Appliance Act, 45 U.S.C.A. § 1 et seq., which imposes an absolute duty on a railway to provide an "efficient handbrake" on every car it transports.

It is undisputed that Newkirk was employed as a switchman by defendant, and at the time of his injuries was engaged in the performance of his duties. The accident occurred at about five o'clock on the morning of December 14, 1938, when in the light of his lantern he was engaged in setting a handbrake on a moving railway tank car as it was proceeding up a slight incline on a storage track on its own momentum, after having been cut away from a switch engine which had been pushing it. The Safety Appliance Act in question provides that it is unlawful for any common carrier that is subject to the provisions of the act to permit any car which is not equipped with "efficient handbrakes" to pass over its line; and if injury ensues as a proximate result of such failure to any one of its employees, it is liable to him absolutely, even though the employee knows of the defect in the instrumentality. It was the contention of Newkirk that the brake was defective and that this defect proximately caused his injuries. On the other hand, the defendant contended that the brake was not defective, and, instead, that plaintiff slipped on the rain-soaked platform adjoining the brake and as a result was precipitated to the ground below with resultant injuries. As the plaintiff did not allege any act of common-law negligence, his case rests wholly on the claim that the brake was inherently inefficient and that its inefficiency was the proximate cause of his injuries. A jury found for the plaintiff and assessed the damages at $8,000. A motion for judgment notwithstanding the verdict having been denied, judgment was entered on the verdict. The case is here on appeal from the judgment as entered.

The defendant is a California railway corporation which transports freight cars and their contents over certain railroad tracks located in the industrial area in the neighborhood of the city of Vernon, in Los

Angeles County. In that locality it has a railway track or siding known as the "Flood" track, within its railroad yards. It is not shown by the record that it owns any engines or other railroad equipment. However, it has track connections with at least three interstate carriers and a great number of industrial concerns located in the neighborhood of its yard. It has no other rail lines except those in the general locality mentioned. It does not do business with the general public but only with railway carriers which have connections with its tracks. It moves railway cars on its own lines on instructions from these carriers, to and from its various track junctions with the carriers and industrial plants on its lines. The service rendered is wholly a switching service over its own lines, for which it makes a flat charge per car to the carrier served. It issues no bills of lading and is not a party to any through rates.

The tank car which is here involved was one of 63 cars which the Southern Pacific Railway Company hauled over its railway lines from Phoenix, Arizona, to Los Angeles. It was loaded with cotton-seed oil and was billed from Phoenix to Swift & Company at its sidetrack in the city of Vernon. The latter company had a switch track upon its property which connected only with the rails of the defendant. The car reached the Los Angeles yards of the Southern Pacific at about 6:50 o'clock p. m. on December 13, 1938. This car, along with other railway cars, was transported by the Southern Pacific from its yards to a rail junction with the defendant company, where the latter accepted it at about 1:40 a. m. on December 14, 1938, for transportation to the siding of Swift & Company. The handbrake of the car received several inspections before it was delivered to the defendant, and one by it immediately after the delivery. It was inspected by a car inspector for the Southern Pacific Company two hours prior to its delivery to defendant. At that time the inspector found the handbrake and all the mechanical appliances in connection therewith, including the pawl, ratchet and other parts, were efficient and in good working order. He so reported in writing to his employer. Another car inspector for the Southern Pacific inspected the brake a few minutes later and found it was efficient and in good working order. He testified that the pawl did not override the ratchet, and that if it had or if it had been otherwise out of order he would have put a "bad-order" card on it. Additionally, it was shown that when the car was weighed earlier in the evening two other car inspectors for the Southern Pacific had checked the brake and found it efficient and in good working order. Immediately after the car was received and placed on the tracks of the defendant company its car inspector, with twenty-seven years of experience in that capacity, inspected the handbrake and found nothing wrong with it.

A few moments before the accident the switching crew of the defendant company, of which plaintiff was a member, hooked a switch engine onto a "cut" of seven cars received from the Southern Pacific, of which the tank car was the last and farthest from the engine. The foreman directed the plaintiff to ride on the tank car during a flying switch operation in order to disconnect it from the other cars and to set the brake on it when it reached a certain locality on defendant's "Flood" track. The flying switch procedure was for the switch engine to back the line of cars fast enough to give the tank car sufficient momentum after it was uncoupled from the other cars so it would pass over a switch onto the "Flood" track and up a slight incline or hump, after which the brake would be set and the car brought to a stop.

The only eye-witness to the accident was plaintiff himself. He testified that after he had uncoupled the car from the cut of cars he mounted the car's ladder and proceeded along the platform on the side of the tank car towards the handbrake which was located on the far end. With his electric lantern slung over his arm—it being still dark—he proceeded to turn the brake. He had no difficulty with it. He tightened it sufficiently so the car would come to a complete stop within about fifteen feet, and engaged the pawl in the ratchet to hold the brake in place. He then reached with his left hand for the handhold on the car, keeping his right hand resting loosely on the brake wheel. His testimony is that at that moment the brake suddenly released itself, causing the brake wheel on which his hand was resting to spin around, and that this action of the brake caused him to fall from the car to an embankment alongside the track. As he fell on the embankment he started to roll towards the rails, and to protect himself, as he rolled, he stuck out his left hand towards the rail. As he did so the fingers of his left hand came in contact with the top of the rail, and before he could withdraw them the rear wheels of the tank car ran over and cut them off.

One of the switchmen, a witness for the plaintiff, testified on cross-examination that he took the plaintiff to a doctor a few moments after the accident happened. While there, in response to his inquiry as to how the accident happened, the plaintiff told him, in the presence of the doctor and another person, that he was setting the brake and he slipped and fell. After the case had been closed and the motion for nonsuit made, the trial court over objection reopened the plaintiff's case on direct. He was then permitted, over objection, to deny he had made the statement attributed to him by his own witness.

Plaintiff testified that after he had finished setting the brake the car was still moving, but slowly, and it was going up a slight incline. It is undisputed that the tank car stopped within fifteen feet of the point where plaintiff fell or was thrown from the car; that the incline was such that if the brake was not set or holding, the car would have rolled back; that the car did not roll back; that as late as three hours after the accident, when the son-in-law of plaintiff examined it, the brake was set and the car was where it had stopped. The only evidence produced by the plaintiff to sustain his claim that the handbrake was inefficient was given by his son-in-law, supported by certain pictures of the brake in question taken more than a year later. This witness testified that a few hours after the accident he found a half-inch vertical and a three-sixteenths-inch lateral play in the "dog," or "pawl," and that "the vibration from the brake-shoes and the brake shaking on the wheels when the car is moving would cause the 'dog,' if it had too much play in it, to slip out of the ratchet." With this statement of the facts we turn to the legal questions involved.

[1-3] The defendant contends that it is not a common carrier by railroad and that the plaintiff and defendant were not engaged in interstate commerce at the moment plaintiff was injured. We think that on the facts which we have already related the contention possesses no merit. The defendant, it seems clear, is "a terminal railroad for the industries and carriers with which it connects, and it serves as a link in the through transportation of interstate freight shipped to or from points in [the city of Vernon] over the connecting carriers." United States v. California, 297 U.S. 175, 56 S.Ct. 421, 423, 80 L.Ed. 567; cf. United States v. Brooklyn, etc., Terminal, 249 U.S. 296, 304, 39 S.Ct. 283, 63 L.Ed. 613, 616, 6 A.L.R. 527. While it is true that the defendant does not hold itself out to the general public as a common carrier, yet its service involves the transportation of interstate cars and their contents as agent of the connecting carriers. As such it is as much engaged in interstate commerce as are its principals. That plaintiff and defendant were both engaged in interstate transportation at the moment plaintiff was injured we think is likewise clear. The tank car in question was still in interstate commerce, as it had been billed from Phoenix, Arizona, to the siding of Swift & Company in the city of Vernon, California, and not merely to a point on the line of the connecting interstate carrier. Its interstate character had not ceased while it was on the defendant's "Flood" track for the latter's convenience. Its interruption and deviation from the nearest route to its ultimate destination did not change the character of the shipment from one in interstate commerce to one in intrastate commerce. The act of plaintiff at the moment he was injured was an act in the furtherance of interstate transportation, required or demanded by his employer for its own ends in the performance of its duty to transport the car to the siding of the consignee. Accordingly, the trial court not only had jurisdiction of the action under the terms of the Federal Employers' Liability Act, but it was entitled as a matter of law on the undisputed facts to instruct the jury, as it did, that both parties were engaged in interstate commerce at the time of the accident. Indeed, as the evidence was undisputed, it was wholly unnecessary to instruct on the issue at all, and we think it would have been preferable for the court not to have done so.

[4-7] A further contention of the defendant is that there is no substantial or credible evidence that the handbrake was inefficient or that its alleged inefficiency was the proximate cause of plaintiff's injury. Before proceeding to an analysis of the facts we turn to controlling decisions as a guide to determine where the fact line is to be drawn. The Safety Appliance Act

is a substantive and not a remedial law. It imposes an absolute liability for all damages sustained by a person which are the proximate result of some defect in a railway vehicle, against the common carrier, interstate or intrastate, who is in possession thereof or on whose line the vehicle is being used. As the act makes the carrier an insurer as against enumerated defects in the vehicle, regardless of any knowledge thereof or of any negligence in respect thereto, it is obvious that the evidence must pointedly disclose there is a defect, as claimed, and that it proximately caused the injury. This is the view of the federal courts, whose decisions, and not those of the states, are alone controlling. Likewise, the character and amount of evidence required to sustain a claim of defect in the instrumentality, that the defect was the proximate cause of the injury, that the evidence is sufficient to warrant a verdict, and other evidential matters, are governed by the standards adopted by the federal courts and not by the laws or decisions of the jurisdiction in which the case is tried. Bevan v. New York, etc., Co., 132 Ohio St. 245, 6 N.E.2d 982—certiorari denied by the United States Supreme Court 301 U.S. 695, 57 S.Ct. 924, 81 L.Ed. 1351. Indicative of the strictness of the rules laid down and as a corollary of the tests we must follow in our analysis of the facts are these cases: Burnett v. Pennsylvania R. Co., 6 Cir., 33 F.2d 579; Travelers' Ins. Co. v. Randolph, 6 Cir., 78 F. 754, 759, 24 C.C.A. 305; Hardy-Burlingham M. Co. v. Baker, 6 Cir., 10 F.2d 277; New York Central R. Co. v. Ambrose, 280 U.S. 486, 50 S.Ct. 198, 74 L.Ed. 562; Patton v. Texas & P. R. Co., 179 U.S. 658, 21 S.Ct. 275, 45 L.Ed. 361; Gulf, M. & N. R. Co. v. Wells, 275 U.S. 455, 48 S.Ct. 151, 72 L.Ed. 370; Northwestern Pacific R. Co. v. Bobo, 290 U.S. 499, 54 S.Ct. 263, 78 L.Ed. 462.

[8-10] We think there is merit in the contention of appellant herein that there was no substantial or credible evidence to sustain the verdict. In the first place, there is no direct evidence that the brake was inefficient at the time of the accident. Such evidence as there is we think fails to overcome the physical facts. While the jury was entitled to disbelieve all the testimony produced by the defendant, it was not entitled to infer that the pawl overrode the ratchet, when the physical fact is it could not have done so on the evidence produced by the plaintiff. Plaintiff testified that while he was setting the brake it appeared to him that it was an efficient brake; that it operated normally; that it was effective in slowing up the car to the extent that it was just creeping along before coming to a stop; that he noticed by the light of his lantern that the pawl had properly engaged the ratchet and was holding properly; that the pawl was not overriding the ratchet when he set the brake; that he did not notice anything was wrong with the brake, its ratchet or pawl, and that if he had he would not have turned it loose. The only fact he testified to in connection with the brake was that the brake wheel unexpectedly turned clockwise, and with his right hand resting lightly on it he was thrown from the car. The testimony of plaintiff's son-in-law as to the extent of the play in the "dog" fell short by at least one-sixteenth of an inch of showing that the pawl could possibly have overridden the ratchet. The only evidence tending to show that the pawl at the time of the accident might have overridden the ratchet was the pictures taken of the brake assembly more than a year after the accident occurred, and the opinion testimony of plaintiff's son-in-law. The pictures in the record are not too clear, but for our purpose we will assume that they show that the pawl could have overridden the ratchet. But we think the pictures were erroneously admitted in evidence, as the conditions were not shown to be sufficiently similar or identical. The only evidence to indicate that there was no change in the condition of the brake assembly was the testimony of the son-in-law. But that there was a change, notwithstanding his testimony, is show by the fact that on his own measurements, made on the morning of the accident, it would have been physically impossible for the pawl to have overridden the ratchet. His opinion that the stress on the brake shoes would cause the pawl to override the ratchet is contrary to the physical facts testified to by him. Accordingly, it follows there was no substantial evidence that the pawl did override the ratchet.

If, then the brake wheel spun clockwise, as plaintiff testified, there is no evidence that it did so because the brake was inefficient, unless we may assume that the brake could not have done so unless it was inefficient. We think we may not make that assumption and that the jury was not entitled so to infer without evidence pointing to the fact. When we bear in mind that the plaintiff's own witness, Everly, although directly contradicted by plaintiff, testified that plaintiff told him at the doctor's office that he was pulling up on the brake and slipped and fell; that the undisputed evidence is that the incline was such that the car would have rolled back down the incline if the brake had not been set; that the brakes were found set three hours after the accident; that the car was then only fifteen feet beyond the point where the undisputed facts disclosed the accident occurred; that the switching crew had not touched it; that the evidence, contradicted only by plaintiff, is that a mist was falling for a half-hour before the accident; that plaintiff approached the brake contrary to well established custom for safety; that he falsified about his age when he applied for the job, making it appear that he was forty-four when he was in fact sixty-three; that he was injured when he was sixty-eight—in conformity with our charitable persuasions we shall classify his testimony and that of his son-in-law as incredible only. To permit the verdict to stand on the tenuous foundation upon which it rests would, in our opinion, be nothing short of a travesty on justice. The opinion expressed by plaintiff's son-in-law to the effect that vibration from the brakeshoes could cause a pawl to slip out of its ratchet was predicated on facts not shown in the record. For the jury to infer from this opinion, thus expressed, that the brake was inefficient would be pure speculation.

As in our judgment the verdict cannot be upheld, we need not consider appellant's claim that the instructions dealing with plaintiff's misrepresentations to defendant were inadequate. In view of a new trial, we need only repeat that the views expressed by the Supreme Court of the United States on that subject control.

[11] Inasmuch as the case must be reversed for a new trial we think it proper to comment briefly on the instructions. The instructions given to the jury dealt with the case as though it were an ordinary negligence case. This was error, but the error was the fault of the appellant. The case is not a negligence case, in the usual sense. There was no count based on any act of common-law negligence, but instead a count based wholly on the violation of a provision of the Safety Appliance Act. If there was such a violation the liability of defendant was absolute, whether or not it was negligent. If there was a violation of that act and the injury resulted proximately from it, the plaintiff was entitled to recover. Accordingly instruction after instruction dealing with definitions and various phases of negligence were entirely out of place and should not have been given.

Judgment reversed.

McCOMB, J., concurred.

W. J. WOOD, Acting Presiding Justice (dissenting).

I dissent. In my opinion the evidence is sufficient to support the jury's finding that the handbrake was defective.

50 Cal.App.2d 844

RITTER v. FRANKLIN et al.

Civ. 2964.

District Court of Appeal, Fourth District, California.

March 30, 1942.

1. Limitation of actions ⇨1

"Statutes of limitation" in a strict sense, are statutes of repose, and are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims or within which certain rights may be enforced, but statutes which merely restrict a statutory or other right are in the nature of "conditions" put by the law upon the right given.

See Words and Phrases, Permanent Edition, for all other definitions of "Condition" and "Statute of Limitation".

2. Municipal corporations ⇨564

The amendment of Street Improvement Act requiring a suit to foreclose lien of improvement bond to be maintained within four years after due date of last installment is a "statute of limitation" rather than a "condition" restrictive of a litigant's right to proceed. St.1929, p. 1306, § 76a.

3. Municipal corporations 🔑405

A street assessment is a "contract" and provisions of statute in force at the time, prescribing manner of its enforcement, are a part thereof.

See Words and Phrases, Permanent Edition, for all other definitions of "Contract".

4. Constitutional law 🔑169

If a remedy available to a person is altered after contract is made so as to materially impair the obligation of such contract, the law cannot affect the relations between the parties to such contract.

5. Constitutional law 🔑144
Municipal corporations 🔑526

The 1929 amendment of Street Improvement Act of 1911 limiting the time within which to foreclose a lien of improvement bonds to four years after due date of last installment, as applied to owner of bond issued in 1925, was not invalid as "impairing obligation of contract", since the amendment was merely a modification of the manner or means of procedure. St.1911, p. 730; St. 1929, p. 1306, § 76a.

See Words and Phrases, Permanent Edition, for all other definitions of "Impairing Obligation of Contract".

6. Municipal corporations 🔑564

Where street improvement bond, issued in 1925 under Street Improvement Act of 1911, did not become due as to its final payment until 1935, and act was amended in 1929 limiting time within which a lien might be foreclosed to four years after due date of last installment, and bondholder filed action to foreclose the lien in November, 1940, the limitation imposed afforded bondholder a "reasonable time" to prosecute the action after adoption of the amendment, and hence action was barred by limitation. St.1911, p. 730; St.1929, p. 1306, § 76a.

See Words and Phrases, Permanent Edition, for all other definitions of "Reasonable Time".

7. Municipal corporations 🔑564

In amending 1911 Street Improvement Act to require a suit to foreclose lien of improvement bond to be brought within four years after due date of last installment, legislature intended to give to any debtor who is sued thereunder the privilege of pleading the limitation statute in same manner that it might be pleaded should an action be instituted by a mortgagee to foreclose a mortgagee or by a payee for judgment upon a note, or other written instrument. St.1911, p. 730; St.1929, p. 1306, § 76a.

8. Municipal corporations 🔑564

A property owner was not precluded from interposing bar of four-year statute of limitations in action to foreclose street improvement bond because the act under which bond was issued provided for payment of principal and interest out of a particular fund only, since if a property owner had provided the fund for payment, his defense would be that he had paid his indebtedness, and only person to whom statute would be available would be the person who would not need its benefit. St.1911, p. 758, § 60; St.1929, p. 1306, § 76a.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Linda Ritter against Harvey H. Franklin, the Pioneer Title Insurance and Trust Company, and others, to foreclose a street improvement bond. From a judgment for plaintiff, last named defendant appeals.

Reversed.

Robert Mack Light, of San Bernardino, for appellant.

Tobias R. Archer, of Los Angeles, for respondent.

PER CURIAM.

The following opinion was prepared by the Honorable Franklin G. West, Justice pro tem., and is adopted as the opinion of the court.

Respondent was the owner of a street improvement bond issued February 3, 1925, under the Street Improvement Act of 1911. Stats.1911, p. 730. She instituted an action to foreclose said bond in the Superior Court of San Bernardino County pursuant to the provisions of section 76a of said act. The said bond was a lien upon certain property in the city of San Bernardino, a portion of which property was owned by appellant and the balance by the defendants Franklin, who, prior to the trial, conveyed to plaintiff all of that portion of the lot of land belonging to them. The action was dismissed as to defendant Southern California Telephone Company.

At the date of the issuance of the bond here under consideration, section 76 of the improvement act of 1911 provided, insofar as pertinent here, as follows:

"In the event of the nonpayment of any installment of the interest or principal and by way of a separate, distinct and cumulative remedy, the holder of any bond upon which any payment either upon the principal or of the interest has not, or shall not be made when due, may file and maintain a suit to foreclose the lien of the bond in the same manner provided in this act for the foreclosure of the lien of delinquent assessments." St.1921, p. 297.

In 1927, St.1927, p. 1411, the section was amended to provide a four-year limitation for commencing foreclosure proceedings and in 1929 the provisions for foreclosure were taken out of section 76 and recast in a new section to wit: Section 76a of said act. Stats.1929, chap. 718, p. 1306. The general provisions governing proceedings for foreclosure were not materially altered. The provisions of said section 76a, insofar as bearing upon such limitation, read as follows:

"In the event of the nonpayment of any installment of the interest or principal and by way of a separate, distinct and cumulative remedy, the holder of any bond upon which any payment either upon the principal or of the interest has become delinquent may, at any time after three months after the date it is provided by ordinance or charter of said city that taxes are due, or in case taxes are collected by the county for the city at any time after four (4) months next succeeding the fourth Monday of September, following the date of delinquency of principal or interest and prior to the expiration of four (4) years after the due date of the last installment upon any bond or of the last principal coupon attached thereto, file and maintain a suit to foreclose the lien of the bond and recover the amount due thereon * * *."

According to the terms of the bond, which is the subject of this litigation, the due date of the last installment as indicated by the principal coupon attached to the bond was January 2, 1935. The first seven of the ten installments on the bond were paid, but the last three installments due respectively January 2, 1933, January 2, 1934 and January 2, 1935, were not paid for the reason that the fund providing for the retirement of said bond became exhausted January 2, 1932, by reason of nonpayment of any further installments of principal and interest into the fund by the owner of the property.

Respondent instituted the present action for the foreclosure of the lien of the bond on the 4th day of November, 1940, designating the appellant as one of the defendants, inasmuch as it was the owner of a portion of the land affected. By its answer appellant alleged that the cause of action set forth in plaintiff's complaint was barred by the terms and provisions of section 76a of the Street Improvement Act of 1911, and also alleged that said action was barred by the provisions of sections 329, 337 and 338 of the Code of Civil Procedure of the State of California. Upon the trial, the court found that all of the allegations of plaintiff's complaint were true, and that the denials and allegations of appellant's answers were untrue. Judgment was entered for plaintiff, and the premises of appellant, or so much thereof as might be necessary, were ordered sold as provided by law. This appeal followed.

The single point presented on this appeal is as to whether an action to foreclose the lien of a bond issued under the terms of the improvement act of 1911 may be maintained in the face of a clear showing that the complaint was not filed within four years after the due date of the last principal coupon attached to said bond. The sole contention of appellant is that section 76a of the act is determinative of the question. It argues that where a statute contains, as does the act under consideration, as an integral part of its provisions a limitation as to the time of performance of a certain act specified therein as one of the steps in effecting a remedy, such limitation is not technically a statute of limitations, but is properly to be considered as a condition to the right extended, and that it must be strictly complied with by litigants seeking to avail themselves thereof. Respondent defends the judgment entered upon two grounds. First, that no statute of limitations barred the action to foreclose the bond for the reason that the provisions of the act limiting the time within which the action must be commenced were not adopted until after the issuance to respondent of her bond, and was therefore inoperative to change or impair the contract or to affect her right of foreclosure by any retroactive limitation of action. She furthermore urges that in any event appellant could not avail itself of a statute of limitations because section

60 of the Street Improvement Act of 1911 (Stats.1911, p. 758) provides for payment of the principal and interest of bonds of the character owned by respondent out of a particular fund only, and that under such circumstances, the debtor may not plead the statute of limitations without showing that the fund has been provided to pay the obligation.

The court found, as heretofore mentioned, that nothing had been paid in to the bond fund for the payment of the amounts due on principal and interest since January 2, 1932.

[1] We are of the opinion that the case must be reversed, and that the trial court erred in its refusal to accord to appellant the benefit of the statute of limitations provided by section 76a, supra. It is not our opinion, however, that the distinction contended for by appellant, to wit: that the four-year limitation provided in said section is not correctly a statute of limitations, but a condition to the prosecution of a foreclosure action is well taken. The distinction between statutes of limitation and statutes in the nature of conditions is clearly set forth in the case of People v. Kings County Development Co., 48 Cal. App. 72, 191 P. 1004, 1005, where it is said:

"Statutes of limitations are, in a strict or legal sense, statutes of repose, and 'are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims, or within which certain rights may be enforced.' Wood on Limitations (3d Ed.) § 1. The same author further observes: 'Those statutes which merely restrict a statutory or other right do not come under this head (i. e., under the head of 'statutes of limitations'), but rather are in the nature of conditions put by the law upon the right given."

[2] We are of the opinion that we are dealing with a statute of limitations, rather than with a condition restrictive of a litigant's right to proceed.

[3-5] Referring to the first contention of respondent, to wit: That the action is not affected by nor subject to the limitation set forth in section 76a of the act, because of the general provision that a law enacted after a contract is made cannot apply to such contract, but can have only a prospective effect, we must disagree with respondent's theory. It is, of course, true that a street assessment is a contract, and the provisions of the statute in force at the time prescribing the manner of its enforcement are a part of such contract. Chapman v. Jocelyn, 182 Cal. 294, 187 P. 962; Jeffreys v. Point Richmond Canal & Land Co., 202 Cal. 290, 260 P. 548. It is likewise well recognized that if a remedy available to a person is altered after the contract is made so as to materially impair the obligation of such contract, the law cannot affect the relations between the parties to such contract. We do not believe, however, that the effectiveness of section 76a as providing a limitation is affected by the rules just referred to. In our opinion, the adoption of said section was merely a modification of the manner or means of procedure.

In the case of Doehla v. Phillips, 151 Cal. 488, 91 P. 330, 332, the Supreme Court in discussing the question of the power of the Legislature to alter a period of limitation as to contracts then in force, stated:

"The constitutionality of statutes establishing or altering a period of limitation as to contracts then in force is beyond question. Subject always to the limitation that a reasonable time must be allowed for prosecuting a proceeding after the passage of an act establishing or shortening such a period, the power of the Legislature is absolute in such matters. There is in such legislation no forbidden impairment of the obligation of any contract. As said in Terry v. Anderson, 95 U.S. 628, 24 L.Ed. 365, the parties to a contract 'have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced, and, as to the forms of action or modes of remedy, it is well settled that the Legislature may change them at its discretion, provided adequate means of enforcing the right remain.'" See, also, Los Angeles Bond & Securities Co. v. Heath, 120 Cal. App. 328, 329, 7 P.2d 1089.

[6] The addition of section 76a to the improvement act of 1911 was in 1929. Respondent's bond did not become due as to its final payment until 1935. She filed her action in the latter part of 1940. It cannot be said that the limitation of action imposed did not afford a reasonable time to respondent to prosecute her proceeding after the adoption of the amendment established in the period of limitation.

The other point necessary to be discussed presents a somewhat more difficult situation.

In a number of cases the courts of California have used substantially the following language: "When payment is provided for out of a particular fund, or in a particular way, the debtor cannot plead the statute of limitations without showing that the particular fund has been provided or the method pursued." Sawyer v. Colgan, 102 Cal. 283, 36 P. 580, 583, 834; Hewel v. Hogin, 3 Cal.App. 248, 84 P. 1002; Bradley Co. v. Ridgeway, 14 Cal.App.2d 326, 58 P.2d 194. Respondent contends that the above stated rule is applicable to the situation existing here. She points out that section 60 of the improvement act of 1911 requires the maintaining of a particular fund by the city treasurer and payment upon the principal and interest of an outstanding bond from that fund and that fund alone. She further calls attention to the fact that it was specifically found that the debtor did not provide the particular fund from which of necessity the principal and interest of her bond had to be paid, and that therefore all of the elements are present which make the plea of the statute unavailing to appellant.

It becomes necessary to analyze to some extent the cases upon which respondent relies in order to determine their applicability to the situation present here. In the case of Sawyer v. Colgan, supra, a petition was filed for a writ of mandate, commanding the controller of the State of California to issue a warrant upon the state treasury for the amount alleged to be due on a certain bond and coupons. The bonds had been issued under an act of 1852 authorizing the state treasurer to issue bonds for the payment of expenses of certain expeditions against the Indians. It was stipulated in the bonds that they should be payable at the office of the state treasurer, ten years after date, provided they had not sooner been paid from funds anticipated in the act to be derived from the Government of the United States under Congressional appropriation. It was further provided that the bonds, if to be paid by the state, should be paid out of any moneys in the treasury not otherwise appropriated to pay the expenses of the expeditions mentioned in the act. Subsequently, Congress did make an appropriation to pay these bonds, but some portions thereof were not paid from said appropriation, which resulted in the mandamus proceeding being instituted. It appeared that from 1862 to 1889, inclusive, there was not in any year in the general fund in the State Treasury of California any surplus not otherwise appropriated, and that in 1890, for the first time, there was a surplus. The controller contended that the action was barred by the statute of limitations. It was clear that some thirty years had elapsed between the due date of the bonds and the institution of the action. It was held that since the petitioner never prior to 1890 could have maintained a mandate for the payment of his bond coupons because of the lack of otherwise unappropriated funds to pay them, the statute could not bar the proceeding, for since the state had not made available those funds necessary to retire its obligation, any previous demand by the bondholder would of necessity have been refused because of the lack of statutory liability on the state.

In Hewel v. Hogin, supra, there was an application for a writ of mandate commanding the treasurer of an irrigation district to pay interest on certain bonds. Several of the interest coupons had fallen due more than four years prior to the institution of the proceeding. The bonds themselves were not barred.

The defendant treasurer sought to avail himself of the statute of limitations. It appeared that no fund was at any time provided for the payment of these interest coupons, as of the time when they became due or until less than four years before the action was filed. It was held that since the principal of the bonds was not barred by the statute, and since no statute forbade payment of the accrued interest, even after the four-year statute had run thereon, the defendant should not be permitted to avail himself of the statute of limitations.

In both of the foregoing cases, it will be noted that the very person seeking to plead the statute could not have complied with a timely demand for payment had it been made.

[7, 8] In Bradley Co. v. Ridgeway, supra, the debtor was the owner of certain property upon which rested the lien of certain street improvement bonds. Certain payments of principal and interest were delinquent for a period of more than four years. The property owner offered to pay into court a part of the installments of principal, interest and penalties which had become due on the bonds within four years

prior to the institution of the action, and sought to quiet its title against the holders of the bonds, and also sought declaratory relief with respect to the outstanding bonds. It was plaintiff's contention that it was not obliged to pay the "outlawed" installments in order to quiet its title against the lien of the bonds. This contention was rejected and insofar as pertinent here, this court predicated its opinion partially upon the rule that the debtor could not claim the benefit of the statute without showing that it had made the payments into the fund which in the action it was contended need not be paid on account of the bar of the statute. Under the peculiar circumstances of the Bradley Co. case, it seems clear that the rule was properly applied, for the debtor was attempting to quiet title against claims for payment of principal and interest due on bonds which had been validly issued, on the ground that such payments were barred by the statute of limitations, without pleading willingness to pay the indebtedness which was admittedly due. The cause of action was equitable in character, and as the court said [14 Cal.App.2d 326, 58 P.2d 199]: "No principle of equity is more firmly established than the familiar rule that he who seeks equity must first do equity." It is and always has been the rule that a court of equity will not look favorably upon the efforts of a debtor to avoid the payment of a just obligation, while at the same time seeking affirmative equitable relief. As applied therefore in the Bradley Co. case, the rule that when payment of an obligation is provided to be made out of a particular fund, the debtor may not plead the statute of limitations without showing that he has provided the fund, was clearly just in its application. To apply the rule in the instant case, however, would, in our opinion, render meaningless the clear limitation of four years provided by the Legislature in the enactment of section 76a of the act, for if a property owner had provided the fund for payment, his obvious defense to the foreclosure proceeding would be that he had paid the amount of his indebtedness into the fund, rather than to plead the statute of limitations. It follows that if the rule contended for by respondent is adopted, the only person to whom the statute would be available would be the person who would have no need for its benefit. Under the circumstances, sound legal reasoning would seem to indicate that it was the intention of the Legislature in the adoption of section 76a to give to any debtor who is sued thereunder the privilege of pleading the statute in the same manner that it might be pleaded should an action be instituted by a mortgagee to foreclose a mortgage, or by a payee for judgment upon a promissory note or other written instrument.

One other case was cited by respondent in support of the rule which she urges is applicable here. That case is McGrath v. County of Butte, 30 Cal.App.2d 734, 87 P.2d 381. In that case, petitioner sought by mandamus to compel the members of the board of supervisors to levy a special tax to pay for lands purchased at a delinquent tax sale. The sale had followed a failure to pay assessments on bonds issued by a county improvement district. Plea of the statute of limitations was raised, but it was held that the proceeding was not barred by subdivision 1, section 338 of the Code of Civil Procedure, for the reason that there was a continuing duty to levy and collect a tax with which to make the payment, and thus that the statute of limitations would never run as long as the obligation to levy the tax existed, such liability not being one created by statute but rather one arising out of the contract created by the bond. The case is clearly not comparable to the instant situation, since the obligation to levy the tax could never be fixed as of a definite date from which the statute would commence to run, while on the contrary, in our case the obligation of appellant arose at fixed intervals indicated in the bond coupons.

We are of the opinion that since the last payment of principal on the bond in question fell due on January 2, 1935, and the action to foreclose was not commenced until the fourth day of November, 1940, some five years and ten months thereafter, that upon a proper pleading the trial court should have found that the action to foreclose was barred under section 76a of the act. For the reasons indicated, the judgment is reversed.

50 Cal.App.2d 721

NORTHWESTERN PAC. R. CO. v. CONSUMERS ROCK & CEMENT CO.

Civ. 11945.

District Court of Appeal, First District, Division 2, California.
March 26, 1942.

1. Landlord and tenant ⟹291(14)

Where assignee of tenant took assignment of lease in violation of provision against assignment without written consent of landlord, and landlord refused to accept assignee's tender of rent but notified assignee that assignment was not recognized, in the absence of a declaration of a forfeiture of the lease by landlord, judgment for landlord in unlawful detainer action for rent in excess of that provided in lease was error.

2. Landlord and tenant ⟹76(3)

The assignment by tenant of a lease in violation of a provision against assignment without the consent of landlord did not of itself terminate the lease or render the assignment void, but it merely gave the landlord the right to stand on the covenant against assignments and declare a forfeiture, sue for breach of covenant, or, upon proper notice, maintain action in unlawful detainer, but he could not, without declaring a forfeiture, recover rental in excess of that provided in the lease.

◆

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Northwestern Pacific Railroad Company against Consumers Rock & Cement Company in unlawful detainer for restitution of real property and treble rent. From portions of a judgment and an order denying defendant's motion for new trial, awarding to plaintiff an amount for rental, defendant appeals.

Reversed.

Randolph V. Whiting and Henry F. Wrigley, both of San Francisco, for appellant.

Paul V. De Ford and A. G. Goodrich, both of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff filed a complaint in unlawful detainer praying for restitution of certain real property and treble rental. The trial court found that no three-day notice had been served as alleged in the complaint and that no notice had been served terminating or forfeiting the lease under which plaintiff had leased the premises to defendant's assignor. The trial court therefore denied judgment for restitution but entered its judgment in favor of plaintiff for the sum of $184, being rental at the rate of $60 per month, which amount was found by the trial court to be the reasonable rental value of the premises during the period that defendant was in possession thereof. Defendant made a motion for a new trial. Upon the hearing of said motion, the trial court made its order denying said motion but further ordering that the findings of fact, conclusions of law and judgment be amended so as to increase the amount awarded to $224. Defendant appeals from the portions of said judgment and order awarding said amounts to plaintiff.

In 1924, plaintiff leased the premises in question to Pacific States Construction Company for a period of one year at a monthly rental of $10. The written instrument provided that in case the lessee should hold over, such holding should be deemed a tenancy from month to month. It further provided that the lease could not be assigned without the written consent of plaintiff. The lessee went into possession and remained in possession under the lease until March 20, 1940, at which time defendant went into possession under an assignment from the lessee. Plaintiff did not give its written consent to said assignment and it refused to accept tenders by defendant of the monthly rental provided in the lease. Plaintiff wrote three letters to defendant stating that it refused to recognize the validity of said assignment but it served no notice terminating or declaring a forfeiture of the lease. The trial was had in August 1940 and it appears that in the meantime the major portion of said premises had been taken by the state for the purposes of a right of way for a highway.

[1] Defendant contends that the trial court erred in awarding to plaintiff any amount in excess of the rental provided in said lease for the period during which defendant was in possession of said premises. We are of the opinion that this contention must be sustained.

[2] The assignment of the lease without the consent of the lessor did not of itself terminate the lease or render the assignment void but the making of such assign-

ment merely gave to the lessor certain rights to be exercised in the manner provided by law. Buchanan v. Banta, 204 Cal. 73, 266 P. 547; Potts Drug Co. v. Benedict, 156 Cal. 322, 104 P. 432, 25 L.R.A.,N.S., 609; Garcia v. Gunn, 119 Cal. 315, 51 P. 684; Licht v. Gallatin, 84 Cal.App. 240, 257 P. 914; Ruppe v. Utter, 76 Cal.App. 19, 243 P. 715. If the lessor desired to stand upon the covenant against assignment, he could have given notice of his election to declare a forfeiture of the lease and could have sued for breach of the covenant. He could also have had his remedy in unlawful detainer if possession had been thereafter withheld following proper notice. But we find no authority indicating that the lessor had the option of merely giving notice of the invalidity of the assignment without declaring a forfeiture of the lease, and then suing for rental in excess of that provided in said lease. We are satisfied from the authorities cited that the lessor had no such option and that, under the circumstances before us, the award of rental in excess of that provided by the lease was not warranted.

The portions of the judgment and order appealed from are reversed.

NOURSE, P. J., and STURTEVANT, J., concurred.

WELLS FARGO BANK & UNION TRUST CO. v. OLDER.

Civ. 11976.

District Court of Appeal, First District, Division 2, California.

March 26, 1942.

1. Internal revenue 🔑121

Where Congress made only one exception in statute imposing upon executor the duty of paying federal estate tax, it will be presumed that no other exception was intended. 26 U.S.C.A. Int.Rev.Code, §§ 800–938, and 822(b), 826(c).

2. Internal revenue 🔑1732

Where decedent had created a trust and made a will without providing in either that federal estate tax should be paid by trustees, duty of paying such tax was on administrator with the will annexed. 26 U.S.C.A. Int.Rev.Code, §§ 800–938, and 822(b), 826(c).

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

Action by Wells Fargo Bank & Union Trust Company, as trustee, etc., against Lily B. Older, as administratrix, etc., for a declaratory judgment whether there was any duty on plaintiff to pay a federal estate tax liability. From an adverse judgment, the defendant appeals.

Judgment affirmed.

Charles A. Christin, of San Francisco, for appellant.

Martin Minney, Jr., and Heller, Ehrman, White & McAuliffe, all of San Francisco, for respondent.

STURTEVANT, Justice.

This action was brought by Wells Fargo Bank & Union Trust Co., one of the trustees of a living trust, for declaratory relief, praying that the court declare whether or not there was any duty upon the plaintiff to pay a federal estate tax liability. The trial court found for the plaintiff, and decreed that the administratrix with the will annexed apply the entire estate of Andreas Bang to the payment of said federal estate tax liability, and that any balance of said federal estate tax remaining should be paid by the trustees of the living trust created by Andreas Bang. This appeal is from said judgment.

The material facts in this cause are undisputed. On the 17th day of May, 1934, Andreas Bang created a trust, wherein plaintiff, Wells Fargo Bank & Union Trust Co., and Benjamin Older were trustees, and certain relatives of Andreas Bang were beneficiaries. Under the terms of said trust Andreas Bang transferred to the trustees certain personal property having a value of approximately $100,000.

Thereafter, and on the 17th day of May, 1938, Andreas Bang died, and after proceedings duly had, defendant was appointed administratrix with the will annexed of his estate. In said estate proceedings the assets of decedent situated in the state of California were appraised in the sum of $7,370.91. Other estate in a substantial amount is being administered in San Salvador and the probate proceedings in this state are but ancillary thereto. At the time the instant action was commenced, there was in said estate the sum of $4,072.88 in cash and one hundred shares of stock in Pan-American Life Insurance Company, appraised at $1,300. During the course of the estate proceedings a federal estate tax return was filed, wherein the aforementioned trust was reported, as well as the property constituting the general estate of said Andreas Bang. Thereafter it was determined by the Department of Internal Revenue of the United States that a federal estate tax was due and owing to the United States in the sum of $6,691.23. The United States Treasury Department made demand upon the trustees of said trust and the administratrix with the will annexed of the estate of Andreas Bang for the payment of said tax.

[1, 2] The defendant contends that the trustees should pay all of the tax or that in equity it should have been apportioned. We find no merit in that contention. We have before us a simple matter of statutory construction. The congress has acted (26 U.S.C.A. Int.Rev.Code, §§ 800 to 938). In the sections cited full provisions are set forth showing in detail how estates are to be taxed, the manner for computing the tax, and the person on whom the duty rests of paying the tax. That person is specifically designated as the executor. Subdivision (b) of Section 822 provides: "The tax imposed by this subchapter shall be paid by the executor to the collector." If the decedent had desired that the tax should have been paid, in whole or in part, by the trustees he could have expressed that desire in the deed of trust or in his will. He did neither. The same remark applies to the matter of apportioning the tax; and, in that particular, if the congress had so intended it would have so provided. It made an exception as to certain insurance (Sec. 826, subd. (c); but there it stopped. It will be presumed the congress intended no other exception. Bemis v. Converse, 246 Mass. 131, 140 N.E. 686. For the courts to designate a different procedure is to usurp the powers of the congress or to make additions to the will or deed of trust executed by the decedent.

The federal government is concerned in collecting the tax—and all of it. The statute makes the executor the actor. If the beneficiaries are dissatisfied they can make such contributions among themselves as to them may seem meet and proper. However, they are not entitled to have the courts readjust the responsibilities which the statute has definitely placed.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

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50 Cal.App.2d 857

FEDERAL DEPOSIT INS. CORPORATION v. EDDLEMAN.

Civ. 13531.

District Court of Appeal, Second District, Division 2, California.

March 25, 1942.

Appeal and error 🔑801(1)

Where motion to dismiss appeal was supported by superior court clerk's certificate setting forth facts required by reviewing court rule, and all grounds stated in motion were supported by certificate and by authorities cited, appeal was dismissed. Rules of the District Court of Appeal, Second District, rule VI.

Appeal from Superior Court, Los Angeles County.

Action by the Federal Deposit Insurance Corporation against Moses E. Eddleman. From the judgment, defendant appeals, and plaintiff moves to dismiss the appeal.

Appeal dismissed.

Houston A. Snidow, of Los Angeles, for appellant.

Sanner, Fleming & Irwin, of Los Angeles, for respondent.

PER CURIAM.

The respondent having filed its motion to dismiss the appeal in the above entitled matter, supported by a certificate of the clerk of the superior court setting forth the facts required by rule VI of this court, and it appearing that all of the grounds stated in the motion are supported by the said certificate and by the authorities cited, it is hereby ordered that this appeal be, and it is hereby, dismissed.

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50 Cal.App.2d 680

POWELL et al. v. JOHNSON.

Civ. 2690.

District Court of Appeal, Fourth District, California.
March 24, 1942.

As Modified on Denial of Rehearing April 13, 1942.

1. Evidence 🔑419(15)

The maker of a note may prove actual consideration given for it and that actual amount of the indebtedness is less than the face of the note.

2. Trial 🔑397(1)

In action to foreclose mortgage with special defense putting amount due in issue, the special defense presented a "material issue" on which trial court should have made findings.

See Words and Phrases, Permanent Edition, for all other definitions of "Material Issue".

3. Appeal and error 🔑1071(6)
New trial 🔑64

Where court renders judgment without making findings upon all material issues of fact, decision is against the law and constitutes ground for a new trial or for reversal provided it appears there was evidence introduced as to such issue sufficient to sustain a finding in favor of complaining party.

4. Appeal and error 🔑1071(6)

In action to foreclose mortgage where defendant pleaded a special defense putting amount due in issue and the parties introduced evidence upon that issue, refusal of trial court in rendering judgment for principal, interest and attorney fees to find upon issue of amount due, which was a "material issue", constituted reversible error.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Donald L. Powell and others against Glenn M. Johnson, as administrator of the estate of Isaac H. Vogle, deceased, to foreclose a mortgage on real property. From a judgment for plaintiffs, defendant appeals.

Affirmed.

Russell & Heid, of Tulare, for appellant.

Harvey, Johnston & Baker, of Bakersfield, for respondents.

MARKS, Justice.

This is an action to foreclose a mortgage on real property in Kern County. Plaintiffs were given the usual decree of foreclosure directing that the property be sold to pay $6,500, the principal of the secured note, $4,389.72, accrued interest, $40, cost of the title search, and $1,250, attorneys' fees.

Earl F. Long loaned Isaac H. Vogle, his aged uncle, various sums of money over a period of years, taking notes secured by mortgages on Tulare and Kern County properties.

The documents affecting the Tulare County property are the following: Note for $2,000, dated January 3, 1922, secured by a mortgage recorded January 13, 1922. Release of this mortgage recorded June 21, 1929; note for $2,980, dated December 28, 1928, secured by a mortgage recorded December 29, 1928. Contract dated December 4, 1933, pertaining to the last-mentioned note and mortgage reciting that "the balance owing upon said promissory note is $1,500.00" and extending the due date of that sum to "on or before the 28th day of December, 1938."

The documents affecting the Kern County property are the following: Note for $1,800, dated September 14, 1923, secured by a mortgage recorded September 22, 1923. Release of that mortgage recorded June 21, 1929. Note for $3,207.66, dated June 15, 1929, secured by a mortgage recorded on June 21, 1929. Release of that mortgage recorded December 6, 1933. Note dated December 15, 1932, for $6,500, secured by a mortgage recorded December 6, 1933.

There was also an unsecured note dated June 19, 1929, for $50.

All of the foregoing notes were signed by Mr. Vogle and were made payable to Mr. Long who died on May 5, 1935, a resident of Franklin County, Ohio, where his estate was probated. Ancillary letters were taken out in Tulare County. Ownership of the unpaid notes together with the mortgages passed to plaintiffs.

Actions were started in Tulare and Kern Counties against Vogle to foreclose the mortgages. Vogle died and the actions were continued against Glenn M. Johnson as administrator of the estate.

The Tulare County action was tried first. While the pleadings are not before us it is apparent from the findings that a special defense was interposed putting in issue the total amount of the indebtedness, alleging that it was less than the $8,000 principal of the two notes and asking for an accounting to determine the amount due and unpaid on the notes.

It was found in that action that the sum of $1,500, represented by the note there involved, was due and unpaid. That court expressly refused to go further into the question of the total amount due and unpaid on the two notes and "expressly makes no findings on said matters." Counsel for defendant states that, as the pleadings admitted a total indebtedness of more than $1,500, this admission furnished the reason for the foregoing holding by the Tulare County Superior Court. This statement is not denied by counsel for plaintiffs. Judgment was rendered for $1,500, principal, $792.81 accrued interest, and $121 attorneys' fees, with the usual decree of foreclosure.

The same defenses were interposed in the instant case. The fact of the pendency of the Tulare County action was affirmatively pleaded and it was alleged that the total indebtedness for which the two notes were given did not exceed the sum of $4,000. An accounting was asked to determine the amount of the debt.

In the instant action the trial court found that the $6,500 note was given "for value received" but did not find the amount loaned by Long to Vogle and expressly refused to find on the special defenses which included the defense that the total indebtedness did not exceed the principal sum of $4,000.

[1, 2] It is a thoroughly established rule in California that the maker of a promissory note may prove the actual consideration given for it and may prove that the actual amount of the indebtedness is less than the face of the note. Richardson v. Lamp, 209 Cal. 668, 290 P. 14; Singh v. White, 111 Cal.App. 683, 296 P. 119; Cooper v. Cooper, 3 Cal.App.2d 154, 39 P.2d 820. This being true the special defenses presented a material issue on which the trial court should have made findings.

[3] In 24 Cal.Juris., pages 940, 941, the following rule is announced: "It has been repeatedly affirmed that where a court renders a judgment without making findings upon all material issues of fact, the decision is against law, and constitutes grounds for granting a new trial in order that the issues of fact may be determined, or for reversal upon appeal, provided it appears that there was evidence introduced as to such issue and the evidence was sufficient to sustain a finding in favor of the party complaining." See, also, James v. Haley, 212 Cal. 142, 297 P. 920; Matthiessen v. Grand, 92 Cal.App. 504, 268 P. 675.

[4] Defendant introduced evidence tending to show that the total principal sum of the indebtedness for which the two notes were given was considerably less than the $8,000 total of the two notes. Evidence to the contrary was introduced by plaintiffs. Thus a material issue was presented both by the pleadings and the evidence upon which the trial court erroneously refused to find.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concurred.

50 Cal.App.2d 658

O'BRIEN v. O'BRIEN et al.

Civ. 11871.

District Court of Appeal, First District, Division 2, California.

March 24, 1942.

1. Trusts ⇨371(2)

In action commenced in January, 1940, complaint alleging that plaintiff's and defendant's mother conveyed realty purchased with family savings to defendant on his promise to hold one-half thereof in trust for plaintiff, that, pursuant to agreement between plaintiff and defendant, apartment house was built on realty and was managed by plaintiff, and that defendant repudiated trust for the first time in December, 1939, and ordered plaintiff to move from apartment house, stated cause of action for declaration of "voluntary constructive trust" or "positive voluntary trust resting in parol", which cause of action was not barred by "laches" or limitations.

See Words and Phrases, Permanent Edition, for all other definitions of "Laches", "Positive Voluntary Trust Resting in Parol" and "Voluntary Constructive Trust".

2. Limitation of actions ⇨103(3)
Trusts ⇨365(5)

The statute of limitations and the equitable doctrine of laches do not begin to operate against action for declaration of voluntary constructive trust or positive voluntary trust resting in parol until trustee begins to act in hostility to continuing obligation imposed by parol agreement or understanding.

3. Pleading ⇨252(2)

An amended complaint supersedes complaints previously filed, and reference cannot be made to the superseded complaints for the purpose of contradicting the last complaint.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Suit by George Ambrose O'Brien against William Francis O'Brien and others for a declaration of trust and for quieting of title. From judgment for defendants, plaintiff appeals.

Reversed with directions.

Eric J. Robertson and Meurice Swim, both of San Francisco, for appellant.

Wolff & Wolff, Norman Sanford Wolff, and Harry K. Wolff, Jr., all of San Francisco, for respondents.

SPENCE, Justice.

Plaintiff's second amended complaint contained two counts. In the first count, plaintiff sought to have it declared that defendant William Francis O'Brien was holding two parcels of real property in trust and that plaintiff was entitled to a conveyance of a one-half interest therein. In the second count, plaintiff sought to quiet his title to a one-half interest in said real property. The trial court sustained the demurrers of the defendants to said second amended complaint without leave to amend. Judgment was thereupon entered in favor of defendants and from said judgment, plaintiff appeals.

Plaintiff contends that the trial court erred in sustaining said demurrers to the second amended complaint without leave to amend and in our opinion said contention must be sustained. The first count of the second amended complaint alleged the following material facts: That plaintiff and defendant William Francis O'Brien are brothers and they are the sons of Margaret O'Brien, who died in 1917. That during her lifetime, said Margaret O'Brien was the custodian and trustee of the accumulations and savings of the family, including those of the said brothers, and that said funds were held for the mutual benefit of said brothers. That said two parcels of real property were purchased with said funds. That in 1916, said Margaret O'Brien informed said brothers of her intention to convey said real property to defendant William Francis O'Brien upon condition that he promise and agree to hold one-half thereof in trust for plaintiff. That said defendant so agreed and that said Margaret O'Brien, relying solely upon said promise and without any other consideration, conveyed said property to said defendant upon said agreement and understanding. That in 1926, and while said defendant was holding said property pursuant to said trust, plaintiff and said defendant agreed to build and did build an apartment house on one of said parcels of real property and it was further agreed that plaintiff would manage and operate said apartment house for their joint and mutual benefit. That since that time and until December, 1939, plaintiff has so managed and operated said apartment house for their joint and mutual benefit and has accounted to said defendant for the income thereof. That at all times prior to December, 1939, peace and harmony existed between plaintiff and said defendant and each reposed great confidence in the other. That in December, 1939, said defendant, who was then 79 years of age, repudiated said trust by ordering plaintiff to vacate and move from said apartment house and by placing another in the management thereof for the purpose of defrauding plaintiff of his one-half interest in said property. That it was not until December, 1939, when plaintiff was served with a notice to surrender and vacate the premises, that he learned of said defendant's purpose to defraud him of said property and to repudiate said trust. The second count of the complaint contained the judicially approved allegations of the ordinary count to quiet title. The action was commenced in January, 1940.

[1, 2] While the second amended complaint may not have been a model pleading, the foregoing facts were pleaded with sufficient certainty and they stated a cause of action for a declaration of a trust in plaintiff's favor. Smith v. Lombard, 201 Cal. 518, 258 P. 55; Taylor v. Morris, 163 Cal. 717, 127 P. 66; Lauricella v. Lauricella, 161 Cal. 61, 118 P. 430; Cooney v. Glynn, 157 Cal. 583, 108 P. 506; Brison v. Brison, 75 Cal. 525, 17 P. 689, 7 Am.St.Rep. 189; 25 Cal.Juris. 165, § 35. This type of trust has been termed a "voluntary constructive trust" or a "positive, voluntary trust resting in parol" and it has been said that "neither the statute of limitations nor the equitable doctrine of laches begin to operate until the trustee begins to act in hostility to the continuing obligation imposed by the parol agreement or understanding." Cooney v. Glynn, 157 Cal. 583, 108 P. 506; see, also, Taylor v. Morris, 163 Cal. 717, 725, 127 P. 66. Here it appears that first acts of the alleged trustee in hostility to the alleged trust were committed in December, 1939. The action was commenced in January, 1940, and it therefore appears clear that defendants' claim that plaintiff's alleged cause of action was barred by the statute of limitations and by laches cannot be sustained.

[3] Defendants further claim in their briefs that there are certain alleged contradictions between the allegations of the second amended complaint and the allegations contained in the complaints previously filed. It appears unnecessary to discuss these claimed contradictions for the complaints previously filed have been superseded by the second amended complaint and it appears well settled that reference cannot be made to the superseded complaints for the purpose of contradicting the last complaint. Penziner v. West American Finance Co., 133 Cal.App. 578, 24 P.2d 501; Bray v. Lowery, 163 Cal. 256, 124 P. 1004; Johnson v. Powers, 65 Cal. 179, 3 P. 625; Maddux v. Mora, 99 Cal.App. 695, 279 P. 467.

The judgment is reversed with directions to the trial court to overrule the demurrers.

NOURSE, P. J., and STURTEVANT, J., concurred.

50 Cal.App.2d 674

SAFEWAY STORES, Inc., v. SAN JOAQUIN COTTON OIL CO.

Civ. 2670.

District Court of Appeal, Fourth District, California.

March 24, 1942.

Rehearing Denied April 23, 1942.

1. Execution ⇨37

A judgment creditor on levy of execution on mortgaged property is in no better position with reference to the rights of the mortgagee than the debtor would be.

2. Chattel mortgages ⇨157(2)

In action by judgment creditor against chattel mortgagee of judgment debtor to have value of mortgaged cotton, which was levied upon but not delivered to sheriff, applied to the satisfaction of the judgment, evidence sustained finding that act of chattel mortgagee in joining judgment debtor in signing application for government loan on the cotton constituted a "subordination agreement" rather than a release of the mortgage lien.

See Words and Phrases, Permanent Edition, for all other definitions of "Subordination Agreement".

3. Attachment ⟹53
Execution ⟹37

Where a cotton crop was subject to an unpaid chattel mortgage, a judgment creditor of the cotton grower could not subject the proceeds of the crop to attachment or execution without tendering to the mortgagee the amount of the mortgage debt. Civ.Code, § 2969.

4. Chattel mortgages ⟹157(2)

In action by judgment creditor of cotton grower to recover from chattel mortgagee of cotton grower value of mortgaged cotton in mortgagee's possession not surrendered to sheriff after garnishments under attachment and execution and after assignment by cotton grower of his interest to judgment creditor, where mortgagee had applied proceeds of the sale of the cotton to the mortgage debt and judgment creditor had not offered to pay mortgage debt, evidence justified denial of recovery on ground that at time garnishments were served and assignment was given, mortgagee did not have in its possession or control any property, moneys or credits belonging to cotton grower. Civ.Code, § 2969.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by Safeway Stores, Inc., against San Joaquin Cotton Oil Company to recover money and property garnisheed under writs of attachment and execution while in defendant's possession but not delivered to sheriff and for money assigned to plaintiff and held by defendant. From a judgment for defendant, plaintiff appeals.

Affirmed.

Calvin H. Conron, Jr., of Bakersfield, for appellant.

Borton, Petrini, Conron & Borton, of Bakersfield, for respondent.

SCHOTTKY, Justice pro tem.

Appellant sought to recover the sum of $2,002.67 from respondent in a complaint which set forth three causes of action. The first cause of action alleged in substance that respondent, on December 21, 1938, had 47 bales of cotton of the value of $2,002.67 in its possession and control, said cotton being the property of the San Joaquin Agricultural Company, which will be hereinafter referred to as the Agricultural Company; that on December 21, 1938, plaintiff filed an action against L. A. Sustarich and the Agricultural Company to recover $2,026.12, and that in said action a writ of attachment was levied which on said date was served on respondent; that on June 21st, 1939, after judgment in said action was rendered in favor of appellant, execution was issued, levied and served upon respondent; and that in response to said levy respondent failed to deliver said property or the value thereof to the sheriff.

The second cause of action alleged in substance that on March 16, 1939, respondent had in its possession and under its control the sum of $2,002.67 owed by it to said Agricultural Company; and that on said date appellant caused a writ of attachment to be served upon respondent. The remainder of the allegations of the second cause of action were the same as those of the first.

The third cause of action alleged an assignment by the Agricultural Company to appellant of the proceeds of 47 bales of cotton to the extent of $2,026.12, and the service of said assignment by appellant on respondent on December 21, 1938, and that respondent, on January 26, 1939, and February 15, 1939, received the proceeds of said 47 bales but did not pay said proceeds to appellant.

The answer of respondent put in issue all of the allegations of the complaint except the incorporation of the parties and admitted that respondent had not paid appellant. The answer also set up by way of special defense the execution of the notes, a deed of trust and a chattel and crop mortgage executed by L. A. Sustarich, the predecessor in interest of the Agricultural Company, in favor of respondent, and alleged that the proceeds of said cotton were received and applied in partial discharge of said obligations, and that there was nothing owing to the Agricultural Company at the time of the alleged garnishment. Further special defenses were set up alleging that the levying or attaching officer did not pay or tender to respondent the amount of the mortgage debt at the time of the alleged garnishment, and that L. A. Sustarich, as general manager of the Agricultural Company, was acting for and was the agent of the Agricultural Company in all transactions concerning the crop.

The trial court found that appellant recovered judgment against the Agricultural Company and L. A. Sustarich in the sum of $2,061.77; that respondent did not have on December 21, 1938, or March 16, 1939, or June 15, 1939, any money or property which respondent owed to or which belonged to the Agricultural Company or L. A. Sustarich; that the proceeds of the loan from the Commodity Credit Corporation were applied in partial payment of the obligation due to respondent and secured by the chattel and crop mortgage and deed of trust; that none of the proceeds were paid to appellant; that the garnishing officers did not pay nor offer to pay the mortgage indebtedness; that throughout the entire transaction L. A. Sustarich was acting for and on behalf of the Agricultural Company. Judgment in favor of respondent followed and appellant appealed therefrom.

It appears from the record that early in 1938, one J. C. Sharp commenced growing a crop of cotton on property known as the McCrary ranch in Tulare County. There was a first deed of trust for $60,230 against the property and respondent held a second deed of trust securing an obligation of $20,000 from said Sharp together with a crop mortgage upon the cotton crop to secure a note of $14,124 plus the obligation secured by the second deed of trust. Respondent was financing the growing of cotton upon the property. In June, 1938, Sharp sold the property to L. A. Sustarich and on June 29, 1938, Sustarich executed a new note and deed of trust to the McCrarys and also a new note to respondent payable on demand in the sum of $25,000, secured by a second deed of trust which covered not only the real property but the "rents, issues and profits therefrom," and which contained all of the usual provisions of such deeds of trust. In addition to the $25,000 note and deed of trust, said Sustarich executed a crop and chattel mortgage in favor of respondent to secure, among other things, his note in the sum of $6,990, which mortgage, by its terms, and by its incorporation, by reference, of the terms of a fictitious mortgage on record in said county, made said crop and chattels, and all payments, bounties, bonuses and benefits that might be received from the state or federal government, security for the payment of the deed of trust note and any other sums that Sustarich owed or might thereafter owe to respondent.

Sustarich testified that shortly after he purchased the property he and one T. H. Mitchell entered into an agreement to jointly farm the property, and in addition to the crop of cotton to put in a crop of peas, and that Mitchell agreed to furnish the money to finance the operation. On August 8, 1938, Sustarich conveyed a one-half interest in the property to Mitchell by deed which specified that it was subject to the deed of trust and crop mortgage. By another deed, also dated August 8, 1938, Mitchell and Sustarich conveyed the property to the San Joaquin Agricultural Company, a corporation which they had formed, they being the only two stockholders, each owning one-half of the stock. There were three directors, Mitchell, his wife A. R. Mitchell, and Sustarich. Sustarich was made general manager and continued in sole and active management of the farming operations upon the property. On August 19, 1938, respondent was advised by letter that the Agricultural Company was the owner of the land and that the interest of Sustarich had been transferred to the Agricultural Company. Throughout the fall of 1938 and the early part of 1939, Sustarich was in sole and active supervision of the growing of the cotton and pea crops, and from time to time obtained advances from respondent to cover and defray the expenses of growing the crops, which advances, he testified, were used for the purposes of the Agricultural Company in growing said crops. The cotton, as it was harvested, was delivered to gins of respondent, and there ginned, and Sustarich, as general manager of the Agricultural Company, sold the cotton from time to time, and the proceeds were applied by respondent on the mortgage debt. By December 12, 1938, all of the cotton crop had been sold except 47 bales, for which negotiable bale or yard receipts had been issued. Sustarich testified that he and Mitchell, the only other stockholder in the Agricultural Company, agreed that because more money could be obtained by placing the last 47 bales in a government loan than by selling same on the open market, this remaining cotton should be put in a government loan. In order to secure the signature of respondent to said loan application, Sustarich, as general manager of the Agricultural Company, agreed that the proceeds of the loan would be delivered to respondent and applied on the secured obligations owing to respondent. On December 16, 1938, the application for said loan on 44 bales was made and the bale and yard receipts endorsed and delivered to the Commodity

Credit Corporation the government agency making the loan.

On December 21, 1938, appellant brought an action against Sustarich and the Agricultural Company and on June 15, 1939, obtained judgment against them in the sum of $22,061.27. A writ of attachment was issued and served on December 21, 1938, but no offer was made then or at any subsequent time, to pay the mortgage obligation due respondent. On December 21, 1938, Sustarich, as general manager of the Agricultural Company, signed a letter addressed to respondent, authorizing respondent to pay to appellant the sum of $2,026.12 out of the proceeds of 47 bales of cotton, and respondent acknowledged receipt of said letter but did not agree to comply with said order. At that time there was still due to respondent on the two notes hereinbefore mentioned, the sum of $26,876.99. On January 26, 1939, the proceeds of the government loan were received by respondent and applied by it on the secured debt. The other three bales of coton were sold on February 15, 1939, and the proceeds likewise applied by respondent on the secured debt. On March 6, 1939, a second garnishment under the writ of attachment was served on respondent, and on June 20, 1939, another garnishment under a writ of execution was served on respondent.

Appellant contends that the evidence is insufficient to support the judgment, and makes an extended argument raising many questions most of which it is unnecessary to discuss. As we view the matter, the issues of fact and law in this case are exceedingly simple.

[1, 2] Appellant, as the creditor of the Agricultural Company, is of course in no better position in reference to the rights of the respondent than said Agricultural Company would be. It is clear that the respondent had a deed of trust upon said land and a mortgage upon the crops thereof, and that in accordance with said deed of trust and mortgage, it had a right to advance money for the care and harvesting of said crops to Sustarich as general manager of the Agricultural Company, or to anyone else, and it is also clear that it had a right to said crops and the proceeds thereof superior to appellant. It is appellant's contention that by signing the loan application for the 44 bales of cotton (which virtually amounted to a sale thereof) respondent released its lien on said cotton, but in the light of the evidence and the testimony of Sustarich it appears that this must be considered merely as a subordination agreement rather than a release of the mortgage lien of respondent, as respondent was merely cooperating in completing the necessary details to consummate the loan from the Commodity Credit Corporation.

It may be true, as appellant contends, that the Agricultural Company did not assume the personal indebtedness of its predecessors in interest, but the land and crops that it acquired were subject to such indebtedness, and the only moneys here involved are the proceeds of said crops.

[3] Appellant has cited numerous well-established rules of law concerning the correctness of which there is no question. However, the difficulty with appellant's position is that the trial court, upon sufficient evidence, has found against the main contentions of appellant as to the facts. Although we may sympathize with the effort of a creditor who has furnished credit to a cotton grower to obtain his money notwithstanding a mortgage lien of the company which has financed the crop, which is still unpaid, there is no way under the law that the proceeds of the crop may be subject to attachment or execution except in the manner provided by section 2969 of the Civil Code, namely, by tendering to the mortgagee the amount of the mortgage debt.

[4] We must conclude, therefore, that the court below properly found that at the time the said garnishments were served and at the time the so-called assignment was given, respondent did not have in its possession or control any property, moneys or credits belonging to the Agricultural Company.

In view of the foregoing, it is unnecessary to discuss a number of other contentions made by appellant. We are convinced from a careful reading of the entire record that the judgment is amply supported by the evidence and that there is no error in the record.

The judgment is affirmed.

BARNARD, P. J., and MARKS, J., concurred.

50 Cal.App.2d 697

PEOPLE v. PALMER.

Cr. 471.

District Court of Appeal, Fourth District, California.

March 24, 1942.

1. Kidnapping ⚷1

In prosecution for attempted child stealing, the intent must be determined from the surrounding circumstances. Pen.Code, § 278.

2. Kidnapping ⚷1

The fact that girl was able to escape from defendant, charged with attempted child stealing, had no bearing upon the inference of intent to detain and conceal which might reasonably be drawn from evidence disclosing defendant's attempt to force girl into defendant's automobile. Pen.Code, § 278.

3. Kidnapping ⚷5

Evidence was sufficient to sustain conviction for attempted child stealing. Pen. Code, § 278.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

James O. Palmer was convicted of attempted child stealing, and he appeals.

Affirmed.

Frank M. Downer, Jr., of San Diego, for appellant.

Earl Warren, Atty. Gen., and Gilbert F. Nelson, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with attempted child stealing in violation of section 278 of the Penal Code, and with two prior felony convictions. He admitted the prior convictions and a jury found him guilty on the charge here involved. He has appealed from the judgment and from an order denying his motion for a new trial.

The incident in question occurred on a little used road which runs into the hills back of Chula Vista. According to the evidence this road "is just a trail," has never been graded, is very rough, and is so narrow that there is no room for two cars to pass. There were two or three houses on the road near where it leaves Chula Vista and the purpose of the road was to serve two or three houses several miles up in the hills. On this occasion a girl 17 years of age was walking along this road toward Chula Vista on her way to school and carrying some books and a purse. As she neared Chula Vista the appellant came up the road toward her driving an old model green Chevrolet sedan. The girl stepped out of a rut to permit the car to pass but the appellant stopped his car, jumped out and grabbed her, ordered her to get in his car, and struggled with her in an attempt to force her into the car. The girl dropped her school books and purse and after a struggle succeeded in getting away. She ran several hundred feet to a house in the direction of Chula Vista, arriving in an hysterical condition, and a woman there telephoned to the Chula Vista police department.

The chief of police with another officer responded to the call and arrived at this house within a few minutes. The officers were given a description of the car and of the appellant and immediately started up the road in the direction the appellant had gone. About 500 feet up the road they found the girl's school books and purse lying in the center of a circle of footprints about five feet in diameter, which they described as looking as though someone had been going around in a circle. As they proceeded up the road they saw a green Chevrolet sedan coming down out of the hills at a high rate of speed for that kind of a road. Being unable to get by the officers' car the appellant stopped and immediately said, before any accusation had been made against him: "What the Hell is the matter? This is a public road here. I have got a right to drive on this road." The officers then placed him under arrest and without asking the reason for his arrest the appellant said: "You can't pin anything on me, I wasn't out of the car." The appellant then told the officers that he had driven into the hills to look for rabbits, although he had no gun with him. At the trial he testified that he had gone into the hills to look at a piece of real estate and that he had told the officers that he had gone to look for rabbits "for the purpose of throwing them off of any idea of how I may have arrived at that point on the road."

Immediately after arresting him the officers took the appellant to the house to which the girl had gone, where she positively identified him as the man who had tried to force her into the car. There was evidence to the effect that this road just ran two or three miles into the hills, that it did not connect with any other road, and that it was not possible to get from it to any other road without unlocking gates and going through the fields. This evidence justifies the inference that it was necessary for the appellant, having gone up this road, to come back the same way. In an attempt to establish an alibi the appellant introduced evidence that approximately half an hour before this incident occurred he had personally applied for a job at a certain place in National City. He testified that he then went out another road leading into these hills and after going up some miles took a crossroad over to the road down which he was coming when he was arrested. Not only does this entire matter present merely a conflict in the evidence but the appellant's brother, who testified that there was another road, which was rough and more or less of a trail but still passable, by which it was possible to go "miles around" and get into the road down which the appellant was coming when he was arrested, when asked on cross-examination how appellant could have gotten around over that road within an hour, replied: "I don't know."

The sole ground relied upon for reversal is that the evidence is insufficient to support the judgment. No evidence is specifically referred to and the only contention is that no intent to detain and conceal this minor is disclosed by the evidence. In People v. Simmons, 12 Cal.App.2d 329, 55 P.2d 297, 299, the court said:

"The statute does not include 'concealment' nor 'detention.' It does contain an element 'with intent to detain and conceal.' As proof of that element, the courts will consider the acts and conduct of the parties, together with all the circumstances of the case both before and after the act complained of."

[1-3] As is usual in such cases, the intent must be determined from the surrounding circumstances. The fact that the appellant was driving along this lonely road toward open country up in the hills, with the facts surrounding his attempt to force the girl into his car, justify an inference that he intended to force her to accompany him into the hills and thereby intended to detain and conceal her from her parents or guardians within the meaning of Penal Code, section 278. The fact that the girl was able to escape has no bearing upon the inference of an intent to detain and conceal which may reasonably be drawn from the evidence. People v. Kocalis, 140 Cal.App. 566, 35 P.2d 584. There is no question that the appellant is the party who attacked this girl and the evidence with the reasonable inferences therefrom is sufficient to sustain the conviction under the statute.

The judgment and order are affirmed.

MARKS and GRIFFIN, JJ., concurred.

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50 Cal.App.2d 705

RAGLAN v. JOHNSTON ROCK CO. et al.

Civ. 6613.

District Court of Appeal, Third District, California.

March 25, 1942.

Hearing Denied May 21, 1942.

1. Waters and water courses 🔑93

Where the change is gradual, whether caused by accretion, reliction or encroachment, the boundaries shift with the shifting of the channel or shore.

2. Boundaries 🔑42

In action involving boundary line, a finding which fixed dividing line as center of non-navigable stream "as now situated" and then delineated the line by metes and bounds was simply a determination that the center of the stream at that time had a definite location and would not operate to deprive either party of any advantage which might accrue to him at a later date by the shifting of the center of the stream to another location.

See Words and Phrases, Permanent Edition, for all other definitions of "As Now Situated".

3. Boundaries 🔑37(4)

In action involving boundary line, evidence sustained finding that boundary line was the center of a non-navigable stream as then situated.

4. New trial ⚷6

The granting or refusing of a new trial rests in the sound discretion of the trial court.

5. New trial ⚷99

Refusal to grant a new trial on ground of newly discovered evidence was not an abuse of discretion.

◆

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by A. W. Raglan against Johnston Rock Company for moneys due under contract for value of gravel removed wherein the defendant paid the money into court and by agreement Isaphene Beasley filed an answer and cross-complaint claiming the money so deposited. From a judgment for substituted defendant, the plaintiff appeals.

Judgment affirmed.

Burke & Rawles, of Ukiah, for appellant.

Taft & Spurr, of Ukiah, for respondent.

TUTTLE, Justice.

The appellant herein, A. W. Raglan, is the owner of a ranch in Mendocino County situated on Highway No. 28, which runs between towns of Cloverdale in Sonoma County and Boonville in Mendocino County. A portion of the boundary line of his land on the southwest is formed by Rancheria Creek, a stream whose course runs in a general southerly direction. The appellant acquired the ranch in the year 1924. The respondent, Isaphene Beasley, is the owner of a ranch situated to the southwest of the Raglan property and whose northeast boundary is also formed by Rancheria Creek.

In 1938 appellant herein entered into an agreement with the Johnston Rock Company, which Company held a contract for the construction of certain highways within the State of California. The agreement was to permit the Johnston Rock Company to remove gravel from the bed of Rancheria Creek for which they agreed to pay to appellant an agreed price for each cubic yard of gravel so removed. Thereafter the Johnston Rock Company entered upon Rancheria Creek and removed the gravel, but due to the fact that the respondent herein presented her claim to the Company for the value of the gravel so removed, the Johnston Rock Company refused to pay either appellant or respondent. Thereafter the appellant herein filed this action against the Johnston Rock Company for the value of the gravel removed as provided by their agreement. The Johnston Rock Company thereafter deposited the value of the gravel removed as agreed upon by both appellant and respondent with the Superior Court of Mendocino County, and the respondent herein filed her answer and cross-complaint claiming the moneys so deposited. Findings were made in favor of respondent, to the effect that he was the owner of the land from which said gravel was removed, and judgment was entered that he recover that portion of the amount paid into court by said Rock Company which represented the value of the gravel taken from the lands found to be owned by respondent. A motion for new trial, based upon newly discovered evidence, was denied, and the appeal then taken from the judgment.

The sole question presented is the sufficiency of the evidence to support the findings. The issue was the boundary line between the properties of the parties. On January 31, 1894, W. T. Rock, Jennie Rock, and Lawrence Rawles, predecessors in interest of the appellant, A. W. Raglan, executed a deed to S. W. Knowles, predecessor in interest of the respondent, Isaphene Beasley, conveying all their interest in "all lands owned by the parties of the first part, or either of them, lying to the south and west of Rancheria Creek, in Section 32, Township 13 North, Range 13 West, M. D. M." On the same date, S. W. Knowles, the predecessor in interest of the respondent Isaphene Beasley, made his deed to W. T. Rock conveying to him, "all land owned by the party of the first part lying to the north and east of Rancheria Creek in Section 32, Township 13 North, Range 13 West, M. D. M." The parties to the above mentioned deeds were apparently attempting to make Rancheria Creek the boundary between their respective ranches. Rancheria Creek is a non-navigable stream. Section 2077 of the Code of Civil Procedure provides as follows:

"The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it:

"1. Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false, does not frustrate the conveyance, but it is to be construed by the first-mentioned particulars.

"2. When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount.

"3. Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces, and that of lines paramount to both.

"4. When a road, or stream of water not navigable, is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance, except where the road or thread of the stream is held under another title.

"5. When tide-water is the boundary, the rights of the grantor to ordinary high-water mark are included in the conveyance. When a navigable lake, where there is no tide, is the boundary, the rights of the grantor to low-water mark are included in the conveyance.

"6. When the description refers to a map, and that reference is inconsistent with other particulars, it controls them if it appear that the parties acted with reference to the map; otherwise the map is subordinate to other definite and ascertained particulars."

[1-3] Rancheria Creek was and is the dividing line between the properties of appellant and respondent. The bed of said Creek, at the point involved in the controversy is of a width of approximately 600 feet, that is, from the southwest to the northeast bank. The volume of water in the stream varies with the season, there being but a small area covered with flowing water in the summer seasons and on some occasions the stream dries up in the summer months. The court fixed the dividing line between the parties as the center of said Creek "as now situated", and proceeded to delineate said line by metes and bounds. The testimony of surveyor Cummins supports such finding. The evidence shows that the stream meandered through its wide bed, in past years, changing from time to time. It is the rule that where the change is gradual and imperceptible, whether caused by accretion, reliction or encroachment, the boundaries shift with the shifting of the channel or shore. 9 C.J., page 195, § 82; 11 C.J.S., Boundaries, § 34. Appellant therefore contends that the court erred in fixing the line by a surveyed description, irrespective of the fact that the line is the center of the stream, and is subject to change. We do not believe that the findings should be so construed. The line fixed, although given by metes and bounds, is simply a determination that the center of the stream at present has a definite and fixed location. It is therefore not a permanent dividing line, and would not operate to deprive appellant of any advantage which might accrue to him at a later date by the shifting of the center of the stream to another location. The rule laid down in Corpus Juris is just as applicable now as it was prior to the judgment herein. We therefore hold that the attack upon the findings is without merit.

[4, 5] It is next contended that the motion of appellant for new trial should have been granted. That matter was committed to the sound discretion of the trial court. We find no error in the denial thereof. It was made upon the ground of newly discovered evidence. We cannot say that the court abused its discretion in making said ruling.

The judgment is affirmed.

THOMPSON, Acting P. J., and STEEL, J., pro tem., concurred.

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50 Cal.App.2d 827

EDGAR et al. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 2691.

District Court of Appeal, Fourth District, California.

March 27, 1942.

Rehearing Denied April 23, 1942.

Hearing Denied May 25, 1942.

1. Appeal and error 🔑882(16)

Where defendant's objection to trial by jury was overruled on ground that action was at law and not in equity and, after evidence was in, plaintiffs advised trial court that they were uncertain as to type of action and were willing for jury to be dismissed or retained in advisory capacity, neither plaintiffs nor defendants could complain on appeal of action of the trial court in retaining jury in advisory capacity only.

2. Trusts 🔑265

Where bank by mistake sold arid land which the bank held in trust, and on discovering the mistake, after purchaser had drilled wells producing water for irrigation, bank repurchased land for trust beneficiaries, the bank could be held liable for its negligence, but beneficiaries were not entitled to punitive damages. Civ.Code, §§ 2229, 2237.

3. Trusts 🔑247

The three statutory remedies available to trust beneficiary in case of use or disposition of trust property by trustee for his own profit are alternative. Civ.Code, §§ 2229, 2237.

4. Trusts 🔑247

The statute setting forth extent of trustee's liability for breach of trust is aimed at making the trust beneficiaries whole. Civ.Code, §§ 2229, 2237.

5. Trusts 🔑247

Beneficiaries who brought action for breach of trust against trustee which by mistake sold land held in trust and, on discovering the mistake, repurchased land for the beneficiaries, could not recover both value of use and occupation of land and the rents, issues, and profits thereof. Civ.Code, §§ 2229, 2237.

6. Trial 🔑395(2)

In beneficiaries' action for breach of trust by trustee which sold arid trust land by mistake and on discovering mistake, after purchaser had drilled wells producing irrigation water, repurchased land for beneficiaries, findings that beneficiaries sustained $25,000 damages for having been deprived of use and occupation, rents, issues and profits, and loss of rents for use of water applied to adjacent lands, were too indefinite and furnished no reasonable basis for judgment for $25,000 for beneficiaries. Civ.Code, §§ 2229, 2237.

7. Trusts 🔑263

In beneficiaries' action for breach of trust by trustee which by mistake sold trust land and, on discovering mistake, repurchased land for beneficiaries, complaint should have charged specifically whether recovery was sought for value of use and occupation of land, or for rents, issues, and profits thereof. Civ.Code, §§ 2229, 2237.

8. Trusts 🔑265

In determining damages recoverable for breach of trust by trustee which by mistake sold trust land and on discovering mistake repurchased it for beneficiaries, true criterion of "rental value" was not what the land or water thereon would rent for under special circumstances or what its worth to owner or to a particular person would be, but its fair rental value on market when offered for rent under ordinary circumstances. Civ.Code, §§ 2229, 2237.

See Words and Phrases, Permanent Edition, for all other definitions of "Rental Value".

9. Evidence 🔑555

In beneficiaries' action for breach of trust by trustee which by mistake sold arid trust land and on discovering mistake, after purchaser had drilled wells producing irrigation water, repurchased land for beneficiaries, testimony concerning rental value of land and water, given by witnesses whose opinions were based mainly on incompetent matter and on what a particular lessee of the land and adjoining land had been able to do on the whole property, was inadmissible. Civ.Code, §§ 2229, 2237.

10. Appeal and error 🔑1050(1)

In beneficiaries' action for breach of trust by trustee which by mistake sold arid trust land and on discovering mistake, after purchaser had drilled wells producing irrigation water, repurchased land for beneficiaries, erroneous admission of testimony concerning rental value of land and water by witnesses, whose opinions were based on what a particular lessee of the land and adjoining land had been able to do on the whole property, which must have resulted in apparently excessive judgment of $25,000, was prejudicial. Civ.Code, §§ 2229, 2237.

Appeal from Superior Court, Kern County; K. Van Zante, Judge Assigned.

Action by Laura B. Edgar, as administratrix, etc., and others, against the Bank of America National Trust & Savings Association and others, for loss of use and occupancy of land, and loss of rental for use of water from the land, resulting from fact that bank by mistake sold plaintiff's land which bank held in trust and, on discovering the mistake, repurchased the land for the plaintiffs. From an adverse judgment, the bank appeals.

Reversed.

Harvey, Johnston & Baker, of Bakersfield, and Louis Ferrari, G. D. Schilling, and D. Bianco, all of San Francisco, for appellant.

John W. Preston, of San Francisco, and Brittan & Mack, of Bakersfield, for respondents.

GRIFFIN, Justice.

On February 15, 1921, plaintiffs or their predecessors, and defendants, other than the defendant Bank of America National Trust and Savings Association, hereinafter referred to as the Bank, purchased in fee an 80-acre tract of land in Kings County. The recited purchase price of the property was $8,000. Because of the fact that there were some 30 or more of such purchasers, it was deemed necessary and advisable to take title to that property directly from the grantor to a trustee, and accordingly, arrangements were made by the purchasers with the Security Trust Company for title to be conveyed to it under the terms and conditions of a certain trust agreement hereinafter referred to. Upon the recording of the deed, the trust agreement was duly entered into between the purchasers and the trustee Security Trust Company. The trust agreement, in form a declaration by the Security Trust Company on the back of which was endorsed the signatures of the purchasers and owners of the land as the beneficiaries of the trust, contained, among other things, the following provisions:

"c. That the trustee was without power or authority to sell or lease the property except as provided in the agreement as follows:

"'In case of sale or lease of the property, or any part or portion thereof, the price and terms of sale or lease shall be agreed upon by holders of at least fifty-one per cent (51%) of the interests hereby represented, and the written consent of a 51% interest to said sale or sales, or lease or leases shall be our authority to make such sale or sales, or lease or leases and our authority for executing a conveyance or lease in accordance therewith;'

"d. The trustee was not required to pay taxes, * * *

"e. The fees for services of the trustee were fixed in the instrument * * *"

Appellant bank succeeded to the interests of the Security Trust Company as trustee without change in the provisions of the trust agreement. The trust property was allowed to remain dormant except for two rights of way, one in 1929 and the other in 1932, which were given by the trustee with the consent of the beneficiaries. From February, 1921, until December, 1936, the property was rented by the beneficiaries, whenever it could be, for grazing purposes, and the rentals received by them for such purposes did not exceed the amount of taxes. The taxes for the years 1932 to 1935 inclusive, were allowed by the respondents to become delinquent and were paid by the bank on January 5, 1937. During the years 1933, 1934 and 1935, no rental money was received by the beneficiaries for grazing. The taxes on the 80 acres for the years 1932 to 1935, inclusive, averaged $6.11 per year. In the year 1935, one Scott and one Stahl, after some investigation, became convinced that land in the region near respondents' land could be made to produce crops if water therefor could be developed. In October, 1936, a letter was written by Scott and Stahl to the bank to determine whether the 80 acres in question was for sale. This letter was referred to the California Lands, Inc., a subsidiary of the bank, which operated or leased the lands owned by the bank. An investigation was made by the California Lands, Inc., which disclosed that this property was acquired by the bank from one Murray, but such investigation was unsuccessful in disclosing that it was also held in trust for the respondents. The bank and California Lands, Inc., then being under the impression that it was desert land of questionable value upon which payment of taxes had been discontinued, and believing itself to be the owner of the property, sold the surface rights to Scott and Stahl and their respective wives for the sum of $800. $200 was paid down and the balance of $600 was agreed to be paid in various installments thereafter. The oil rights were reserved by the bank and conveyed without consideration to its subsidiary. At this time there was no irrigation of land in the Kettleman plain where this property was located. The entire area was arid and had been used only for pasturing sheep. It had a rental value for such purpose of 15c to 25c per acre per annum. The plan of Scott and Stahl was to drill a well for water on the 80 acres belonging to respondents, leasing several hundred acres of surrounding or near-by land cheaply and conveying the water thus developed to the entire project. After the sale of the surface rights by the bank on December 28, 1936, early in 1937, Scott and Stahl drilled two wells on the 80 acres and developed a large quantity of water (about 1200 gallons per minute per well). Pumping equipment was placed thereon by them. They also paid the cost of the wells and the casings thereon amounting to approximately $4,500. They also obtained leases on approximately 900 acres to the west and north of the 80 acres at a cost of about 50c to $1 per acre per year. When water was developed on the 80 acres, on March 1, 1937, they executed a lease to one Samples of the 80 acres as well as a sublease covering the 900 acres. The rental to be paid by Samples to Scott and Stahl was approximately $5 per acre per year during the term of the lease and sublease, which lease and sublease were to terminate on August 1, 1942. In October, 1937, one of the beneficiaries noticed that extensive farming operations were being conducted on the 80 acres. This was reported to the bank and an investigation was made. Immediately upon the discovery of the bank's error in selling the trust property, the oil, gas and mineral rights were reconveyed by the California Lands, Inc., to the bank and restored to the trust. Negotiations were then conducted by the bank which on March 10, 1938, resulted in a repurchase of the property by the bank subject to a reservation in the deed from Scott and Stahl reserving unto them the use and occupation of the 80 acres until August 1, 1942, on the payment by them of $200 cash and $400 annually beginning with the first day of August, 1938, to and including August 1, 1941. The water wells and casings were to be maintained in good condition, reasonable wear and tear excepted, and delivered to the bank at the end of the term. The repurchase price paid by the bank for the property subject to the reserved use was the cancellation of the balance of $500 owing on account of the original purchase price from Scott and Stahl and the further sum of $5,000 cash. This valuation of $5,500 was predicated on the amount that Scott and Stahl had paid for the property and the cost of drilling and equipping the wells with casings. From this transaction it becomes immediately evident that the bank expended at least $4,700 to recover the property for the trust as the result of its mistake.

[1] This action was filed by the plaintiffs and respondents to recover damages for its deprivation of the use, occupancy, rents, issues and profits of the 80 acres for the term of the reservation. Certain of the beneficiaries refused to join as parties plaintiff and were consequently joined as defendants and have become respondents on this appeal. By amendment at the close of plaintiffs' case, and over objection of the appellant, plaintiffs were granted permission to amend their complaint to charge damages for the loss of rents for use of water applied to the 900 acres for the same period. Objection was made by appellant to the trial of the action by a jury on the ground that it was an equitable action. See Reay v. Reay, 97 Cal.App. 264, 275 P. 533. This objection was overruled on the ground that the action was one at law. After all of the evidence was in, plaintiffs advised the trial court that they were uncertain as to whether the action was one in equity or at law; that they were willing that the jury be dismissed or retained in an advisory capacity. This point is not raised on appeal. In view of the conduct of the parties neither could complain. Hyde v. Redding, 74 Cal. 493, 16 P. 380. The jury was retained by the court in an advisory capacity and returned a verdict against appellant in the sum of $25,000, which verdict was adopted by the court and findings and conclusions were prepared and signed.

From the evidence it becomes immediately apparent that the bank was negligent in the handling of the property of the trust. This is admitted and there is no dispute as to this issue. The only question here presented is whether, under the pleadings and the evidence the court was justified in concluding that the appellant bank was liable to respondents in the sum found. The gist of the complaint is that the respondents purchased and transferred to appellant's predecessor, in trust, 80 acres of real property to be held and managed for the respondents; that appellant sold and repurchased the property; that by reason thereof the respondents "have been deprived of the use and occupancy, rents, issues and profits therefrom, * * * and loss of rental for use of water from said property, the same being distributed to adjacent leases adjoining said property * * *" since the 28th day of December, 1936, and "will continue to suffer damage likewise until the first day of August, 1942, and that by reason thereof these plaintiffs have been damaged in the sum of fifty thousand dollars ($50,000.00)." The jury returned an advisory verdict that respondents had "been damaged by the actions of the defendant" bank in the sum of $25,000. The trial court then prepared separate findings and found that respondents suffered damages in the sum of $25,000 for having been deprived of the use and occupancy, rents, issues and profits and loss of rents for use of water applied to the adjacent lands, without specifying particularly whether the amount of the recovery was for deprivation of use and occupancy of the 80 acres or as rents, issues and profits therefrom, or loss of rental for use of the water from said property, which water was distributed to adjacent leased property, or all of these combined. Judgment was entered for the lump sum of $25,000 as and for "damages." This appeal is from this judgment.

At the outset it will be seen, as a result of the bank's so-called negligent act, on August 1, 1942, the beneficiaries of the trust, instead of having 80 acres of arid sheep grazing land which was producing practically no income and having no great rental value, and on which the taxes were delinquent, will have the same acreage returned to them, enhanced by two large producing wells and casings and the benefits therefrom paid for by funds of the appellant bank. In addition, the trust was paid or will be paid as rental, under the reservation agreement, until August 1, 1942, the sum of $200 cash, plus $400 paid on August 1, 1938, and a like sum on August 1st of each year thereafter, including August 1, 1941, and if this judgment is allowed to stand, the beneficiaries will receive, in addition thereto, the sum of $25,000.

[2] Respondents, in effect argue that the appellate court is bound to affirm the judgment because there is a conflict in the evidence produced on the issue presented on the question of damages and such conflict must be resolved in favor of the judgment of the trial court. This may be true if the evidence received was competent, relevant and substantial and based on law and reason. To apply the rules claimed by respondents alone to this case would work an injustice and not only give to them the pound of flesh they claim but also innocent blood to which they are not entitled. While appellant bank should be held liable for the result of its negligence in accordance with the rules of law applicable, it cannot be said that respondents may benefit by any judgment that indicates an award of punitive damages. Richman v. Bank of Perris, 102 Cal.App. 71, 90, 282 P. 801. From the pleadings, the evidence, and the instructions to the jury, we are unable to determine whether the proper measure of recovery was applied.

[3-7] Section 2229 of the Civil Code provides that a trustee may not use or deal with the trust property for his own profit or for any purpose unconnected with the trust in any manner. Section 2237 of the Civil Code measures the liability of the trustee for breach of that trust. It provides that a trustee who uses or disposes of the trust property, contrary to section 2229, may, at the option of the beneficiary, be required to (1) account for all profits so made, or (2) to pay the value of its use, and if he has disposed thereof, (3) to replace it with its fruits, or (4) to account for its profits with interest. These remedies are alternative. Work v. County Nat. Bank, etc., Co., 4 Cal.2d 532, 537, 51 P.2d 90; Reay v. Reay, supra. This section sets forth the extent of the trustee's liability for the breach of the trust here involved, and is aimed at making the beneficiaries whole. Clapp v. Vatcher, 9 Cal.App. 462, 466, 99 P. 549. In Work v. County National Bank, etc., Co., supra, at page 537 of 4 Cal.2d, at page 93 of 51 P.2d the court said: "The alternative remedies given to the beneficiary by section 2237, supra, are all aimed to make the beneficiary whole. * * * The only way the trust properties can be 'replaced' is to permit the respondents to receive what they would have received had appellant been faithful to its trust." In the instant case, respondents, neither by their pleadings nor otherwise, have elected to exercise their option and rely upon any one particular measure of recovery, but have grouped most of the allowed measures of recovery, taken evidence tending to support each one, and the trial court submitted all of the theories of recovery to the jury under instructions that would indicate that it could find on any one or all of the theories mentioned and, without designating in the findings or judgment the particular basis for the judgment, allowed an amount which, from the competent evidence received, would appear to exceed any one of the alternative measures of recovery reasonably allowable under the above-mentioned section. Under no theory of law would the plaintiffs be entitled to recover both the value of the use and occupation and the rents, issues and profits. If they elected to charge the bank for the value of the use and occupation, the bank would be entitled to retain the rents, issues and profits. They cannot have both. Whether the judgment is for any one or more of these items cannot be determined from the findings. The findings are not

definite and furnish no reasonable basis for damages in the sum mentioned in the judgment. James v. Haley, 212 Cal. 142, 297 P. 920; 24 Cal.Jur., p. 935, sec. 183; 24 Cal.Jur., p. 940, sec. 186; Erving v. Jas. H. Goodman & Co. Bank, 171 Cal. 559, 153 P. 945; Yellen v. Fidelity & Casualty Co., 115 Cal.App. 434, 441, 1 P.2d 1019; Hullinger v. Big Sespe Oil Co., 28 Cal.App. 69, 71, 151 P. 369; Armstrong v. Rau, 72 Cal. App. 288, 290, 236 P. 937. The complaint should have charged definitely and specifically the theory under which the recovery was sought. Tobin Grocery Co. v. Spry, 204 Cal. 247, 267 P. 694.

Respondents produced lay and expert witnesses who testified, over strenuous objection, in reference to all phases of the claimed damages for the breach of the trust by the trustee. Some of this testimony pertained to loss of profits, some to use and occupancy of the property, some to reasonable rental value of the 80 acres, and other portions pertained to rental value of the water in connection with the 900 acres. This may be illustrated by the testimony of one witness which was received in support of the judgment and is as follows:

"Mr. Brittan: Supposing you were a farmer out in this section and you had no water and you wanted to raise some crops, what would be the reasonable rental value to this farm in this section would be insofar as water being given to his land is concerned? (Objection by Mr. Harvey) * * * Mr. Brittan: I said 'What is the reasonable rental value' * * * A. Of course, it depends upon the crop. He can afford to pay more for crops like cotton than he could for flax or barley or grain. I think a farmer could well afford to pay over that—may I explain the general contours?

"Q. Yes. A. This land all has a gentle slope to the north, it is rather smooth and requires some slight floating, which is not a very difficult farming project. From the records given to me by Mr. Samples, it is mostly productive land." (There was testimony that in the year 1937 Samples raised total crops having a gross value in excess of $40,000; in 1938, in excess of $26,000; and in 1939, in excess of $26,000.) "On that whole property land has no value except for water, without the water it could only be rented for sheep pasture at a small rental (about 25c per acre). *Based upon what I considered Mr. Samples' income thought he could afford to pay* (italics ours), and based upon what I assumed that anyone could afford to pay on the whole property, something between twelve and fifteen dollars an acre. * * *

"Mr. Brittan: Now, having in mind the eighty acre parcel of land where you saw the buildings and so forth, and pumping plant, what would be the reasonable rental value of that land itself? * * * A. * * * I would place the value of rental on that, and it could be cultivated to crops, —oh, I assume you mean crops that bring the largest net rental to the farmer,—*I think a farmer could pay for that property $15.00 an acre.*" (Italics ours.)

A motion to strike the above so-called expert testimony was denied.

"Mr. Brittan: What would be your opinion, based upon your investigation, and also upon your experience as an appraiser and being in the real estate business also, what would be your opinion of the value of the water per acre on the adjacent lands for farming purposes other than the lands of the eighty acres, what would be the rental value per acre per year?" This question was objected to on the ground that "it takes into consideration improvements on the premises and things of that sort which are certainly not proper to charge against these defendants as elements of rental value and incompetent, irrelevant and immaterial, no proper and sufficient foundation laid for the reasons stated." The objection was overruled. "A. * * * Before I can answer that question I would have to determine the cost of the operations, planting, harvesting and sacks.

"Q. * * * I would like to have what the rental value of that water would be to that farmer who has no water per acre per year? * * * I think the value of the water to the person buying the water that could use it on the land adjoining this eighty acres to the north and to the west, if delivered to him without any other additional cost, that the water that could be delivered there would be worth about $15.00 per acre to that person."

A motion to strike the answer was denied.

"Q. (By Mr. Brittan): If confined to the eighty acre parcel of land if you owned the land what would you expect the reasonable rental value of that eighty acre parcel? * * * A. You also mean if I owned *the pumping plants* and wells and improvements on it? (Italics ours.)

"Q. Yes. A. I think it is worth $15.00 per acre as rental value."

A motion to strike this answer was also denied.

This is a general illustration of the evidence received and upon which the court allowed the judgment for damages in the sum of $25,000.

[8] The true criterion of rental value is not what the land or water would rent for under special or extraordinary circumstances or what its worth to the owner or to a particular occupant or to a particular person would be, but its fair rental value on the market when offered for rent under ordinary circumstances. Nathan v. Dierssen, 164 Cal. 607, 130 P. 12.

[9, 10] The lands adjacent, which were referred to in each of the questions above quoted, were the lands under lease to Samples. This was an inquiry into the value of the water to a particular occupant situated such as Samples was. It is plain from the testimony that the witnesses based their opinions mainly on incompetent and inadmissible matters and upon what Samples had been able to do on the whole property. They were basing their value mainly upon the peculiar situation of this particular land and the gross value of crops produced thereon by Samples, without considering the cost of production, planting, harvesting and sacks, and without considering the personal element of skill, industry and management. They were not giving opinions of market value or reasonable rental value on the market of the 80 acres here involved, together with the water thereon. The motions to strike portions of this evidence should have been granted. Reclamation District No. 730 v. Inglin, 31 Cal.App. 495, 500, 160 P. 1098; San Diego Land & Town Co. v. Neale, 88 Cal. 50, 62, 25 P. 977, 11 L.R.A. 604. Timely motions were made to strike the evidence of these witnesses for the reason that they were based upon what one man's industry and skill had been successful in producing and were, for many reasons, incompetent, irrelevant and immaterial. The rulings of the court in reference to a great portion of the evidence received, were prejudicial and must have resulted in the apparent excessive judgment rendered. Crow v. San Joaquin, etc., Irr. Co., 130 Cal. 309, 314, 62 P. 562, 1058; Stockton & C. R. R. Co. v. Galgiani, 49 Cal. 139, 140. All these matters were called to the attention of the court on a motion for new trial and a request for a specific finding in reference to them was made. This request was refused by the trial court.

The judgment is unsupported by proper evidence, unsupported by proper findings, and appears to be excessive. It should be and is reversed.

BARNARD, P. J., and MARKS, J., concurred.

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50 Cal.App.2d 709

BURGER et al. v. HIRNI, County Auditor.

Civ. 2681.

District Court of Appeal, Fourth District, California.

March 25, 1942.

1. Statutes 🔑158

The repeal of statutes by implication is not favored, especially where prior enactment has been judicially construed and is generally understood and acted upon.

2. Statutes 🔑158

It will be presumed, in absence of express terms, that Legislature did not intend to repeal a statute by a later act, if both can be given effect by fair and reasonable construction.

3. Statutes 🔑159

To overcome presumption that act was not intended to repeal former act, the two acts must be "irreconcilable", that is, clearly repugnant, as to vital matters to which they relate and so inconsistent that they cannot operate concurrently, or it must be apparent that later act is revision of entire subject matter and designed as substitute for earlier act, or intent to effect repeal must be otherwise expressed in unmistakable language.

See Words and Phrases, Permanent Edition, for all other definitions of "Irreconcilable".

4. Statutes 🔑161(1)

Two laws on same subject will be so construed as to maintain integrity of both, if reasonably possible, as courts are bound to uphold prior act, if both may well subsist together, but if they cannot be reconciled; the last act governs and repeals former act so far as they are repugnant.

5. **Statutes** ⟐158

The theory of repeal of statute by inadvertence will not be considered, if another result may be reached by application of any rule of construction.

6. **Schools and school districts** ⟐22

The sections of School Code, referring exclusively to annexation of elementary or high school districts to unified school districts, do not impliedly repeal earlier sections prescribing procedure for withdrawal of elementary districts from union high school districts, as two groups of sections do not relate to same subject and are neither conflicting nor irreconcilable. School Code, §§ 2.120–2.131, 2.270, 2.271, 2.640 et seq., 2.641, 2.2081–2.2084.

7. **Statutes** ⟐231

A code section dealing with but one subject must be construed in its entirety.

8. **Statutes** ⟐231

The provisions of entire code, or at least all those relating to same subject matter, must be examined in order to ascertain meaning of language of one section thereof.

9. **Statutes** ⟐231

The various sections of a code should be read together and harmonized, if reasonably possible, so that all may stand.

10. **Schools and school districts** ⟐37(1), 42(2)

An elementary school district, which is part of union high school district, should follow procedure established by law for its withdrawal from such high school district, as well as prescribed procedure for its annexation to unified school district, in order to join such unified district. School Code, §§ 2.120–2.131, 2.270, 2.271, 2.640 et seq., 2.641, 2.2081–2.2084.

◆

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Proceeding by August T. Burger, as a taxpayer of Central School District in Tulare County, and such district for a writ of mandate requiring William J. Hirni, as auditor of such county, to compute taxes on property in the district annexed to the Lindsay Unified School District of Tulare County. From a judgment denying a peremptory writ, petitioners appeal.

Affirmed.

Jas. R. McBride, of Lindsay, for appellants.

Walter C. Haight, Dist. Atty., and Leroy McCormick, Asst. Dist. Atty., both of Visalia, for respondent.

MARKS, Justice.

This is a petition for a writ of mandate brought by August T. Burger as a taxpayer of the Central School District in Tulare County, and by that district against Wm. J. Hirni, as auditor of Tulare County to require him to compute the taxes on property in the Central School District as annexed to and a part of the Lindsay Unified School District of Tulare County. The Central School District had been a part of the Exeter Union High School District. The trial court refused to issue the peremptory writ of mandate and this appeal followed.

All the facts of the case are admitted. Without question the Central School District and the Lindsay Unified School District complied with all the provisions of the School Code (Secs. 2.120 to 2.131, incl., Sec. 2.270, Secs. 2.2081 to 2.2084, incl.) necessary to permit the joining of the two districts. Also admittedly the Central School District complied with none of the provisions of that code governing withdrawal from Exeter Union High School District. Sec. 2.640 et seq., School Code.

The question presented to us is this: Can a school district which is a part of a union high school district join a unified school district and thereby automatically sever itself from the union high school district by following the prescribed procedure permitting it to join a unified school district without following the prescribed procedure under which it can sever itself from the union high school district?

Sections 1577 and 1578 of the Political Code have been codified into sections 2.120 to 2.131, inclusive, of the School Code. Section 1591a of the Political Code has been codified into sections 2.270 and 2.271 of the School Code. Sections 2.640 and 2.641 of the School Code have similar provisions relating to the separation of a district from a union or a joint union high school district as had the former section, 1591a of the Political Code relating to its separation from a union elementary district.

Section 2.2081 of the School Code as amended in 1939, and sections 2.2082 and

2.2083, as passed in that year (Stats. 1939, Ch. 433 p. 1763) established the procedure for the annexation of an elementary or high school district to a contiguous unified school district. These sections do not provide for the withdrawal of an elementary district from a union high school district of which it may have been a member before its annexation to the unified school district.

It is petitioners' theory that as section 2.2081 of the School Code was amended in 1939, and sections 2.2082 and 2.2083 of that code were enacted in that year, subsequent to the adoption of the other sections we have cited requiring the withdrawal of a school district from a union high school district, the 1939 enactments provide for a complete and exclusive procedure for annexation which can be followed without the necessity of following the procedure prescribed for the withdrawal from the union high school district. This argument has the legal effect of maintaining that the 1939 enactments repealed by implication the other sections of the School Code requiring a school district to follow the procedure to withdraw from a union high school district before it can be excluded therefrom.

[1-5] In 23 Cal.Juris., page 694, it is said: "It is elementary that the repeal of statutes by implication is not favored, especially where the prior enactment has been judicially construed and is generally understood and acted upon. Likewise, in the absence of express terms it will be presumed that the legislature did not intend by a later act to repeal a former one, if by a fair and reasonable construction effect can be given to both. To overcome this presumption, the two acts must be irreconcilable—i. e., clearly repugnant—as to the vital matters to which they relate, and so inconsistent that the two cannot have concurrent operation, or it must be apparent that the later statute is a revision of the entire subject matter and designed as a substitute for the earlier act, or the intent to effect a repeal must be otherwise expressed in unmistakable language. Accordingly, where there are two laws upon the same subject, they will, if reasonably possible, be so construed as to maintain the integrity of both, the courts being bound to uphold the prior act if the two may well subsist together, though if the two cannot be reconciled, the last act will, of course, govern, and repeals the former in so far as the two are repugnant. The theory of repeal by inadvertence will not be considered if another result may be reached by the application of any rule of construction * * *."

[6] Sections 2.2081, 2.2082 and 2.2083 of the School Code refer exclusively to the annexation of an elementary or high school district to a unified school district. The other sections we have cited prescribe the procedure for the withdrawal from a district. It is immediately apparent that the two groups of sections do not relate to the same subject and are neither conflicting nor irreconcilable. Therefore under the rules we have quoted we cannot regard the 1939 sections as a repeal by implication of the earlier sections.

[7-9] A further rule of construction important here is thus stated in 23 Cal. Juris., at page 761: "This rule is applicable to the codes. Thus it has been held that a code section which deals with but a single subject must be construed in its entirety; that the provisions of the entire code—or at least all such provisions as relate to the same subject matter—must be examined in order to ascertain the meaning of the language of one section; and that the various sections of a code should be read together and harmonized if reasonably possible, so that all may stand."

[10] It needs no great effort to harmonize and give effect to both groups of sections as they do not relate to the same subject matter and therefore are neither inconsistent nor conflicting. We can thus give each effect in the sphere in which it is supposed to operate. We therefore conclude that the trial court properly construed all of the code sections together, gave effect to both groups and correctly held that the Central School District should have followed the procedure established by law for its withdrawal from the Exeter Union High School District as well as the prescribed procedure for its annexation to the Lindsay Unified School District.

We are fortified in this conclusion by the case of Slater v. Kesey, 102 Cal.App. 266, 282 P. 1021, 1022, where a similar result was reached. It is true that the Slater case was decided prior to the adoption of the School Code, but the sections of the Political Code there construed were not materially changed when they were adopted into the School Code. With a factual situation somewhat similar to the one before us, the court there held: "These several sections respecting the organization, maintenance severance, and termination of school districts must be construed together and harmonized if possible. This leads to the conclusion that after an elementary school district becomes subject to a joint or union district by formally uniting therewith, except when it has been suspended under the provisions of section 1591b of the Political Code, it is imperative that such district or any portion of its territory seeking independence from the union district shall first withdraw therefrom in the manner prescribed by section 1591a of the same Code. Having voluntarily become a part of a duly organized union district, independence therefrom may be secured only by a formal severance. Participation in the benefits of a union district may not be repudiated without legal process and without consent of the representatives of the union district so abandoned."

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concurred.

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50 Cal.App.2d 700

DAVIS v. ROBINSON.

Civ. 11769.

District Court of Appeal, First District, Division 1, California.

March 25, 1942.

1. Death 🔑13

Where motorist negligently caused mother's death, obligation arose against motorist, immediately on the mother's death, to recompense her child for any damages sustained and such obligation constituted a "cause of action", the child's action against the motorist being founded thereon. Code Civ.Proc. § 377.

See Words and Phrases, Permanent Edition, for all other definitions of "Cause of Action".

2. Death 🔑27

Where decedent's mother improperly obtained judgment in death action against negligent motorist although decedent's son, rather than her mother, was decedent's heir and hence the only party who could properly bring death action, such recovery did not bar action by son. Code Civ.Proc. § 377.

3. Stipulations 🔑19

Admissions of fact made by counsel in one case have no binding effect in another and different action. Code Civ.Proc. § 283.

4. Stipulations 🔑19

In death action by decedent's son, admission of stipulations by defendant's counsel in former death action by decedent's mother, wherein defendant's responsibility for the fatal accident was admitted, was erroneous. Code Civ.Proc. § 283.

5. Appeal and error 🔑1050(1)

In death action by decedent's son, admission of stipulations by defendant's counsel in former death action by decedent's mother, wherein defendant's responsibility for the fatal accident was admitted, was prejudicial to defendant where the only other evidence of defendant's negligence was policeman's testimony as to defendant's oral statements, relating how defendant had struck decedent without seeing her while driving on right hand side of street. Code Civ.Proc. § 283.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by Olin Davis, a minor, by his guardian ad litem, against Alfred Robinson, for the death of plaintiff's mother. From a judgment for plaintiff, defendant appeals.

Reversed and remanded for new trial.

Elliott Johnson and D. W. Brobst, both of Oakland, for appellant.

Hubbard & Hubbard, of San Francisco, for respondent.

B. C. JONES, Justice pro tem.

This action is by a minor suing through a guardian ad litem to recover damages as an heir under section 377 of the Code of Civil Procedure for the negligent death of his mother. The complaint alleges that the mother, Nilan Burns, was struck and killed by an automobile, driven by the defendant, while she was crossing East 14th Street in Oakland in a pedestrian lane.

Prior to the bringing of this suit one Ida B. Turner, the grandmother of the plaintiff, also sued the defendant for damages under section 377 for the death of

Nilan Burns, claiming to be her heir and recovered a judgment for $2,500. This judgment was paid by the defendant and satisfaction thereof duly entered. The grandmother did not divulge that her daughter was the mother of a child, although at the time he was in her care and being kept by her. She was not joined as a defendant, or otherwise made a party to this action. The child was awarded a judgment by the court in the sum of $4,000, and it is from this judgment in favor of the child that the defendant appeals.

[1, 2] The appellant makes the point that the judgment recovered by the grandmother is a bar to a recovery by the plaintiff, and in support of his position he cites the case of Daubert v. Western Meat Co., 139 Cal. 480, 69 P. 297, 73 P. 244, 96 Am. St.Rep. 154, and other cases. In each of these cases the question raised was as to the right of an heir to maintain the action, or the effect of an action brought by one heir out of several. In none of them was there presented the precise question here involved. Ida Turner, the grandmother, not being an heir, was not entitled under the provisions of section 377 to recover a judgment against the defendant. The fact that she did so did not jeopardize the rights of the minor child as an heir of the decedent. If the defendant had been negligent, an obligation arose in the child's favor against the defendant immediately upon the mother's death to recompense him for any damages sustained. An obligation so created is the cause of action, and upon that obligation the action is founded. Frost v. Witter, 132 Cal. 421, 64 P. 705, 84 Am.St.Rep. 53; Bradford v. Southern R. Co., 195 U.S. 243, 25 S.Ct. 55, 49 L.Ed. 178; Milwaukee Light, Heat & Traction Co. v. Ela Co., 142 Wis. 424, 125 N.W. 903, 27 L.R.A.,N.S., 567, 20 Ann. Cas. 707. When such a cause of action arises, it can only be defeated by a release, payment, or the receipt of something in satisfaction. The failure of the defendant to defend against the false claim of any one who was not an heir does not operate to estop another with a rightful claim to prosecute his cause of action.

In the action brought by the child's grandmother, and in which she recovered, counsel for the defendant stipulated liability and responsibility for the happening of the accident. The stipulation so made is as follows: "Mr. Johnson: Your Honor, I might simplify matters a little bit by saying that Mr. Robinson, who is seated here, confesses liability and responsibility for the happening of the accident in which the deceased was killed. The only question to be litigated is that of damages. I think the evidence will be confined to that feature of the case."

[3, 4] The appellant contends that the admission of this stipulation, made in another and different case, in evidence in this case constitutes reversible error. It was early held in this state to be the rule that admissions of fact made by counsel in one case can have no binding effect in another and different action. Wilkins v. Stidger, 22 Cal. 231, 83 Am.Dec. 64. As is said in Board of Commissioners v. Sutliff, 8 Cir., 97 F. 270, 282, 38 C.C.A. 167, "A stipulation made by an attorney in one action will not bind his client in another, unless the latter expressly acquiesces in it in the second suit. Much less will it estop his assignee. Nichols, Shepard & Co. v. Jones, 32 Mo.App. 657, 664; Wilkins v. Stidger [supra], 22 Cal. pages 232, 239, [83 Am.Dec. 64]; Weisbrod v. Chicago & N. W. Ry. Co., 20 Wis. [419], 441, 443. The reason for this rule is obvious. An attorney employed to conduct and try a single action has no power to bind his client or the assignee of his client in subsequent suits upon other causes of action, respecting which he has neither retainer, employment, nor authority." To the same effect is Berry v. Littlefield, Alvord & Co., 54 App.D.C. 195, 296 F. 285, 287. The authority of an attorney to bind his client in any proceeding is found in section 283 of the Code of Civil Procedure. It is there provided: "An attorney and counselor shall have authority: 1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise." It is manifest that the stipulation made by counsel with reference to the alleged cause of action of the grandmother, Ida Turner, against the defendant, was not entered in the minutes of the court in the action of this plaintiff against the defendant. Unless so entered it can have no binding effect. Fresno City High School District v. Dillon, 34 Cal.App. 2d 636, 94 P.2d 86. The admission of the stipulation in evidence in this case was clearly erroneous but the point is made that it was not prejudicially so.

The only evidence as to what occurred at the scene of the accident is contained in an oral statement made by the defendant to a police officer on the day following. This statement as testified to by the officer is as follows:

"'I was driving west on East 14th Street about 25 to 30 miles an hour. There was no top on my car. The weather was clear. The streets were dry, and my brakes were good. I was driving between the north curb and the tracks.' And later he corrected this particular statement by, 'I was driving between the north curb and the tracks' and qualified it by saying, 'I am not certain of it.' Then he said, 'I never saw the woman before I struck her. I heard her scream about the center of the intersection of Fourth Avenue and East 14th Street. I didn't know where the scream came from. I stopped immediately, then continued on with the car about 100 feet west of Fourth Avenue, parked my car, as there was several parked at the curbing. I stopped as soon as I heard the scream and put my car in second gear to pull out of the street to the curb. I told her to remain in the car and I went back to the safety zone on the southwest corner of Fourth Avenue and East 14th Street. Saw the woman lying in the rails of the eastbound street car tracks. I called for some one to get an ambulance. Then I went back to my car and asked the young lady to park it on Third Avenue around the corner facing East 14th Street. Then went back to the scene, and the ambulance arrived. Saw the ambulance pick up the woman and drive away.'"

It is this oral statement taken with the stipulation in the Turner case that comprises the evidence of the defendant's negligence. There is no corroboration of the statement other than the stipulation. In passing upon the effect of oral admissions as evidence, the Supreme Court in Herbert v. Lankershim, 9 Cal.2d 409, 430, 71 P.2d 220, 230, said: "On the subject of oral admissions, unless corroborated by satisfactory evidence, this court, in the Estate of Emerson, 175 Cal. 724, 728, 729, 167 P. 149, rates it as the weakest of testimony that can be produced." Again in Smellie v. Southern Pacific Co., 212 Cal. 540, 560, 299 P. 529, 537, it is said: "Evidence of the declarations or oral admissions of a party are always received with caution. Code Civ.Proc., § 2061, sub. 4. The reason for this rule is that: 'In most cases it is impossible, however honest the witness may be, for him to give the exact words in which the declaration or admission was made. Sometimes even the transposition of the words of a party may give a meaning entirely different from that which was intended to be conveyed. The slightest mistake or failure of recollection may totally alter the effect of the declaration or admission.' 10 Cal.Jur., p. 1081; Davis v. Davis, 26 Cal. 23, 44, 85 Am.Dec. 157."

There is very little evidentiary value to be attached to the declaration which we have here when it is taken alone. In Larson v. Larsen, 72 Cal.App. 169, 236 P. 979, where the evidence was weak and largely circumstantial, it was held that evidence of other acts than that charged, erroneously admitted, was prejudicial. And in Anderson v. Hagen, 19 Cal.App.2d 714, 66 P.2d 168, that hearsay testimony was prejudicial, the other evidence in the case being in sharp conflict on a vital issue. The court there deemed the erroneously admitted testimony sufficient to turn the case in view of the sharp conflict in the other evidence. The character of the oral statement here presented leaves the weight of the proof of liability resting upon the erroneously admitted stipulation. In such a case the trial court could not but have taken into consideration in some degree the confession of negligence and responsibility for the death of the decedent in making its findings. As is said in Nishi v. Inoguchi, 116 Cal.App. 398, 2 P.2d 864, 865, quoting from Estate of James, 124 Cal. 653, 655, 57 P. 578, 1008: "'If improper evidence under objection has been admitted, it is impossible for this court to say how much weight and influence it had in the mind of the trial court in framing its findings of fact. The improperly admitted evidence may have been all-powerful to that effect. As far as this court knows, it may have been that particular evidence which turned the scale, and lost the case to the appellants. This must, of necessity, be the rule wherever improper evidence has been admitted, which, upon its face, tends in any degree to affect the final conclusion of the court.'"

[5] In view of the inherent weakness in the oral statement, the error in admitting the stipulation of liability made in a different case cannot be said to be without prejudice.

The judgment appealed from is reversed, and the cause remanded for a new trial.

PETERS, P. J., and KNIGHT, J., concurred.

50 Cal.App.2d 837

CALDER v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 11929.

District Court of Appeal, First District, Division 2, California.

March 30, 1942.

Hearing Denied May 28, 1942.

1. Negligence ⚿1
Nuisance ⚿1, 7

While a nuisance and liability for injuries occasioned thereby may exist without negligence, the torts of negligence and nuisance may be coexisting and practically inseparable, and a "nuisance", especially with respect to buildings or premises, presupposes negligence. Civ.Code, § 3479.

See Words and Phrases, Permanent Edition, for all other definitions of "Nuisance".

2. Negligence ⚿65
Nuisance ⚿43

When a claim of liability is predicated upon theory of nuisance or theory of negligence, defense of contributory negligence is available to defendant. Civ.Code, § 3479.

3. Municipal corporations ⚿808(2, 3)

Every obstruction or depression, constructed or maintained by a property owner in the area between curb and property line, does not necessarily constitute a "nuisance". Civ.Code, § 3479.

4. Municipal corporations ⚿821(17)

In action for injuries when plaintiff fell in driveway leading to private garage in basement of defendant's cottage, whether the construction or maintenance of driveway constituted a nuisance was for jury. Civ. Code, § 3479.

5. Municipal corporations ⚿808(2, 3)

The major factor in determining whether an obstruction or depression in area between the curb and property line constitutes a "nuisance" is the factor of reasonableness and the same factor is the major factor in determining negligence. Civ.Code, § 3479.

6. Appeal and error ⚿1066

Where complaint in action for injuries when plaintiff fell in private driveway was drawn on theory of nuisance, but trial proceeded as though negligence had been especially alleged, negligence instructions, which predicated recovery if defendant was negligent, were not prejudicially erroneous, it appearing that a finding by jury of nuisance would have necessarily presupposed a finding of negligence. Civ.Code, § 3479.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Mabel Calder against the City and County of San Francisco and others to recover for injuries sustained when plaintiff fell in a driveway leading to a private garage in basement of a cottage of defendant property owner. From an adverse judgment, plaintiff appeals.

Affirmed.

Hearing denied; CARTER, J., dissenting.

James C. Purcell and William Ferriter, both of San Francisco, for appellant.

Hoge, Pelton & Gunther and A. Dal Thomson, all of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff sought damages against the defendant property owner for personal injuries sustained when she fell in the driveway leading to the private garage in the basement of one of defendant's cottages. The jury returned a verdict in favor of defendant and from the judgment entered upon said verdict, plaintiff appeals.

Defendant was the owner of the business premises on the northeast corner of La Playa and Judah Streets in San Francisco and he also owned the two adjoining cottages on La Playa Street. He purchased the property in question in 1934 with the improvements thereon. The area between the curb and the property line on La Playa Street was fifteen feet in width. In 1934 this fifteen foot area in front of the business premises was entirely covered with a concrete sidewalk. For the remainder of the block and in front of the two cottages, there was only the ordinary six foot concrete sidewalk, which was located approximately three feet from the curb and six feet from the property line. The area on either side of the six foot sidewalk consisted of sandy soil covered with weeds. There was a garage in the basement of each of the two cottages. Access to said garages was obtained by driveways which sloped slightly upward from the curb to the six foot sidewalk and sloped slightly downward from said sidewalk to the property line. These driveways were likewise constructed of concrete and the gradual incline downward from the sidewalk to the property line was such that the driveways were ten inches below the level of the sidewalk at the property line.

After purchasing said premises, defendant made extensive improvements on all of the buildings. The driveways leading to the cottages were not changed but, in order to eliminate the dirt and the weeds, defendant covered with concrete practically all of the area between curb and the six foot concrete sidewalk and between said sidewalk and the property line. Several small areas were left open for planting between the original six foot sidewalk and the property line. Shrubs were planted in said open areas.

On the night of the accident, plaintiff and her escort left their automobile at the curb near the driveway of the second cottage. They walked to the business premises on the corner where they had something to eat. On the return to the automobile plaintiff's escort went directly to their automobile but plaintiff walked near the property line and fell as she stepped into the portion of the driveway of the second cottage between the original six foot sidewalk and the property line.

Plaintiff filed her complaint alleging that the construction and maintenance of the above described depressed area for driveway purposes "constituted a public nuisance." Defendant denied the allegations of the complaint and affirmatively alleged that plaintiff was guilty of contributory negligence. The trial court instructed the jury on the issues of nuisance, negligence and contributory negligence and the jury returned its verdict in favor of defendant.

Plaintiff's attack is directed solely at the instructions given by the trial court. It is not claimed that the evidence was insufficient to sustain the verdict. The proposition stated in the heading in plaintiff's brief is "In a case founded on nuisance, is it proper to instruct that negligence of defendant is a prerequisite to liability?"

[1, 2] While it is true that "a nuisance and liability for injuries occasioned thereby may exist without negligence" (Curtis v. Kastner, 220 Cal. 185, 188, 30 P.2d 26, 28), it is likewise true that "The torts of negligence and nuisance may be, and frequently are, coexisting and practically inseparable. * * * A nuisance, in many if not in most, instances, especially with respect to buildings or premises, presupposes negligence." Foley v. H. F. Farnham Co., 135 Me. 29, 188 A. 708, 710; see also 46 C.J. 663. And when a claim of liability is predicated upon either the theory of nuisance or the theory of negligence, the defense of contributory negligence is available to the defendant. Curtis v. Kastner, supra. This last mentioned fact further emphasizes the close relationship existing between these two theories of liability.

Here the complaint was drawn upon the theory of nuisance rather than upon the theory of negligence. Plaintiff states that she "did not attempt to produce any evidence to show negligence in the construction of the driveway." Nevertheless the trial proceeded in much the same manner as though negligence had been specifically alleged. The trial court gave numerous instructions covering both the theory of nuisance and the theory of negligence. Among said instructions were certain so-called stock instructions customarily used in negligence cases, which instructions indicated, when read alone, that unless the jury found that defendant was negligent, the verdict should be in favor of defendant. It is the giving of these last mentioned instructions which is assigned by plaintiff as error. We may assume, without deciding, that the giving of said instructions would have constituted prejudicial error under certain circumstances but the question remains as to whether the giving of said instructions constituted prejudicial error under the circumstances presented by the record before us.

[3-5] Not every obstruction or depression, constructed or maintained by a property owner in the area between the curb and the property line, constitutes a nuisance. Under the code definition a nuisance is declared to be anything which unlawfully obstructs the free use, of such street "in the customary manner." Civil Code, section 3479. It seems to be conceded here that the question of whether the construction or maintainence of the driveway in question constituted a nuisance was a question of fact for the jury. In McQuillin on Municipal Corporations, Second Edition, Volume 4, page 114, section 1438, it is said that no absolute rule can be stated and that "The final question is: Are the obstructions or encroachments involved unreasonable and against the public

rights and general welfare?" And after discussing whether the construction or maintenance of cornices, awnings, shade trees, hitching posts, steps and the like constituted nuisances, the court said in Pickrell v. City of Carlisle, 135 Ky. 126, 121 S.W. 1029, at page 1032, 24 L.R.A.,N.S., 193, "The question always comes back to the point: Are they unreasonable, and do they make the street unsafe for the public use?" The major factor in the test on the question of nuisance in such cases is therefore the factor of reasonableness and, for all practical purposes, the same factor of reasonableness is the major factor in test on the question of negligence.

[6] As we view the situation presented by this record, a finding by the jury of nuisance would have necessarily presupposed a finding of negligence on the part of the defendant. Under these circumstances, we find no prejudicial error in the giving of the challenged instructions.

The judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

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50 Cal.App.2d 713

CRIVELLO et al. v. SAN DIEGO COUNTY et al.

Civ. 11893.

District Court of Appeal, First District, Division 1, California.

March 26, 1942.

1. Counties 🔑190(1)

Boats engaged in fishing industry and carrying only fishing equipment and sufficient food to supply their crews until the return to port with the catch of fish were not "engaged in transportation of freight or passengers" within constitutional provision exempting certain vessels so engaged from taxation, except for state purposes, and therefore the boats were not exempt from taxation by county. Const. art. 13, § 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Engaged in Transportation of Freight or Passengers".

2. Counties 🔑190(1)

The phrase "engaged in transportation of freight or passengers" in constitutional provision exempting certain vessels so engaged from taxation, except for state purposes, means engaged in the transportation of property or persons for hire. Const. art. 13, § 4.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by M. Crivello and others against County of San Diego and others to recover taxes paid under protest. From an adverse judgment, plaintiffs appeal.

Affirmed.

Sloane & Steiner, of San Diego, for appellants.

James B. Abbey, Dist. Atty., and William A. Glen, Chief Deputy Dist. Atty., both of San Diego, for respondents.

KNIGHT, Justice.

Plaintiffs appeal from a judgment in favor of defendants in an action brought against the County of San Diego and its tax assessor to recover personal property taxes paid under protest on two boats for the year 1939. Each boat was of more than fifty tons burden, and the refund was sought upon the theory that said boats were exempt from taxation under section 4 of article XIII of the state Constitution which provides: "All vessels of more than fifty (50) tons burden registered at any port in this State and engaged in the transportation of freight or passengers shall be exempt from taxation except for State purposes until and including the first day of January, 1955." The cause was decided in favor of the defendants upon the authority of Dragich v. County of Los Angeles, 30 Cal.App.2d 397, 86 P.2d 669, and plaintiffs make no claim that the facts of the present case differentiate it from that case; but they contend that the construction there placed upon the meaning of said constitutional provision is erroneous; and by this appeal they seek to have that decision repudiated. In this respect plaintiffs in the opening statement of their opening brief frankly state: "This appeal is taken for the purpose of testing the soundness of a decision of First Appellate District, Division Two, wherein a judgment of the Superior Court of Los Angeles County was reversed, Dragich v. County of Los Angeles, 30 Cal.App.2d 397, 86 P.2d 669 [670]. Petition for hearing in the Supreme Court was denied."

[1] In this case, as in that one, the boats involved were engaged in the fishing industry. After leaving port they proceeded many miles distant to the fishing grounds, manned by a fishing crew, and carrying only fishing equipment and sufficient food to supply the crew until the return to port with the catch of fish. The boats involved in the Dragich case were purse seiners, while those here involved were operated as bait fishing boats, and brought back the catch in refrigeration.

[2] In the Dragich case it was held "that the phrase 'engaged in the transportation of freight or passengers' as found in said section [4 of Article XIII of the Constitution] means 'engaged in the transportation of property or persons for hire' "; and the ground upon which plaintiffs base their attack upon the soundness of the decision is that since the constitutional provision does not employ the words "for hire" the decision therein has in effect written those words into the Constitution. Plaintiffs then argue that by so doing the court exceeded its judicial power. The record in the Dragich case discloses, however, that counsel for the boat owners herein were of counsel for the boat owners in that case, and that one of the major questions presented by the appeal therein was whether it was intended by said constitutional provision to exempt from county taxation all vessels of the specified tonnage, or only those engaged in the transportation of property or persons for hire. The record in that case further discloses that said question was extensively argued in the briefs by the respective parties; and it appears from the opinion subsequently rendered therein that said question was fully considered by the reviewing court and proved to be the controlling question on the appeal. In holding adversely to the contention made by the boat owners the court said in part: "It is at once apparent that said section was not intended to exempt all vessels of the specified tonnage but only those 'engaged in the transportation of freight or passengers'. This phrase must be given some meaning. If it be given the broad meaning contended for by respondents, it would only be necessary that the vessel be used for the conveyance of property or persons. But to give this phrase such meaning would be to render it meaningless as all vessels are used for the conveyance of either property or persons or both." Being dissatisfied with the decision the boat owners petitioned for a hearing in the Supreme Court; and in addition numerous amici curiae briefs were filed in behalf of several large boat owners. In the petition for a hearing and in said briefs the same attack was made upon the soundness of the decision therein as is here made. It was based on the same points and the same arguments; and the Supreme Court denied a hearing. The order of denial was made on March 20, 1939, and so far as our attention has been called nothing has transpired since then to alter the situation. It is our conclusion, therefore, that the decision in the Dragich case is decisive of the present appeal.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.

50 Cal.App.2d 761

PEOPLE v. ONE 1937 PACKARD 6 TOURING SEDAN, ENGINE NO. T21720 et al.

Civ. 11793.

District Court of Appeal, First District, Division 1, California.

March 27, 1942.

1. Forfeitures 🔑5

In proceeding for forfeiture of automobile used to transport narcotics, claimant has burden of proving investigation of automobile purchaser's moral responsibility, character and reputation, of the kind and to the extent required by statute. St.1939, pp. 767, 768, §§ 11610 et seq., 11620, 11622.

2. Forfeitures 🔑3

In order to protect claimant of automobile against forfeiture for use to transport narcotics, statute requires an investigation not only as to financial responsibility of purchaser to pay, but also as to moral responsibility, character and reputation. St.1939, pp. 767, 768, §§ 11610, et seq., 11620, 11622.

3. Forfeitures ⚿3

Investigation of proposed purchaser of automobile, required by statute in order to protect claimant against forfeiture for use in concealing or transporting drugs, is not alone to protect financial investment of seller or finance company, but to protect public, and to keep automobiles out of the possession of those who might use them for an unlawful purpose. St.1939, pp. 767, 768, §§ 11610, et seq., 11620, 11622.

4. Forfeitures ⚿3

Refusal to forfeit finance company's lien against automobile used to transport narcotics could not be sustained, where purchaser was unknown to manager of finance company, who negotiated loan, and no attempt was made to investigate his moral character, notwithstanding purchaser's parents were well known to company and of good reputation. St.1939, pp. 767, 768, §§ 11610, et seq., 11620, 11622.

5. Forfeitures ⚿5

The extent and reasonableness of an investigation of automobile purchaser's moral responsibility, character and reputation required by statute to protect claimant of automobile against forfeiture for use in concealing or transporting drugs is primarily a question of fact, as to which trial court's finding, having evidentiary support, will not be disturbed.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceeding by the People to obtain a judicial forfeiture of One 1937 Packard 6 Touring Sedan, Engine No. T21720 for the illegal transportation of narcotics, wherein, the San Francisco Remedial Loan Association, Ltd., appeared and sought to establish priority for its mortgage lien. From that portion of the judgment denying a forfeiture of the interest of the finance company, the people appeal.

Judgment reversed.

Earl Warren, Atty. Gen., and Dennis Hession, Deputy Atty. Gen., for appellant.

Thomas, Beedy & Paramore, of San Francisco, for respondent.

KNIGHT, Justice.

This proceeding was instituted in behalf of the state pursuant to the provisions of chapter 7, article I, of the narcotics division of the Health and Safety Code, St. 1939, page 767, to obtain a judicial forfeiture of a 1937 Packard 6 touring sedan seized by state narcotic inspectors for the illegal transportation of cannabis sativa (marihuana). The car in question was being operated by the registered owner (hereinafter referred to as the purchaser). He was accompanied by a friend, and they were placed under arrest. The San Francisco Remedial Loan Association had refinanced the purchase of the car and was the legal owner thereof by virtue of a chattel mortgage given as security for the payment of a promissory note executed by the purchaser and endorsed by his father, upon which there was a balance due of $216 and interest. The finance company appeared in the proceeding by answer and at the trial sought to establish priority for its mortgage lien. The trial court found that at the time of the seizure the vehicle was being used for the illegal transportation of narcotics and gave judgment forfeiting the interest therein of the purchaser, but denied a forfeiture of the interests of the finance company. This appeal was taken by the state from that portion of the judgment in favor of the finance company.

[1-3] Section 11620 of said code provides that the claimant of any right, title or interest in a seized vehicle may prove his lien, mortgage or conditional sales contract to be bona fide *and that his right, title and interest was created after a reasonable investigation of the moral responsibility, character and reputation of the purchaser* and without any knowledge that the vehicle was being or was to be used for the purpose charged; and section 11622 declares in effect that "In the event of such proof" the rights of the claimant shall not be forfeited. In construing the provision above italicized it has been held that the burden of proving that such investigation has been made rests upon the claimant (People v. One Pontiac 8 Sedan, 22 Cal.App.2d 503, 71 P.2d 302; People v. One 1938 Buick Sedan, 39 Cal.App.2d 42, 102 P. 2d 447), and that the statutory requirement imposed thereby is not met where the purchaser is unknown to the claimant and the inquiry extends only to the ascertainment of his financial responsibility to pay and no effort is made to investigate his moral responsibility, character or reputation. People v. One 1939 Buick 8 Coupe, 43 Cal.App.2d 411, 110 P.2d 1013; People

v. One Packard 6 Touring Sedan, 26 Cal.App.2d 150, 79 P.2d 130; People v. One Lincoln Eight, 12 Cal.App.2d 622, 55 P.2d 925; People v. One Harley-Davidson Motorcycle, 5 Cal.2d 188, 53 P.2d 970. In speaking of the object sought to be obtained by the statutory requirement, the court in the first of the cases just cited goes on to say that the investigation of a prospective purchaser of an automobile is not alone for the protection of the financial investment of the seller or the institution financing the sale; that the legislature has in effect said the public also has an interest in the character of persons who may acquire automobiles; that the purpose of the law clearly is, therefore, to keep automobiles out of the possession of those who might use them for an unlawful purpose and is one of the methods devised to aid in the prevention of crime.

[4] In the present case the only proof offered by the claimant as to the matter of investigation consisted of the testimony given by the manager of installment loans of the finance company, who negotiated the loan; and he stated definitely that prior to making the loan the purchaser was unknown to him and that no attempt was made to investigate his moral character. In this regard the witness testified that he had never seen the purchaser prior to the time he applied for the loan; but that the purchaser told him he lived with his parents and that they had recommended that he refinance the purchase of the car with this company. Continuing, the witness stated that the company had known the purchaser's parents in a business way for about 10 years, during which period it had handled "many deals" with them; that he knew where they lived and knew that the purchaser's father was employed by the Southern Pacific Company and had been so employed for about 23 years. The witness then went on to say that so far as the finance company was concerned, the purchaser's parents had a fine reputation; that they were always found to be very reliable, and were very prompt in taking care of their obligations. The witness felt, however, so he testified, that since the purchaser was only 22 years old and the amount of the loan he was applying for ($250) was a "pretty heavy" obligation for him to carry, he "wanted to make sure that it was more or less with his parents' consent," and that accordingly he contacted the purchaser's father, who agreed to the loan and agreed to endorse the note, which he did. The witness positively stated, however, that previously the purchaser was unknown to him and that he did not ask him for any personal references on the application; that he did ask him what his employment was and was informed that he worked as a musician at various clubs in San Francisco; but that he "did not contact them"—that he "felt that it was not necessary, due to the fact that the father authorized this loan." And finally, on cross-examination the witness was asked the direct question: "Did you attempt to make any investigation of his [the purchaser's] moral character?" and he answered, "No, I am sure we did not." Applying the law as laid down in the cases above cited to the foregoing admitted facts, it is apparent that the trial court's finding that the finance company's lien as mortgagee was created "after a reasonable investigation of the moral character and reputation of" the purchaser, cannot be sustained. People v. One 1939 Buick 8 Coupe, supra.

[5] As supporting the trial court's finding, the finance company emphasizes the undisputed fact that the reputation of the purchaser's parents was of the very best and that such reputation was well known to the finance company. But neither of the parents was the purchaser of the car; and the law requires that the reputation of the purchaser be investigated. It is doubtless true that the question of the extent and reasonableness of such investigation is primarily one of fact, and that a finding of the trial court on that issue will not be disturbed where found to be with evidentiary support; but here, as shown, the finance company admits that it made no attempt to investigate the moral character of the purchaser.

It follows, therefore, that the portion of the judgment in favor of the finance company from which the appeal was taken must be reversed, and it is so ordered.

PETERS, P. J., and B. C. JONES, J. pro tem., concurred.

50 Cal.App.2d 841

ANDERSON et al. v. MEUER et al.

Civ. 2685.

District Court of Appeal, Fourth District, California.

March 30, 1942.

1. Quieting title ⚿44(4)

In lessors' suit to quiet title to mining claim which had been leased to defendant under lease giving lessors right of termination, on 30 days' notice, if defendant did not begin actual mining operations within certain period, defendant's testimony that he received two letters stating that he was in default in performance of work under lease, stating exact amount of default, and stating that he was to remedy such default within 30 days, supported finding that proper notice of default was given.

2. Quieting title ⚿44(4)

In lessors' suit to quiet title to mining claim which had been leased to defendant under lease giving lessors right of termination, on 30 days' notice, if defendant did not begin actual mining operations within certain period, evidence supported finding that defendant was in default when notice of termination was served, 36 days after service of notice of default.

3. Mines and minerals ⚿64

Where lessee, who had defaulted under lease of mining claim giving lessors right of termination, on 30 days' notice, if lessee failed to begin actual mining operations within certain period, was given notice of default, and, 36 days later, was given notice of termination, lessee's assignee under subsequent assignment acquired no interest in claim.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Suit by Walter W. Anderson and another against Rolph L. Meuer and another to quiet title to a mining claim. From a judgment for plaintiffs, defendants appeal, and plaintiffs move to dismiss the appeal.

Motion denied and judgment affirmed.

Holcomb, Holcomb & Kempley and C. C. Kempley, all of Los Angeles, for appellants.

Gerard Remington, of Los Angeles, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment quieting title to a mining claim in the plaintiffs.

The respondents Anderson and Umbach, on July 15, 1935, leased this mining claim to Rolph L. Meuer, who will be referred to as the appellant. This lease was for a term of five years with the privilege of renewal on certain conditions, and it provided that the lessee should have sixty days in which to do prospecting and such other work as he saw fit; that within sixty days he should begin "actual mining operations" and thereafter do a specified amount of such work each month; that he should have the right to remove all machinery and equipment upon the expiration or termination of the lease; that in the event of any default upon his part the lessors should give him thirty days written notice; and that if he failed and neglected to correct said default within thirty days the lease should terminate.

It is conceded that the time within which the appellant was required to begin actual mining operations was extended by mutual agreement to July 1, 1936. On November 8, 1936, the lessors served written notice on the appellant that he was in default in that he had not done the required work during the preceding four months and notifying him that if the default was not corrected within thirty days the lease would be terminated. On December 14, 1936, a notice that the lease was terminated was served. In March, 1937, the appellant assigned his interest in the lease to the Golden Butte Mining Company, Ltd., a limited copartnership of which he was the only general partner. In this action, which was subsequently filed, the only issues presented, as stated by counsel for the appellants, were "whether proper notice was given after they claimed the default, and secondly if such notice was given, whether there was a default during the four months given to perform this work." The court found in all respects in favor of the respondents and this appeal followed.

[1] It is first contended that the evidence does not support the finding that notice of default was given. The appellant himself testified that on or about November 8, 1936, he received a letter, although he could not remember whether or not it was registered; that "some kind of a notice" was enclosed in this letter; that he read the notice; that the notice specified that he

was in default in the performance of his work under this lease; that it stated the exact amount of the default; that it stated that he was to remedy such default within thirty days; that four or five days later he was handed another notice; that this second notice was to the same effect as the first; that it specified the amount of work he was in default and notified him he would have thirty days in which to remedy the default; that he paid no attention to either notice; and that he had done no "tunnel work" upon the leased property before he received this notice. This evidence sufficiently supports the finding in question.

[2] It is next contended that the evidence does not support the court's finding that a default existed on December 14, 1936, with respect to the amount of work called for by the terms of the lease. Assuming, as appellants contend, that there is some evidence in the record which would have supported a finding to the effect that the required amount of work was done there is other evidence to the contrary which amply sustains this finding. It may be further observed that much of the evidence upon which appellant relies, if accepted as true, relates to work in the nature of prospecting, for which work the appellant had but a limited time, and not to actual mining operations within the meaning of the terms of the lease. Moreover, the record rather clearly indicates why the evidence upon which the appellant particularly relies was not accepted at face value by the court. No machinery or equipment was placed upon the leased property and the appellant was mainly engaged in working some near by claims and in attempting to sell his interest in this claim, and the record amply sustains the court's finding that he did not comply with the terms of this lease.

[3] The finding that the Golden Butte Mining Company, Ltd., did not acquire any right in and to this property is attacked. That partnership acquired nothing other than any interest the appellant might have, it acquired such interest with full knowledge of all of the facts, and that interest was terminated before any assignment thereof was made.

Three other points raised are entirely without merit, involve matters which were proper and which could not have affected the result, and require no detailed consideration.

A motion to dismiss this appeal on the ground that all questions are moot since the term of the lease has now expired was also submitted. While it seems probable that the lease has expired by the lapse of time and that it has not been renewed in accordance with its terms, one matter in this connection has not been presented and is not disclosed by the record before us, and for this reason we have preferred to pass upon the appeal upon its merits.

The motion to dismiss is denied and the judgment is affirmed.

MARKS and GRIFFIN, JJ., concurred.

50 Cal.App.2d 796

SILVA et al. v. MARKET ST. RY. CO. et al.

Civ. 11813.

District Court of Appeal, First District, Division 2, California.

March 27, 1942.

Rehearing Denied April 25, 1942.

Hearing Denied May 25, 1942.

1. Appeal and error ⇨694(2), 719(6)

An error in granting a nonsuit is an "error of law" which may be reviewed on appeal from judgment when presented by bill of exceptions without any specification of insufficiency of evidence.

See Words and Phrases, Permanent Edition, for all other definitions of "Error of Law".

2. Appeal and error ⇨719(6)

An appeal from a judgment notwithstanding the verdict presents the identical question which is presented by an appeal from a judgment of nonsuit, and if the one presents only an error of law which may be inquired into without a specification of insufficiency so must the other.

3. Appeal and error ⇨719(6)

Where plaintiffs appealed from judgment notwithstanding the verdict for defendant and bill of exceptions did not specify wherein evidence was insufficient to support the decision or show an exception to judgment, appellate court could consider sufficiency of evidence to support decision since appeal presented the same question as an appeal from a judgment of nonsuit and no specification of insufficiency of evidence was necessary in such appeal. Code Civ. Proc. § 647.

4. Negligence ⚷90, 93(3)

Where the mother, father and sister were riding with the driver of an automobile at time of the accident and the automobile belonged to the father, negligence of the driver would be imputed to the father as owner and to the mother but would not be imputed to the sister who was a mere guest and had no control over the driver nor interest in the automobile.

5. Appeal and error ⚷934(1)

On appeal from judgment for defendant notwithstanding verdict of jury for plaintiff, appellate court was only required to inquire whether there was any substantial evidence in record giving it the most favorable interpretation that it would reasonably bear and drawing from it all favorable inferences that would support the verdict of the jury.

6. Street railroads ⚷117(28, 34)

Where driver of automobile looked to left as he neared intersection and saw only an approaching street car a few feet back of a stop sign, and looked to his right as he proceeded across the intersection and was then struck by street car, whether the street car's failure to stop was the "proximate cause" of the collision, and whether driver was negligent was a question for jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

7. Automobiles ⚷224(1), 245(88)

The extent of duty of passenger in automobile depends upon the particular circumstances and is a question for the jury.

8. Street railroads ⚷117(28)

Whether plaintiffs who were riding in an automobile which collided with a street car at intersection when the driver of the automobile seeing a street car approaching a stop sign and in reliance upon its duty to stop proceeded across intersection were contributorily negligent was a question for jury.

9. Trial ⚷139(1)

In action for injuries resulting from collision of an automobile with a street car, court was not authorized to take case from jury on ground that testimony of occupants of automobile and physical facts of accident demonstrated that plaintiff's theory of the accident was inherently impossible.

10. Appeal and error ⚷695(3)

Where material testimony was clearly intelligible without reference to map used as illustration on trial and sufficient to show verdict was supported by substantial evidence, and no amount of contradiction could affect result of appeal, failure to include the map in the record was immaterial.

11. Judgment ⚷199(3)

Where evidence preponderated in favor of defendants, trial court could not enter judgment notwithstanding the verdict for defendant.

12. Judgment ⚷199(3)
New trial ⚷65

Trial court has power to correct an unjustified verdict upon motion for new trial, but cannot make judgment notwithstanding the verdict serve the same purpose where there is any substantial evidence to support the verdict.

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Antone F. Silva and others against Market Street Railway Company for injuries suffered in automobile collision. From a judgment notwithstanding the verdict for defendant, plaintiffs appeal.

Reversed.

Vincent W. Hallinan, Emmett R. Burns, and James A. Himmel, all of San Francisco, for appellants.

Wm. M. Abbott, Cyril Appel, and Ivores R. Dains, all of San Francisco, for respondents.

DOOLING, Justice pro tem.

[1-3] This is an appeal from a judgment for defendants entered notwithstanding the verdict of a jury in favor of the appealing plaintiffs. The appeal is presented by bill of exceptions and respondents claim that this court cannot consider the sufficiency of the evidence because the bill contains no specification wherein the evidence is insufficient to support the decision. The rule is settled in this state that an error in granting a nonsuit is an error of law which may be reviewed on appeal from the judgment when presented by bill of exceptions with-

out any specification of insufficiency of the evidence in the bill. Donahue v. Gallavan, 43 Cal. 573, 574; Hammond v. Wallace, 85 Cal. 522, 24 P. 837, 20 Am.St.Rep. 239; Barfield v. South Side Irr. Co., 111 Cal. 118, 43 P. 406; Martin v. Southern Pacific Co., 150 Cal. 124, 88 P. 701; Beeson v. Schloss, 183 Cal. 618, 192 P. 292; Western California L. Co. v. Welch, 41 Cal.App. 435, 183 P. 169. An appeal from a judgment notwithstanding the verdict presents the identical question which is presented by an appeal from a judgment of nonsuit (Ferran v. Southern Pacific Co., 3 Cal.2d 350, 44 P.2d 533; Card v. Boms, 210 Cal. 200, 291 P. 190) and if the one presents only an error of law which may be inquired into without a specification of insufficiency so must the other. The dictum of this court in Fuchs v. Southern Pacific Co., 5 Cal.App.2d 409, 42 P.2d 704, stating a contrary conclusion, was announced without a consideration of the cases above cited. Nor is the objection open to respondents that the bill shows no exception to the judgment non obstante, since section 647, Code of Civil Procedure, provides that "the final decision in an action or proceeding * * * [is] deemed to have been excepted to." Beeson v. Schloss, supra, 183 Cal. at page 622, 192 P. 292.

[4] Appellants are the mother, father and sister of Joseph Thomas Silva, who was driving the automobile at the time of the collision out of which this action grows. The automobile belonged to the father Antone F. Silva. Some space is devoted in the briefs to the question whether the negligence, if any appeared, of the driver would be imputed to the three plaintiffs. Since the submission of the case the Supreme Court has decided the case of Milgate v. Wraith, 19 Cal.2d 297, 121 P.2d 10. Under the authority of that decision the negligence, if any, of the driver would be imputed to Antone F. Silva as owner of the car and the cause of action of his wife, Louise Silva, would apparently be subject to the same defense. 3 Cal.Jur., Ten-year Supp., pp. 542, 543. This defense would not apply to Marie Silva who, from the evidence, was a mere guest and neither had any control over the driver nor interest in the automobile in which she was riding.

[5] In considering an appeal from a judgment of this character we have only to inquire whether there is any substantial evidence in the record which giving it the most favorable interpretation that it will reasonably bear and drawing from it all favorable inferences, will support the verdict of the jury. Ferran v. Southern Pacific Co., supra. The automobile in which plaintiffs were riding was on the evening of the collision proceeding northerly on Potrero Avenue in San Francisco. Potrero Avenue is crossed by Sixteenth Street. Potrero Avenue is a boulevard street and there is a regulation "stop sign" near the westerly property line of Potrero Avenue on Sixteenth Street. As the driver of the automobile approached Sixteenth Street and when he was about five or six feet south of the south curb line he looked to his left and saw the street car operated by defendants a few feet back of the stop sign on Sixteenth Street. It was then in motion. There was no other traffic coming from his left and the driver turned his gaze to his right to look for traffic from that direction and proceeded into the intersection at a speed of fifteen to twenty miles per hour without again looking to his left. When he was crossing the eastbound track of the Market Street Railway he heard his sister scream and almost immediately the street car struck the automobile in the neighborhood of its rear left wheel. The father's testimony was substantially the same, and the sister testified that from the time they reached the curb line she was watching the street car and it made no stop.

[6] From this evidence the jury was entitled to conclude that the street car was not stopped at the intersection and that the collision was proximately caused by this violation of law. 2 Cal.Jur., Ten-year Supp., p. 349. They were likewise entitled to find that the driver of the automobile was not guilty of negligence. It would be at least a question of fact whether the driver, seeing the car approaching a stop sign, and in reliance upon its duty to stop taking his eyes from it to look for traffic in the other direction, was guilty of negligence in so doing. In Inouye v. McCall, 35 Cal.App.2d 634, at page 638, 96 P.2d 386, at page 388, the court said: "Upon this testimony we cannot assume that deceased was negligent. He had a right to believe the driver of the truck would obey the law and stop at the arterial and yield to him the right of way."

[7, 8] Nor can any of the plaintiffs be held negligent as a matter of law. The extent of the duty of a passenger "depends upon the particular circumstances of each case, and is a question for the jury." Wagner v. Atchison, etc., R. Co., 210 Cal. 526, 528, 292 P. 645, 646; Dowd v. Atlas Taxi-

cab, etc, Co., 187 Cal. 523, 529, 530, 202 P. 870.

[9] Respondents make an elaborate argument based upon testimony of the plaintiffs and their driver and the distances traveled by the automobile and street car from the time that the street car was first seen by the occupants of the automobile and the physical facts of the accident in an attempt to demonstrate that the plaintiffs' theory of the accident is inherently impossible. We have considered this argument carefully and are not convinced by it. The argument depends upon estimates of the speed of the automobile and the positions of the moving car and moving automobile at the time the car was first observed as testified to by plaintiffs and their driver. Such testimony cannot be mathematically accurate and a few feet or a few miles per hour one way or the other would completely change the result of any such calculation. Applying the same test to defendant Wimmer's testimony the same sort of argument could be as plausibly made by plaintiffs since Wimmer testified that the automobile traveling at the rate of thirty miles per hour skidded into the front of the car and "the body of the automobile pressed itself right up against the corner of the street car" and stopped.

[10] Respondents complain that a map used to illustrate the testimony of the witnesses was not included in the bill of exceptions. Since all of the testimony that we have quoted is clearly intelligible without reference to the map and is sufficient to show that the verdict of the jury was supported by substantial evidence, and since no amount of contradiction in the testimony could affect the result of this appeal, the record presented was sufficient to show the error complained of.

[11, 12] The case was one in which the evidence preponderated in favor of defendants; but that cannot be made the justification for a judgment non obstante. The trial judge has ample power to correct what may appear to him to be an unjustified verdict upon motion for new trial, but he cannot make a judgment non obstante serve the same purpose where there is any substantial evidence to support the verdict. Ferran v. Southern Pacific Co., supra, 3 Cal.2d at page 353, 44 P.2d 533.

The judgment is reversed.

NOURSE, P. J., and SPENCE, J., concurred.

BUXBOM v. SMITH et al.*

Civ. 12810.

District Court of Appeal, Second District, Division 3, California.

March 24, 1942.

Hearing Granted May 21, 1942.

1. Master and servant 🔑41(2)

Where plaintiff sued for breach of contract of employment to manage the publication of a newspaper, the damages awarded plaintiff for loss of trained organization, supervisors, good will, and for general damages to plaintiff's business as a distributor of handbills, newspapers, and advertising matter, could not be sustained, since in performing the contract alleged plaintiff needed no such organization and could use none, and defendants' refusal to perform the contract could not have damaged plaintiff in such particulars.

2. Damages 🔑124(3)

Where without fault on his part one party to a contract who is willing to perform it is prevented from doing so by the other party, the primary measure of damages is the amount of his loss which may consist of his reasonable outlay or expenditure toward performance and the anticipated profits which he would have derived from performance. Civ.Code, §§ 1512, 3300.

3. Master and servant 🔑41(2)

In action for breach of contract to distribute newspapers at the rate of $5 per thousand copies which defendant refused to permit plaintiff to complete, where court awarded plaintiff profits which would have been derived from the distribution of the papers for the remainder of the term that was all plaintiff was entitled to, and allowance of damages for loss of plaintiff's trained organization, supervisors, good will, and general damages to plaintiff's business was error. Civ.Code, §§ 1512, 3300.

4. Master and servant 🔑41(2)

In action for breach of contract to distribute newspapers, allegation that in reliance upon contract plaintiff enlarged his organization without stating amount expended and allegation that after canceling the contract defendants employed plaintiff's men, did not entitle plaintiff to damages, since, while it is actionable for a third person having knowledge that an employee is working under contract to induce such employee to

* Subsequent opinion 132 P.2d 4.

break his contract, such conduct is a "tort" and not a "breach of contract".

See Words and Phrases, Permanent Edition, for all other definitions of "Breach of Contract" and "Tort".

5. Principal and agent ⚷136(1)

In action for breaches of contracts to manage the publication of a newspaper and to distribute it where one of the defendants had acted merely as the agent of another defendant, and such fact was known to the plaintiff, such agent was not personally liable on either of contracts. Civ.Code, § 2343.

6. Principal and agent ⚷190(3)

In action for breaches of employment contracts made by agent of defendant where plaintiff testified that principal said that all matters involved should be taken up with agent, and that anything agent did would be all right, and that thereafter plaintiff made contract with agent, evidence supported finding that contracts were made by principal through such agent.

7. Appeal and error ⚷1151(2)

Where plaintiff suing for breaches of employment contracts was improperly allowed damages for an act which if committed would be tortious, modification of judgment of trial court excluding amount allowed for such tort would not prevent plaintiff from recovering for alleged tort in a proper action therefor.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Seymour Buxbom against E. F. Smith and another for breaches of contracts of employment. From a judgment for plaintiff, the defendants appeal.

Judgment reversed in part, and modified and affirmed in part.

W. T. Stockman and John L. Flynn, both of Los Angeles, for appellants.

Franz R. Sachse, Jesse E. Jacobson, and John C. Packard, all of Los Angeles, for respondent.

SHAW, Justice pro tem.

In bringing this action plaintiff labeled his complaint as one for "breach of contract of employment." The defendants, appealing from a judgment against them, complain that the trial court awarded plaintiff damages that could be allowed, if at all, only in some action sounding in tort. The complaint alleges two contracts and the breach of both of them as the basis for the action. One was a contract by which defendants employed plaintiff for a term of six months to handle the publication of a "newspaper," so-called, which was to carry free of charge all advertising of a chain of markets owned and operated by defendant Smith and to carry advertising of other markets at reasonable rates, plaintiff to receive 25 per cent of the gross advertising receipts for his services. By the other contract alleged, defendants employed plaintiff, for six months, to distribute the newspaper above mentioned at the rate of five dollars per thousand copies. The defendants canceled both the above mentioned contracts soon after they were made, and refused to perform them further, both cancellations being without plaintiff's consent. It is also alleged that at the time of making the contracts plaintiff was the owner of a distributing business and was engaged in distributing handbills, newspapers and advertising matter in the region where this newspaper was to be circulated, and that after the contracts were made plaintiff enlarged his distributing crews, employed additional supervisors and prepared to handle 40,000 copies of said newspaper. The complaint also alleges "that by reason of the said breaches of contract by defendants and proximately caused thereby, plaintiff has suffered damages as follows," setting forth seven items, two of which are substantially the same, except in amount, as the two damage items hereinafter quoted from the findings.

After trial the court made findings in plaintiff's favor which substantially followed the language of the complaint above outlined, except as to damages. The court denied plaintiff any commissions for sale of advertising, gave him two other small items of damage for breach of the publication contract, and found: "That as a result of defendants' violation of the terms of said contracts, the plaintiff has suffered damage as follows: In the sum of $1121.40 representing the profit which would have been derived by plaintiff from the distribution of said paper for the remainder of the term of said distribution contract. * * * In the further sum of $4,000 for the loss of plaintiff's trained organization, supervisors, good will and for general damages to plaintiff's business."

The defendants object to the damage item of $4,000 thus awarded as not a proper element of damage at all under the complaint or for breach of such contracts as plaintiff has alleged, and further as not shown in this case to have resulted from the breach. We think these contentions must be sustained.

[1] There can be no doubt, from the allegations of the complaint as well as the title given it by plaintiff, that the action is solely one for two breaches of contract, and the damages sought are claimed to have resulted from those breaches of contract alone. It is equally clear from the findings that the damages awarded are given only by reason of those breaches of contract. Obviously the item for loss of plaintiff's distributing organization, etc., can have no relation to the breach of the contract for managing the publication of the newspaper. For the purpose of performing that contract plaintiff needed no such organization and could use none, and defendants' refusal to perform that contract could not have affected it.

[2, 3] It is also plain to us that this item is not a proper element of damages for breach of the distribution contract. That contract was for the distribution of papers at a definite price, and by defendants' acts plaintiff was prevented from performing it after a short period of time. He was fully paid for the performance rendered, so that the question here affects only his damages for the performance prevented. In such a case the rule, as stated in 25 C.J.S., Damages, § 78, p. 575, is: "Where, without fault on his part, one party to a contract who is willing to perform it is prevented from doing so by the other party, the primary measure of damages is the amount of his loss, which may consist of his reasonable outlay or expenditure toward performance, and the anticipated profits which he would have derived from performance." In conformity to this rule, see sections 1512 and 3300 of the Civil Code; also Connell v. Higgins, 1915, 170 Cal. 541, 549, 150 P. 769; Cederberg v. Robison, 1893, 100 Cal. 93, 98, 34 P. 625; Caspary v. Moore, 1937, 21 Cal.App. 2d 694, 699, 70 P.2d 224; Spitzer v. Pathe Exchange, Inc., 1933, 132 Cal.App. 612, 620, 23 P.2d 308; Blair v. Brownstone Oil & Refining Co., 1917, 35 Cal.App. 394, 170 P. 160. In the case of Overstreet v. Merritt, 1921, 186 Cal. 494, 200 P. 11, on which plaintiff strongly relies to support the judgment, the plaintiff, who had given up an established business in order to engage in a new business with defendant, which defendant then refused to establish, was allowed to recover his loss from the giving up of his old business. This is merely an application of the first part of the measure of damages stated in the rule above quoted, that is, the "reasonable outlay or expenditure toward performance." In the case at bar there is no showing under this part of the rule, either in the pleadings, the findings or the evidence. It is alleged and found that the plaintiff, in anticipation of performing the contract, enlarged his distributing organization, and there is some evidence to the same effect, but it nowhere appears that he expended any money in so doing, or that he devoted any particular amount of time thereto, or that his time, if so spent, was of any particular value. Moreover, the finding does not purport to award anything for such an item. The plaintiff is fully compensated for the second element of damages stated in the rule by the award of the profits which, the court found, he would have made if allowed to complete the distribution contract. As far as this contract is concerned there is no room for further items of damage. If the plaintiff has suffered a damage by the loss of his organization it has not resulted from the breach of this contract, but from some other cause.

[4] The complaint alleges that, after canceling the distributing contract, the defendants "employed plaintiff's distributing crews, and supervisors in said area," and the findings repeat this statement and add that "defendants took over and appropriated the plaintiff's distributing organization." Plaintiff insists that this conduct was a breach of the contract, but he points to no provision of it which is so breached. The contract, as pleaded and found, says nothing of a distributing organization; it does not require plaintiff to provide such an organization, or to render any personal services at all, but would permit him to subcontract the entire work to others, if he so desired. The evidence on this point goes no further than the pleading. If the findings above quoted tend toward any cause of action in plaintiff against defendants it is not one for breach of either of the contracts sued on, but one for some independent tort. No such cause of action is completely stated, however, in either complaint or findings. Thus, "it is actionable for a third person, having knowledge that an employé is work-

ing under contract, to induce such employé to break his contract." (Patterson Glass Co. v. Thomas, 1919, 41 Cal.App. 559, 566, 183 P. 190, 193); to same effect, see 39 Cor.Jur. 1370; and many cases cited in note in 84 A.L.R. 77. On inducing breach of contract, generally, see Imperial Ice Co. v. Rossier, 1941, 18 Cal.2d 33, 112 P.2d 631. Such conduct is a tort, not a breach of contract. (39 Cor.Jur. 1373; Bloom v. Bohemians, Inc., 1921, 223 Ill. App. 269; Huff v. Watkins, 1883, 20 S.C. 477, 480.) But knowledge by the defendant of the contract of employment, breach of which is induced by him, is essential to a cause of action of this kind. (39 Cor.Jur. 1372.) The complaint and findings do not show such knowledge here. Except in rather general fashion they do not even show that there were any such contracts, and the evidence leaves the matter even more doubtful.

[5] The defendant Wright further contends that he is not liable at all in this action. It appears without conflict that he acted in all the matters involved herein as the agent of defendant Smith and that this fact was at all times known to plaintiff. Wright was therefore not personally liable on either of the contracts and the judgment against him is erroneous, unless one of the conditions to the personal liability of an agent specified in section 2343 of the Civil Code is met. In his brief plaintiff concedes this proposition and admits, as he must under the evidence, that the first two subdivisions of that section are not applicable, but contends that Wright is liable for the $4,000 award under subdivision 3, which makes an agent liable "when his acts are wrongful in their nature." Since we have already held that this item of damage cannot be recovered from any defendant under the complaint and findings this argument must fail.

[6] It is argued by defendant Smith that the evidence does not support the findings and judgment against him, particularly in that there is no evidence of Wright's authority to act for him in making the contracts sued on. But the plaintiff testified that before these contracts were made, and at a time when he was negotiating with Wright on the subject, he saw Smith and told him he had been talking to Wright about distributing circulars, and discussed the newspaper, "and he seemed rather busy; and he said, 'No, you take all those matters up with Mr. Wright; he handles all that; and anything you do with him is all right for the company.'" Plaintiff made no further effort to deal with Smith directly but made his arrangements with Wright. This was sufficient to show at least an ostensible authority in Wright to make, in behalf of Smith, the contracts in question. The evidence conflicts on the question whether any such contracts were made at all, but that of plaintiff and another witness called by him is sufficient to support the findings that they were made.

[7] No complaint is made of any items of damage other than the $4,000; and the judgment here, if modified to exclude it, will not be conclusive on plaintiff's right to recover it in a proper action. Hence there seems no reason to order a new trial as to defendant Smith. We cannot, however, order judgment for Wright on the findings because they assert that he personally entered into the contracts sued on.

The judgment against the defendant Wright is reversed. The judgment against the defendant Smith is modified by reducing the amount stated in paragraph 1 thereof from $5,156.40 to $1,156.40, and as so modified it is affirmed.

SCHAUER, P. J., and SHINN, J., concurred.

FERNELIUS et al. v. PIERCE et al.*

Civ. 11805.

District Court of Appeal, First District, Division 2, California.

March 26, 1942.

Rehearing Denied April 25, 1942.

Hearing Granted May 22, 1942.

1. Officers ⚷118

The doctrine of "respondeat superior" is not applicable to public officers, and a superior officer is ordinarily not responsible to third parties for the acts of his subordinates unless he directed acts to be done or personally co-operated therein.

See Words and Phrases, Permanent Edition, for all other definitions of "Respondeat Superior".

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* Subsequent opinion 138 P.2d 12.

2. Appeal and error 🔑917(1)

For the purposes of an appeal from a judgment entered after a demurrer to the complaint was sustained, all allegations of the complaint are assumed to be true.

3. Officers 🔑118

A public officer is not responsible for the tortious acts of a subordinate who is not in his private service but is himself a servant of the same governmental agency unless such officer has directed or co-operated in the acts done or unless, having unlimited power of appointment and removal, the officer has failed to use ordinary care in the selection or in the retention of the subordinate.

4. Municipal corporations 🔑170

Oakland city manager with power, subject to the civil service provisions of the charter, to appoint, discipline, and remove subordinate officers responsible to him, did not have an "unlimited power" of appointment and removal over police officers, and hence was not liable for death of prisoner at hands of police officers, for failure to use ordinary care in the selection or retention of such officers. St.1931, pp. 2653, 2655, art. 7, § 27, subds. 2, 5; p. 2665, art. 13, §§ 81, 82.

See Words and Phrases, Permanent Edition, for all other definitions of "Unlimited Power".

5. Municipal corporations 🔑182

Under Oakland charter giving chief officials power to suspend subordinates temporarily for incompetency or dereliction of duty, and establishing removal procedure subject to appeal to civil service board, chief of police does not have an "unlimited power" of appointment or removal over police officers, and hence is not liable for death of prisoner at hands of police officers for failure to use ordinary care in the selection or retention of such officers. St.1931, p. 2665, art. 13, §§ 81, 82.

6. Municipal corporations 🔑170

The Oakland city manager was not liable for the unlawful acts and omissions of police officers selected pursuant to the provisions of the charter unless he directed such acts or personally cooperated therein. St. 1931, pp. 2653, 2655, art. 7, § 27, subds. 2, 5; p. 2665, art. 13, §§ 81, 82.

7. Officers 🔑118

A superior officer is not liable for the torts of subordinates or deputies where the latter are themselves statutory officers and not under the superior's unrestricted control or right of hiring and discharging.

8. Municipal corporations 🔑173(5), 182

In action for wrongful death of prisoner at hands of police officers where complaint failed to state cause of action against either city manager or chief of police, it also failed to state a cause of action upon a bond given as surety that such officers would perform the duties imposed upon them by law.

9. Municipal corporations 🔑173(1), 182

Under the Oakland charter, a police officer or patrolman is not a "deputy city manager" or "deputy chief of police" or a "clerk" but is a "special officer" responsible as such to the municipal corporation, precluding a recovery by one injured by such officer or patrolman upon the official bond executed by the city manager and chief of police covering breaches committed by their deputies or clerks. St.1931, pp. 2653, 2655, art. 7, § 27; Pol.Code, § 959; St.1911, p. 1606, art. 14, § 87.

See Words and Phrases, Permanent Edition, for all other definitions of "Clerk", "Deputy Chief of Police", "Deputy City Manager", and "Special Officer".

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Lola Mae Fernelius and others against August Pierce and others for the wrongful death of Fred Fernelius. From a judgment for defendants, Bodie A. Wallman, Hassler, and Fidelity & Deposit Company of Maryland, plaintiffs appeal.

Affirmed.

Heber James Brown, of Oakland, and Johnson & Harmon and Wm. H. Henderson, all of San Francisco, for appellants.

F. Bert Fernhoff, City Atty., John W. Collier, Asst. City Atty., and Hagar, Crosby & Crosby, all of Oakland, and Thomas E. Davis, of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiffs are the widow and minor children of Fred Fernelius, deceased. They brought this action seeking damages for the death of said deceased, alleging that said death resulted from an unlawful assault upon said deceased by two police officers while said deceased was confined in the city jail of the City of Oakland. The defendants Pierce and Hancock were the two police officers who were alleged to have made said unlawful assault. The defendants Hassler and Wallman were respectively the city manager and the chief of police of said City of Oakland. The defendant Fidelity and Deposit Company of Maryland was sued as the surety on the official bond of defendants Hassler and Wallman. Separate demurrers were interposed by the several defendants. The demurrers of defendants Pierce and Hancock were overruled. The demurrers of defendants Hassler, Wallman and Fidelity and Deposit Company of Maryland were sustained without leave to amend. Plaintiffs appeal from the judgment thereafter entered against plaintiffs and in favor of the last mentioned defendants.

The main question raised on this appeal is that presented by plaintiffs' contention that the complaint stated a cause of action against defendants Hassler and Wallman and that the trial court therefore erred in sustaining the demurrers of said defendants without leave to amend. Said defendants seek to defend the ruling of the trial court on their demurrers solely upon the ground that no cause of action was stated against them.

[1, 2] All parties are agreed that the doctrine commonly known as respondeat superior is not applicable to public officers and that a superior officer is not ordinarily responsible to third parties for the acts of his subordinates unless he had directed said acts to be done or has personally cooperated therein. Michel v. Smith, 188 Cal. 199, 205 P. 113; Hilton v. Oliver, 204 Cal. 535, 269 P. 425, 61 A.L.R. 297; Whiteman v. Anderson-Cottonwood Irr. Dist., 60 Cal.App. 234, 212 P. 706; Baisley v. Henry, 55 Cal.App 760, 204 P. 399; 21 Cal.Jur. 405. Plaintiffs argue, however, that a superior officer is responsible to third parties for his own negligence consisting of either the negligent appointment or the negligent retention of incompetent subordinates. The complaint of plaintiffs against defendants Hassler and Wallman was drawn solely upon the theory of the negligent retention of incompetent subordinates, and for the purpose of this appeal we must assume that all allegations thereof are true.

It is unnecessary to set forth in detail all of the allegations of the complaint as said defendants do not question the sufficiency of the specific allegations to support plaintiffs' theory. Said defendants question only the soundness of the theory itself.

The complaint alleged the unlawful assault upon the deceased by said police officers resulting in skull fractures and concussion of the brain leading to the death of the deceased. It further alleged the existence of the power in defendants Hassler and Wallman to appoint and remove said police officers. It further alleged: "That defendants August Pierce and Glen Hancock were unfit and incompetent to perform their duties as police officers of the City of Oakland, as follows, to wit: that said August Pierce and Glen Hancock were vicious, high tempered, and addicted to the use of unnecessary force and violence and likely to unlawfully assault, beat, wound, ill-treat and use unnecessary force and violence against any person in their charge as police officers of the said City of Oakland. That defendants Bodie Wallman and John F. Hassler prior to May 4, 1940, knew, or should have known in the exercise of due care, of the aforesaid incompetence and unfitness of defendant August Pierce and defendant Glen Hancock to perform their duties as police officers of the City of Oakland; (Here follow allegation of numerous previous alleged unlawful assaults by the defendant police officers and allegations on information and belief of reports made to defendants Hassler and Wallman concerning said unlawful assaults) * * * That in spite of the fact that said defendants Bodie Wallman and John F. Hassler knew or should have known prior to May 4, 1940, that the defendants August Pierce and Glen Hancock were unfit and incompetent as aforesaid, they wholly failed and neglected to suspend, discipline or discharge said August Pierce and Glen Hancock, they having the power and the duty so to do as set out in paragraphs V and VI hereof, and thereby failed and neglected to well, truly, honestly and faithfully perform the duties of their respective offices."

Though there is much argument in the briefs for a distinction in the rule of liability between the negligent appointment and the negligent retention of an incompetent subordinate, the real point at issue is the status of the subordinate as it relates to the supervision and control of the superior. The principle upon which liability rests in cases of this character is stated in Union Bank & Trust Co. v. Los Angeles County, 11 Cal.2d 675, 679, 81

P.2d 919, 921: "It may be conceded that in the absence of statute the modern view is opposed to making public officers civilly liable for torts of deputies, *where the latter are themselves statutory officers and not under the superior's unrestricted control* or right of hiring and discharging. See Michel v. Smith, 188 Cal. 199, 205 P. 113 (municipal police officer); Van Vorce v. Thomas, 18 Cal.App.2d 723, 64 P.2d 772 (deputy marshal of municipal court); Pavish v. Meyers, 129 Wash. 605, 225 P. 633, 34 A.L.R. 561 (police officer); note, 43 Harv.L.Rev. 327. The other view is usually grounded upon the identity of the officer and his deputy *or the unrestricted right of control.* See Foley v. Martin, 142 Cal. 256, 71 P. 165, 75 P. 842, 100 Am.St. Rep. 123; Duluth v. Ross, 140 Minn. 161, 167 N.W. 485; New York v. Fox, 232 N.Y. 167, 133 N.E. 434. In the instant case the clerk's deputies are independent statutory officers within the rule of such cases as Michel v. Smith, supra, and Van Vorce v. Thomas, supra." Emphasis ours.

The determining point here is the question of "unrestricted control." The statements found in 43 Cor.Jur. p. 717 and 21 Cal.Jur. p. 405 are but partial statements of the rule. To say that a public officer is not responsible unless he has directed or cooperated in the tortious acts of the subordinate, or unless he has failed to use ordinary care in the appointment does not conform to the modern decisions. Conceding that a public officer might be liable if he knowingly and willingly retained in the service one who is incompetent to perform his duties, such liability does not rest solely upon the statement that he has not discharged the subordinate from his public employment. The leading case on the subject is Michel v. Smith, 188 Cal. 199, 205 P. 113. That was an action against the chief of police, a sergeant, and two subordinate police officers for an unlawful arrest and imprisonment. There the court noted the distinction between the status of a sheriff and his deputy, and a chief of police and subordinates who were also public servants whose appointment and removal were governed by civil service restrictions. After consideration of the old rule relating to a sheriff and his deputy the court said (188 Cal. at page 202, 205 P. at page 114): "A different rule prevails in the case of the chief of a municipal police department. He may even be charged with the duty of selecting the members of the force, but he is not responsible for their acts, unless he has directed such acts to be done, or has personally co-operated in the offense, for each policeman is, like himself, a public servant. Casey v. Scott, 82 Ark. 362, 101 S.W. 1152, 118 Am.St. Rep. 80, 12 Ann.Cas. 184." The court then clearly stated that, because of the civil service provisions of the charter, the chief of police "may not be held liable in damages for the unlawful acts and omissions of the subordinates of the department, selected pursuant to the provisions of the charter, unless it can be shown that he has directed such acts or personally co-operated therein."

This ruling was followed in Lorah v. Biscailuz, 12 Cal.App.2d 100, 54 P.2d 1125, where the court denied the liability of the sheriff for a tortious act of his deputy who was appointed and made subject to removal under civil service provisions of the Los Angeles County charter. Michel v. Smith, supra, was followed in Bower v. Davis, 13 Cal.App.2d 678, 57 P.2d 574, which was a suit against the chief of police for an alleged assault and conversion by a turnkey in the city police station. It was followed in Van Vorce v. Thomas, 18 Cal.App.2d 723, 64 P.2d 772, which was a suit against the marshal for an alleged assault by a deputy. In rejecting the early rule that the sheriff and his deputy are one, and that the superior is always liable for the acts of his subordinate, the court emphasized the change in "principle" brought about by the civil service restrictions upon the power of selection and removal. We quote (18 Cal.App.2d at page 725, 64 P.2d at page 773): "Eventually, however, the gradual changes continue until there appears an office in which the chief is only one of many holding salaried positions created by law, and his right to employ and terminate employment is no longer unrestricted. Under such circumstances, to make the head of the office respond in damages for the negligent discharge of duties, which he has no choice but to delegate to others, becomes 'manifestly unjust.' So Michel v. Smith, 1922, 188 Cal. 199, 205 P. 113, and again Bower v. Davis, 1936, 13 Cal.App.2d 678, 57 P. 2d 574, find in the changed situation, particularly the restrictions placed upon the right to employ and sever the employment of assistants, a reason for differentiating the liability of the Los Angeles chief of police from that of the sheriff. So, also

Lorah v. Biscailuz, 1936, 12 Cal.App.2d 100, 54 P.2d 1125, declines to follow the formula of 'personal representative' in the case of the Los Angeles county sheriff, whose deputies are to be appointed and discharged under the regulations of civil service."

The Michel case was followed with approval in Hilton v. Oliver, 204 Cal. 535, 539, 269 P. 425, 426, 61 A.L.R. 297, where the court said: "The rule laid down or approved by the decisions in this state is that an agent is not in general liable to third persons for the misfeasance or malfeasance of a subagent employed by him in the service of his principal, unless he is guilty of negligence in the appointment of such subagent, or directs or authorizes the particular wrongful act of the subagent, or improperly co-operates in the latter's acts or omissions. Dobbins v. City of Arcadia, 44 Cal.App. 181, 186 P. 190; Baisley v. Henry, 55 Cal.App. 760, 204 P. 399. The defendant trustees can be held liable under the facts shown herein only by reason of the application of the doctrine of respondeat superior. This doctrine has no application as between a public officer and his subordinates, who are likewise in the public service, unless the public officer has directed or countenanced the tortious acts to be done, or has co-operated therein. Michel v. Smith, 188 Cal. 199, 205 P. 113; Whiteman v. [Anderson-Cottonwood] Irrigation District, 60 Cal.App. 234, 212 P. 706."

Reed v. Molony, 38 Cal.App.2d 405, 410, 101 P.2d 175, an action against the State Board of Medical Examiners for a tort of a special police officer employed by the board, followed the same rule, and in O'Brien v. Olson, 42 Cal.App.2d 449, 463, 109 P.2d 8, the court, after approving the rule of Michel v. Smith, supra, quoted with approval the language in Hilton v. Oliver, supra, which we have quoted above relating to the doctrine of respondeat superior.

[3] The true analysis of all these decisions is that, though none states the rule with all its exceptions, they concur in the approval of the principle that a public officer is not responsible for the tortious act of a subordinate who is not in his private service, but is himself a servant of the same governmental agency, unless such officer has directed or cooperated in the acts done, or unless, *having unlimited power of appointment and removal,* the officer has failed to use ordinary care in the selection or in the retention of the subordinate. The reason for these limitations upon the liability of a public officer is that, since the liability must be founded upon his negligence, it is unfair and unjust to hold one responsible for the negligence of another which he had no power, in the exercise of all reasonable ordinary care, to prevent.

[4, 5] The application of these principles to the city manager and chief of police seems clear. The Oakland charter provides: "The City Manager * * * subject to the civil service provisions of this Charter * * * shall have the power to appoint, discipline and remove * * * all subordinate officers and employees of the City responsible to him." Article VII, section 27, subdivision 2, Stats.1931, p. 2653. "The City Manager, among other limitations, shall have no power under this Charter * * * f. To dismiss, suspend or discharge any officer or employee in the classified civil service, except in accordance with the civil service provisions of this Charter." Article VII, section 27, subdivision 5, Stats.1931, p. 2655. The chief of police does not possess the same authority. He is appointed by the manager, subject to the civil service provisions of the charter but like all other "chief officials," has the power to suspend any subordinate temporarily for incompetency or dereliction of duty. Section 81 of the charter (Stats.1931, p. 2665) provides for the suspension, fine, and removal of all persons in the classified civil service on order of the city manager, or on his approval of the suspension made by a "chief official," but in all such cases the person affected may appeal to the civil service board which "shall fully hear and determine the matter." The finding and decision of the civil service board shall "forthwith be enforced and followed" by the board or official from which the proceedings were initiated. Section 82, Stats.1931, p. 2665.

[6, 7] We can find no essential difference between these provisions of the Oakland charter, and those of the Los Angeles charter which were before the court in Michel v. Smith, supra. And there is no essential difference in the status of the city manager here and that of the chief of police involved in that case. For these reasons we are satisfied that the questions here involved are determined by the con-

clusion reached in the Michel case, where the court said (188 Cal. at page 203, 205 P. at page 115): "Aside from the limitations thus placed upon the chief in the selection of his subordinates, his control over the members of the force after appointment is also subject to the limitation that while he may remove members of the force for cause, such removal is subject to review by the police commission. These provisions of the charter plainly determine the status of the chief in the police department. He is a member of the department and a public servant like every other member, but by reason of his position is charged with the supervision and control of the police force of the city. Charter, § 53. In this capacity he may not be held liable in damages for the unlawful acts and omissions of the subordinates of the department, selected pursuant to the provisions of the charter, unless it can be shown that he has directed such acts or personally co-operated therein." We have found no authority in the state taking an opposite view, and no authority disputing the brief statement in Union Bank & Trust Co. v. Los Angeles County, supra, that the superior officer is not liable for the torts of subordinates or deputies "where the latter are themselves statutory officers and not under the superior's unrestricted control or right of hiring and discharging."

[8] From our conclusion that the complaint does not state a cause of action against either the city manager or the chief of police it would follow that no cause is stated against the bonding company since the bond was given as surety that these officers would perform the duties imposed upon them by law. The complaint pleads that the bond was given to the City of Oakland to cover a specified number of officers and employees of the city named in a schedule attached, and that in said schedule appear the names of Hassler and Wallman. (The names of Pierce and Hancock do not appear upon this schedule.) The bond attached as an exhibit to the complaint recites that it shall cover losses occasioned by "any officer and/or employee listed in the schedule." Since defendants Pierce and Hancock were not listed in this schedule the appellant seeks to hold the bonding company under the theory that they were acting as deputies of Hassler and Wallman. They rely upon section 959 of the Political Code and Union Bank & Trust Co. v. Los Angeles County, supra.

[9] The code section declares that the official bond executed by any public officer shall apply to breaches committed by "his deputy, or clerk." In the case cited the supreme court held the surety company liable under this section for a default by a deputy of the county clerk. But, under the Oakland charter, there is no such relation of principal and agent, or deputy, between the city manager, the chief of police, and subordinate police officers. Section 87 of the Charter (Stats.1911, Part Two, p. 1606) provides:

"The police department shall consist of a chief of police, captain of inspectors who shall act as chief of police in the absence of the chief of police, and such captains of police, lieutenants, inspectors, assistant inspectors, sergeants, corporals and bailiffs as in the judgment of the council the needs of the service may require * * *.

"Patrolmen shall be appointed in such numbers as not to exceed one patrolman for every eight hundred inhabitants of the city."

Certainly a police officer, or a patrolman, is not a deputy city manager, or a deputy chief of police, or a clerk of either. He is a special officer of the municipality responsible as such to the municipal corporation and subject only to such supervision and control as the charter may provide.

The judgment is affirmed.

STURTEVANT, and SPENCE, JJ., concurred.

SELLERY et al. v. WARD et al.*

Civ. 12878.

District Court of Appeal, Second District, Division 3, California.

March 25, 1942.

Hearing Granted May 21, 1942.

1. Judgment ⟹16

A judgment rendered by a court without jurisdiction of the subject matter is void.

2. Appeal and error ⟹185(1)

Where superior court had been without jurisdiction of the cause, the judgment was reversed even though the question of jurisdiction had not been raised by the parties.

3. Courts ⟹24, 37(1)

Jurisdiction of the subject matter cannot be conferred by consent, agreement or waiver of the parties.

4. Courts ⟹472(6)

Under constitutional provision that superior court should have original jurisdiction in all cases except cases in which jurisdiction should be given by law to municipal courts, a case within jurisdiction of a municipal court is excluded from that of superior court, and there is no concurrent jurisdiction in the same county. Const. art. 6, § 5; Code Civ.Proc. §§ 82, 89.

5. Dismissal and nonsuit ⟹75

A dismissal of some of causes of action without prejudice is substantially the same in its effect as an amendment eliminating the dismissed causes of action from the complaint.

6. Courts ⟹39

Where some of the causes of action are eliminated from complaint by an amendment, the jurisdiction of court is to be determined by consideration only of the part of complaint remaining, and the same rule applies where some causes of action are dismissed without prejudice.

7. Landlord and tenant ⟹217(1)

Where complaint alleged that plaintiffs' lots were leased by defendants who thereafter failed to pay reasonable rental value of the lots, plaintiffs' action to recover reasonable rental value was not one in equity, but was a case at law.

8. Landlord and tenant ⟹217(2)

Where plaintiffs alleged that they had leased lots to defendants, and that defendants had failed to pay reasonable rental value thereof, plaintiffs' action to recover reasonable rental value was an action on an implied contract, and would at common law have been deemed an action in assumpsit.

9. Courts ⟹472(6)

Under constitutional provision giving superior courts jurisdiction except where jurisdiction had been given by law to municipal courts and under statute giving municipal courts jurisdiction of cases at law involving less than $2,000, action to recover reasonable rental value in the amount of $800 of lots leased to the defendants was within jurisdiction of municipal court in Los Angeles County, and superior court of that county was without jurisdiction. Code Civ.Proc. §§ 82, 89; Const. art. 6, § 5.

10. Courts ⟹486

Where Supreme Court was without jurisdiction of action at law to recover reasonable rental value of leased premises, court should have proceeded under Code of Civil Procedure to transfer case to a proper court. Code Civ.Proc. §§ 82, 89, 396.

Appeal from Superior Court, Los Angeles County; Walter Desmond, Judge.

Action by Albert C. Sellery and another against J. E. Ward and another to recover the reasonable rental value of property owned by the plaintiffs and leased by the defendants. Judgment for the plaintiffs, and the defendants appeal.

Judgment reversed with directions.

Newton M. Todd and Fred A. Watkins, both of Long Beach, for appellants.

James E. Pawson, of Long Beach, for respondents.

SHAW, Justice, pro tem.

[1-3] The defendants Ward have appealed from a judgment against them in favor of plaintiffs for $1,016.60. On examination of the complaint on which this judgment was rendered we conclude that the case stated by it is not within the jurisdiction of the superior court, and the judgment must be reversed for that reason. This point is not made by the appellants, but it is plainly apparent to us; and since a judgment rendered by a court without jurisdiction of the subject matter is void (Cook v. Winklepleck, 1936, 16 Cal.App.2d Supp. 759, 768, 59 P.2d 463), we should

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* Subsequent opinion 131 P.2d 550.

reverse it even though the point is not raised by the parties. Jurisdiction of the subject matter cannot be conferred by consent, agreement or waiver of the parties. Cook v. Winklepleck, supra, 16 Cal.App.2d Supp. at page 769, 59 P.2d 463; Norton v. Baranov, 1935, 4 Cal.2d 443, 50 P.2d 67.

[4] By section 5, Article VI of the Constitution, as amended in 1928 and still in force, the superior courts have "original jurisdiction in all civil cases * * * (except * * * cases and proceedings in which jurisdiction is or shall be given by law to municipal * * * courts) * * *." Section 89 of the Code of Civil Procedure confers upon municipal courts jurisdiction "In all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to two thousand dollars ($2,000) or less, except cases which involve the legality of any tax, impost, assessment, toll or municipal fine." Under the constitutional provision above quoted, there can be no concurrent jurisdiction of superior and municipal courts (at least, in the same county; see section 82 of the Code of Civil Procedure); a case within the jurisdiction of a municipal court is excluded from that of the superior court. Hopkins v. Anderson, 1933, 218 Cal. 62, 66, 68, 21 P.2d 560; Norton v. Baranov, 1935, supra.

[5, 6] The complaint filed by plaintiff, as amended before the trial, contained six purported causes of action, of which two, the third and fourth, may be conceded to be within the jurisdiction of the superior court. The findings and the judgment, respectively, recite receipt of evidence on the first cause of action and that all the causes of action except the first were dismissed without prejudice. Such a dismissal is substantially the same in its effect as an amendment eliminating the dismissed causes of action from the complaint. It is settled that after such an amendment the jurisdiction of the court is to be determined by consideration only of the part of the complaint remaining. Jacobson v. Superior Court, 1936, 5 Cal.2d 170, 174, 53 P.2d 756. The same rule applies here. The action stood, after the dismissal, as if only the first cause of action had ever been stated in the complaint. If that cause of action was not within the jurisdiction of the court, no judgment could be given upon it.

The first cause of action, as amended, after alleging that the plaintiffs are husband and wife, that the defendants Ward stand in the same relation and that plaintiffs own six described lots of land in Long Beach, and stating the reasonable rental value of said lots, proceeds thus: "V. That on or about May 15th, 1937, said lots were leased and used from month to month thereafter and are still being used at the express instance and request of the defendants, and each of them, and for the use and benefit of the defendants, and each of them.

"VI. That the defendants, J. E. Ward and Cora B. Ward, have failed to pay said reasonable rental value per month and still continue to fail to pay the plaintiffs the reasonable rental value of said lots, as aforesaid.

"VII. That there is now unpaid as the reasonable rental value of said lots the sum of $800.00."

[7-10] Here is stated no case for relief like or analogous to that granted in courts of equity. The sole relief that could be granted on these allegations is damages. The answer consisted only of denials, and so could not affect the decision of the question of jurisdiction. The case is, therefore, not one in equity but is a case at law. 1 C.J.S., Actions, § 54, pp. 1153-1156; Traffic Truck Sales Co. v. Justice's Court, 1923, 192 Cal. 377, 383, 220 P. 306; Sturgeon v. Security First Nat. Bank, 1934, 139 Cal.App. 197, 199, 33 P.2d 874; Massachusetts, etc., Ins. Co. v. San Francisco-Oakland Terminal Rys., 1919, 39 Cal.App. 388, 178 P. 974. It is an action on an implied contract and would, at common law, have been deemed an action in assumpsit. 7 C.J.S., Assumpsit, Action of, § 1, p. 109; 3 Cal.Jur. 373. Since there are two municipal courts in Los Angeles County, where this action was filed, and the amount sued for is less than two thousand dollars, the superior court of that county had no jurisdiction of it upon the cause of action remaining after the dismissal, and should have proceeded under section 396 of the Code of Civil Procedure to transfer it to a proper court.

The judgment is reversed and the superior court is directed to proceed as directed by law to transfer the action to a proper court having jurisdiction of the subject matter thereof.

SCHAUER, P. J., and SHINN, J., concurred.

50 Cal.App.2d 802

KUHLEMEIER et al. v. LACK.

Civ. 12849.

District Court of Appeal, Second District, Division 2, California.

March 27, 1942.

Rehearing Denied April 8, 1942.

Hearing Denied May 25, 1942.

1. Landlord and tenant ⇨184(2)

Where ten-year lease of large apartment house and furnishings required $25,000 deposit to guarantee performance by tenant without provision for forfeiture in event of any breach of lease by tenant, and applied deposit to rent principally at end of term and gave tenant power to terminate lease on 30 days' notice in which event he should "forfeit" any interest he might have in deposit, there was no attempt to determine "liquidated damages" in event of a breach since the so-called forfeiture provision would become operative only upon voluntary exercise of option by tenant which would not be a "breach" of the lease, and such provision was valid. Civ.Code, §§ 1670, 1671.

See Words and Phrases, Permanent Edition, for all other definitions of "Breach", "Forfeit", and "Liquidated Damages".

2. Landlord and tenant ⇨37

In construing any part of lease, entire document must be considered.

3. Contracts ⇨1

It is court's duty to sustain contracts when deliberately entered into between parties who have equality of opportunity for understanding and insisting upon their rights, and when such contracts are not clearly in violation of law or against "public policy".

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

4. Damages ⇨78(6)

That word "forfeit" is used in lease is not determinative of parties' interests since in law it means to lose and surrender to an individual or the state something that belongs to one for misconduct or breach of duty and implies that there must be some person, natural or artificial, who is entitled to receive the benefit of the forfeiture when it accrues and a breach of duty on the part of the one losing his interest in the property.

5. Damages ⇨78(6)

There is no legal principle which makes void a provision in a lease that in consideration of landlord's granting to tenant right to terminate lease, tenant agrees to pay stipulated sum in event that he elects to exercise the option, and fact that tenant agreed to relinquish or "forfeit" a right to a sum of money instead of to pay a sum of money did not alter the situation as in either event payment of money or relinquishment of right to demand return of money constitutes the "consideration" for option to terminate lease.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

6. Landlord and tenant ⇨184(2)

In action for return of deposit made by plaintiffs' predecessor as tenant to guarantee performance of lease providing for termination of lease upon 30 days' notice in which event lessee should forfeit any interest he might have in deposit, evidence showed that lease was terminated upon notice given by plaintiffs and not by mutual agreement.

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Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Elsie Kuhlemeier and others against F. S. Lack for remainder of deposit made by plaintiffs' predecessor as lessee to guarantee the faithful performance of lease. From a judgment for plaintiffs, the defendant appeals.

Judgment reversed.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

John L. Schaefer and Stephen Monteleone, both of Los Angeles, for appellant.

Conroy & Conroy, Edward L. Conroy, Chambers & Lyman, and Robert G. Chambers, all of Hollywood, for respondents.

STEPHENS, Justice pro tem.

Appeal from a judgment in favor of plaintiffs for the return of a deposit made by plaintiffs' predecessor, as lessee, "to guarantee the full and faithful performance of each and every term and condition herein contained incumbent upon the lessee." Lessee died shortly after taking possession under the lease and plaintiffs succeeded to his interest. Defendant is the lessor in this lease.

The property covered by the ten-year lease consists of a large apartment house with its furnishings, the minimum rental varying from $2,000 to $3,000 per month, with provision in the lease for division between lessor and lessee of the excess revenue above certain minimums. By paragraph 26 of the lease it is provided that the deposit of $25,000 made by lessee is applied upon the payment of rental in the following manner:

(a) from Nov. 15, 1936, to Nov. 15, 1937, at the rate of $400.00	$ 4,800.00
(b) from Nov. 15, 1937, to Dec. 14, 1937, at the rate of $200 per month	200.00
(c) from Dec. 15, 1944, to August 14, 1946, (the date of the termination of the lease) at the rate of $1,000 per month	20,000.00
	$25,000.00

$5,000 of the deposit was theretofore applied to the months indicated in items (a) and (b) above. No question as to the application of such sum is involved on this appeal.

The controversy before this court involves the effect of section 10 of the lease, which reads as follows:

"10. Lessee may at any time during the term of this lease, at his election, terminate this lease by giving thirty (30) days' notice in writing to Lessor of his intention to so terminate, and such termination shall be effective upon payment by Lessee of all rental due up to the effective date of said termination. Upon the expiration of said thirty-day period, Lessee shall deliver possession of said premises to the Lessor and shall thereupon be relieved of all further duties, liabilities and obligations under said lease. Upon such termination as aforesaid, Lessee shall forfeit any right, title or interest he may have in and to the deposit of $25,000 paid as aforesaid."

Some time after respondents had succeeded to the lessee's interest they gave notice to appellant of the termination of the lease, in the following language:

"Notice of Intention to Terminate Lease.

"To F. S. Lack, Los Angeles, California:

"You are hereby notified that the undersigned Lessees of that certain lease dated August 14, 1936, between F. S. Lack, as lessor, and W. H. Kuhlemeier, as lessee, and which lease by proper conveyances is now the property of the undersigned as lessees, and which lease covers the Hotel Apartment House located at No. 945 Wilshire Boulevard, Los Angeles, hereby elect to and by this Notice do terminate said lease as of the 31st day of January, 1939.

"That said lease is terminated under the provisions of paragraph No. 10, page 6, and paragraph No. 26, page 11, of said lease, and for the further reason that the Lessor failed and refused to perform that part of the lease designated as paragraph 8, page 5, relative to the furnishing of the ballroom, billiard room and penthouse of said building, on or before October 1, 1936, or at all.

"You are further notified that the lessees will at the close of the 31st day of January, 1939, deliver possession of the premises described in said lease to the Lessor or his agent.

"You are further notified that under the terms and provisions of said lease and especially under the provisions of paragraph 26, page 11, of said lease, the undersigned Lessees hereby demand payment to them of the sum of Twenty Thousand Dollars ($20,000) on or before February 1, 1939.

"Dated this 30 day of December, 1938."

To this notice appellant sent the following reply:

"Mrs. Elsie Kuhlemeier,

"Mr. William Kuhlemeier, Jr.,

"Mrs. Wanda Anslyn,

"Mr. J. E. Kuhlemeier,

"Conroy & Conroy, Attorneys at Law:

"You and each of you are hereby notified that, through your attorneys, Conroy and Conroy, the undersigned has been advised by his attorney, that following a reply from the undersigned to your written notice of intention to terminate the lease on the Rex Arms Apartment building, that it is your intention to terminate said lease, and that as an evidence of such termination, you are now in process of taking inventory of all of the furniture, furnishings and equipment now located in said Rex Arms Apartment building.

"The undersigned hereby recognizes your right to terminate said Rex Arms lease, but only by virtue of and pursuant to the terms and conditions of said lease.

"The undersigned hereby denies that you have any right at all to terminate said lease for your alleged reason that the undersigned lessor failed and refused to perform that part of the lease designated as Paragraph 8, page 5, of said lease.

"The undersigned hereby further notifies you and each of you that he does not recognize any right alleged by you, whether referred to by you in said lease or not, to the return to you of Twenty Thousand Dollars ($20,000) or any sum at all, as alleged in your notice of intention to terminate said lease, or for any reason, right, or claim whatsoever, and on the contrary hereby notifies you that pursuant to Paragraph 10 of said Rex Arms lease, upon the final termination of said lease by you, pursuant to your notice of intention to terminate said lease, you and each of you shall and will thereupon forfeit all of your right, title and interest in and to said Twenty-Five Thousand Dollars ($25,000) and/or Twenty Thousand Dollars ($20,000) or any and all sums referred to therein, to the undersigned.

"Upon the aforesaid termination of said lease, followed by the re-possession of said premises by the undersigned, the undersigned demands that you and each of you perform all and sundry the requirements of you as contained in Paragraph 14 of said lease, and return all furniture and fixtures as contained in Exhibit 'A' in good condition of repair, less ordinary wear and tear, as provided in Paragraph 14 of said lease, and failing to do so, to pay to the undersigned the reasonable value thereof, and to account and pay to the undersigned for all rentals due the undersigned.

"You and each of you will please govern yourselves accordingly.

"F. S. Lack,
"The Undersigned."

Thereafter possession was surrendered to appellant on February 1, 1939, and he has been in possession ever since. All rent up to that time was paid, and certain minor adjustments concerning articles of personal property were made.

The complaint contained a second cause of action based upon alleged failure of lessor to comply with requirements of the lease in connection with the furnishing of the ballroom, billiard room and penthouse, but the trial court found against plaintiffs on this cause of action and it is not involved in this appeal. The trial court also found against the contention that there was any violation of this provision which could be made the basis for termination of the lease, and this finding is amply supported by the evidence.

The real question for determination here, therefore, is whether or not the provision of section 10 of the lease, that "upon such termination as aforesaid, lessee shall forfeit any right, title or interest he may have in and to the deposit of $25,000 paid as aforesaid," constitutes a penalty or forfeiture and should be held void under the provisions of Civil Code sections 1670 and 1671.

Appellant contends that he became entitled to the deposit, not by reason of any damage or as a penalty for any breach of lessees' obligations, but as a consideration for a privilege granted to lessees which they could exercise or not at their option. He points out also that although the deposit is made as a guarantee of faithful performance by lessees, there is no provision for forfeiture in case of breach, and contends that the use of the word "forfeit" in provision 10 of the lease is in fact a misnomer, because it does not contemplate a penalty for a breach. On the other hand, respondents take the position that if the effect of the provision is to penalize the lessees for not going through with the lease, and to forfeit their rights to a large sum of money for a reason and upon a basis having no relation whatever to the damage, if any, suffered by lessor through termination of the lease, then it is void, regardless of the particular words used or the ostensible basis for it. The trial court interpreted the provision as amounting in effect to a penalty, and declared it to be void.

There can be no serious doubt about the meaning of section 10 of the lease, for the language used is plain and unambiguous. The lessee is given the right to cancel the lease at any time upon thirty days' notice, and in that event he loses any right he may have to the $25,000 deposit, or so much thereof as had not, at the time of cancellation been applied to rental in accordance with other provisions of the lease. Must this provision then, deliberately agreed upon and clearly expressed by the parties, be declared void?

[1] Section 1670 of the Civil Code provides that "Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section." It is apparent that this is not a contract by which the parties attempted to determine the amount of liquidated damages in the

event of a breach. The so-called forfeiture provision came into operation solely as a result of the lessee's voluntary action in exercising the option to terminate the lease. Since the option was exercised in accordance with the terms of the contract, it cannot be considered as a breach of the contract.

The cases of Green v. Frahm, 176 Cal. 259, 168 P. 114; Webster v. Garrette, 10 Cal.App.2d 610, 52 P.2d 550; Redmon v. Graham, 211 Cal. 491, 295 P. 1031, and Bacciocco v. Curtis, 12 Cal.2d 109, 82 P.2d 385, relied upon by respondents, do not aid them, for in each of those cases the court had before it a lease which provided in effect that the forfeiture was conditioned upon the lessee's breach of the lease and was therefore held to be void under section 1670 of the Civil Code because it constituted an attempt to fix liquidated damages in anticipation of a breach.

[2] In construing any part of the lease the entire document should, of course, be considered. It should be noted that although in the preliminary recitals the deposit is said "to guarantee the full and faithful performance of each and every term and condition herein contained incumbent upon the lessee," there is nowhere any provision for forfeiture of the deposit in the event of any breach by lessee. This is a valid provision for the protection of the lessor. Green v. Frahm, supra; A-1 Garage v. Lange Inv. Co., 6 Cal.App.2d 593, 596, 44 P.2d 681.

[3] It is also provided that the deposit *is* (not shall be) applied to the rental for certain months, principally those at the end of the term; in other words, application of the deposit to rental is made at the time of execution of the lease. It has been held that "where rent is paid in advance the law itself, in the absence of any agreement therefor, authorizes the landlord to retain the rent so paid though he re-enter before the expiration of the term." Wetzler v. Patterson, 73 Cal.App. 527, 535, 238 P. 1077, 1080. How, then, can it be said that an agreement of the parties themselves is invalid when it provides for the same thing in consideration for a right which the lessee is free to exercise if he deems it to his interest to do so? It is the duty of the court to sustain contracts "when deliberately entered into between parties who have equality of opportunity for understanding and insisting upon their rights," and when such contracts are not clearly in violation of law or against public policy. Burns Trading Co. v. Welborn, 81 F.2d 691, 106 A.L.R. 285. A provision in a lease for payment of a lump sum by lessee as a bonus for entering into a lease (and later to be applied to rental if lessee has observed his obligations) has been held not to be in violation of section 1670 of the Civil Code. A-1 Garage v. Lange Inv. Co., supra; Parigian v. Citizens Nat. Trust & Sav. Bank, 42 Cal.App.2d 773, 110 P.2d 117. If such a payment can be upheld as a consideration for entering into a lease, it would appear equally logical to sustain it as consideration for the right to terminate the lease.

[4, 5] The fact that the parties have used the word "forfeit" in the lease is not determinative of their interest. In law the word "forfeit" means "to lose and surrender to an individual or the state something that belongs to one *for misconduct or breach of duty* * * *. The term implies that there must be some person, natural or artificial, who is entitled to receive the benefit of the forfeiture when it accrues, *and a breach of duty on the part of the one losing his interest in the property.*" (Emphasis added.) 12 Cal.Jur. 632, and cases there cited. The lessee in the case under review was not to lose or forfeit his right to the money because of any misconduct or breach of duty, but was to surrender the money as consideration for the right to terminate the lease. There is no legal principle which makes void a provision in a lease to the effect that in consideration of the lessor's granting to the lessee the right to terminate a lease for a term of years the lessee agrees to pay a stipulated sum in the event that he elects to exercise the option to terminate. The fact that in the present case the lessee has agreed to relinquish or "forfeit" a right to a sum of money, instead of to pay a sum of money, does not alter the situation. In either event the payment of money, or the relinquishment of the right to demand the return of money, constitutes the consideration for the option to terminate the lease.

[6] The trial court found that "the lease was mutually terminated," but there was no evidence to sustain such a finding other than the correspondence hereinabove quoted. Such finding is not sustained by the evidence. The finding should have been

that such lease was terminated pursuant to the provision thereof for such termination.

The judgment is reversed.

W. J. WOOD, J., concurred.

MOORE, Presiding Justice, (concurring).

I concur. I do so with deep anxiety in view of the precise allocation of the money to the payment of the rentals for specified months of the term of the lease. Since those months had not arrived, the moneys were never earned. My hesitancy arises from a deep-seated dislike for any scheme that transfers to a person the property of his neighbor without adequate return. Defendant has the same property he had on the day he leased it to plaintiffs' predecessor, but at the same time he has also $20,000 of plaintiffs' money.

But to hold that the retention of the $20,000 by defendant would be a forfeiture were tantamount to saying that we have a contract utterly without mutuality. In view of such dilemma as would thereby be created I am persuaded that Mr. Justice STEPHENS has wisely solved the problem presented. If the balance remaining in defendant's hands at the time of the cancellation was not intended to constitute payment for the privilege of being discharged from further obligations under the lease, then plaintiffs had the right to determine at any time during the ten-year term whether they would stay in or go out without having to pay one penny for the privilege. It is an essential of a valid contract that the obligation of one party should be supported by an adequate consideration on the part of the other. Reading the lease by its four corners, it appears that a genuine attempt was made to provide for the compensation of the lessor in the event the lessee should desire to withdraw from his engagement to operate the property during the ten-year term.

Courts should, only after the exercise of due caution, approve the transfer of the title to moneys without the passing of adequate consideration therefor. It was for a long time the disposition of courts to look upon such a provision as that under consideration with disfavor and to construe it strictly in order that damages provided to be paid in the event of a breach might be treated as penalties. By such holding it was rendered difficult to recover except for only such loss as could be definitely proved. But the modern tendency is, when a contract has been deliberately conceived and executed by two mature parties with equal understanding of their respective rights, to regard such provisions as inserted for the purpose of promoting prompt performance of the contract as well as to adjust amicably in advance the settlement of a potential controversy without uncertainty, delay and expense. To this end courts now industriously seek to ascertain the true intention of the parties at the time of making provision for the payment of a designated sum upon the breach of a covenant, rather than merely to conclude that it is a penalty because of the failure of the parties to include a stipulation that it would be extremely difficult to determine the amount of damage to be suffered in the event of a breach. Wise v. United States, 249 U.S. 361, 39 S.Ct. 303, 63 L.Ed. 647.

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50 Cal.App.2d 716

GOODERHAM & WORTS, Limited, v. COLLINS et al.

Civ. 11908.

District Court of Appeal, First District, Division 1, California.

March 26, 1942.

Hearing Denied May 21, 1942.

1. Intoxicating liquors 🔑90(1)

Where order for whisky was addressed and delivered to and accepted by plaintiff in San Francisco, upon arrival of bonded car in San Francisco from Canada whisky was hauled by buyer's bonded truck and delivered aboard buyer's ship docked in San Francisco, and payment for whisky was made to plaintiff in San Francisco by check payable to plaintiff, there was a "sale" of whisky in California within statute imposing excise tax on distilled spirits sold in California. St.1935, pp. 1123, 1132, §§ 2(*l*), 24.

See Words and Phrases, Permanent Edition, for all other definitions of "Sale".

2. Intoxicating liquors 🔑90(1)

Even if whisky shipped in bond from Canada to California could not have been used within territorial limits of United States because no federal tax had been paid

on it, that fact had no bearing on question whether there was a delivery of whisky free from bond to buyer in California, and consequently a sale of whisky in California within statute imposing excise tax on distilled spirits sold in California. St.1935, pp. 1123, 1132, §§ 2(*l*), 24.

◆

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Action by Gooderham & Worts, Limited, against R. E. Collins and others for the refund of excise taxes paid under protest on the sale of distilled spirits. From a judgment for defendants, plaintiff appeals.

Affirmed.

Richard S. Goldman, of San Francisco, for appellant.

Earl Warren, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for respondents.

KNIGHT, Justice.

The plaintiff, Gooderham & Worts, Ltd., sued for the refund of excise taxes paid under protest on the sale of distilled spirits. The taxes were collected by the state under the authority of the 1935 Alcoholic Beverage Control Act, Stats.1935, p. 1123. The total amount sued for was $1694.22, but at the trial plaintiff abandoned claim to the refund of all items except $360, the amount of tax imposed and paid on the sale of 150 cases of whiskey to the Matson Navigation Company. Judgment was given for defendants, and plaintiff appeals.

By the terms of section 24 of the 1935 act an excise tax was imposed on all distilled spirits "sold in this state;" and section 2(*l*) declared that the words "sell" or "sale" and the phrase "to sell" as used in the act meant and included any of the following: to exchange, barter, traffic in; to solicit or receive an order for; to keep or expose for sale; to serve for a consideration with or without meals; to traffic in or deliver for value or in any other way than gratuitously; to possess with intent to sell; and that the transfer of title to alcoholic beverages unaccompanied by a transfer of possession of such beverages shall not be deemed a sale of such beverages. The trial court found that the transaction involving the sale of the whiskey to the Matson company constituted a sale by plaintiff in this state within the meaning of the terms of said act, and that therefore the plaintiff was liable for the payment of the excise tax thereon. The evidence fully supports such findings.

[1] It appears that at the time the sale in question was made there were two corporations bearing the name Gooderham & Worts, Ltd. One was the plaintiff, a Delaware corporation; and the other a Canadian corporation. All of the capital stock of the latter was owned by another Canadian corporation named Hiram Walker and Gooderham & Worts, Ltd., which owned also all of the capital stock of Hiram Walker & Sons Distilleries, Inc., a Delaware corporation, which in turn owned 75% of the corporate stock of the plaintiff company. Gooderham & Worts, Ltd., of Canada was a manufacturer of distilled spirits, and maintained its offices and distilleries in Walkerville, Ontario, Canada. It was not authorized to do business in California. The plaintiff company of the same name was a distributor of distilled spirits, and authorized to do business in California but not in Canada. It maintained offices and a warehouse at 144 Townsend Street, in San Francisco, and held a distilled spirits wholesaler's license and a distilled spirits wine importer's license issued by the state pursuant to section 5 of said act. In its warehouse it kept on hand for the purposes of distribution and sale a stock of distilled spirits, much of which it received from the Canadian company of the same name. The Matson company was operating ships for the transportation of passengers and freight in and out of the port of San Francisco, and was the holder, under said act, of an importer's distilled spirits license and distilled spirits retailer's licenses for specific boats.

In October, 1936, the Matson company mailed an order from its San Francisco offices to plaintiff at its place of business in San Francisco for the purchase of 150 cases of whiskey. The order read: "Requisition No. A-16,536. Date October 1, 1936. Gooderham & Worts, Limited, 144 Townsend Street, San Francisco, California. * * * *Delivery: 480 Main Street* * * * [Then follows the itemization of the whiskey as to quantity, grade and price.] 1. Prices f.o.b. Toronto, Canada, in bond. 2. Merchandise to move in pooled car and benefit of carlot rate to be obtained. 3. *Payment upon presentation of necessary transfer papers to our customs* *brokers,* H. B. Thomas & Company, San Francisco, Free of all transfer charges to purchaser. 4. * * * Vendor will supply purchaser with label approval and release if necessary to withdraw merchandise from Custom Bond. 5. Delivery as soon as possible. 6. No Federal red strip stamps are to be affixed to bottles. 7. *Our customs bonded trucks to take care of cartage at San Francisco. Merchandise to be stored at Matson Bonded Warehouse at 480 Main Street, San Francisco.* 8. No insurance charges to be borne by purchaser. 9. Free of California Excise tax as we hold California Importers License." (All italics ours.) Plaintiff transmitted the order to Gooderham & Worts, Ltd., of Canada at Walkerville, Ontario, and as directed in the order the whiskey was shipped in a bonded railroad car to Detroit, then placed in a pooled car with other merchandise destined for San Francisco. When the bonded car arrived in San Francisco arrangements were made by the Matson company through its customs brokers for the transfer and delivery of the whiskey to the Matson company; and thereupon the liquor was hauled from the car by a Matson company bonded truck to and delivered aboard one of its ships docked in San Francisco; and according to the stipulation of facts upon which the cause was partly tried, the whiskey was sold by the Matson company to its passengers when the ship was beyond the territorial limits of the United States. Following the delivery of the whiskey to the Matson company it paid for the same by check made out to Gooderham & Worts, Ltd., and delivered the check to plaintiff at its office on Townsend Street; whereupon plaintiff deposited the check in a bank in San Francisco in a special account of the Canadian company of the same name, and the moneys represented thereby were transmitted by the bank to the Canadian corporation.

One of the major contentions made by plaintiff is that it did not make the sale; that in fact the sale was made in Canada by the Canadian company of the same name; that plaintiff merely transmitted the order and received and deposited the check in behalf of the Canadian company and in doing so acted gratuitously for the Canadian company. The contention is without merit. To the contrary, the evidence shows that at the time of the sale plaintiff was engaged in business in San Francisco as a licensed wholesaler and distributor of distilled spirits and operated a warehouse in San Francisco for such purposes, and that all of the transactions relating to the sale except the actual shipment of the whiskey took place in San Francisco between the plaintiff company and the Matson company. The order for the whiskey was addressed and delivered to and accepted by plaintiff; upon the arrival of the whiskey in San Francisco arrangements for the transfer and delivery thereof to the Matson company were made with plaintiff, and upon the delivery of the whiskey to the Matson company in San Francisco payment therefor was made to plaintiff in San Francisco by check payable to plaintiff. True, one of plaintiff's San Francisco office employees testified that so far as he knew the plaintiff company made no profit out of the sale; but his testimony on this point was of little or no value because of his qualifying statement that the corporate records of the plaintiff company were not kept in the San Francisco office.

[2] The additional major point made by plaintiff is that in any event the sale was not subject to state taxation, it being argued in this respect that the whiskey "never came to rest" within this state, and was "never within the state" except in bond in transit through the state from Canada to some point beyond the territorial limits of the United States. One of the principal factors relied upon in support of the theory so advanced is that no federal red strip stamps were affixed to the liquor, showing that no federal tax had been paid thereon; hence that it would have been in violation of the federal law to have opened and used the liquor within the territorial limits of the United States. Conceding that to be true, that is a matter which concerned only the federal government and the Matson company, and has no bearing whatever upon the controversy existing between the State of California and the plaintiff company, with which we are here concerned, namely, whether there was a delivery of the liquor free from bond to the Matson company within this state; and the evidence clearly establishes that such delivery was made at the latest the moment the liquor was removed from the bonded truck and placed aboard the company's ship docked in San Francisco, for then and there and thereafter the liquor was in the actual and absolute possession of the Matson company and under its complete control and dominion. If as appellant seems to assume

the liquor had been consigned for delivery at some designated point outside of the territorial limits of the United States and remained under government control until it was delivered at that point, a different situation would be presented. But such is not the case; the bonded car was destined for and the liquor was consigned for delivery in San Francisco and was in fact transferred and delivered to the Matson company at that point.

The remaining points made by appellant are only incidental to those already discussed and decided, and likewise are without merit.

The judgment is affirmed.

PETERS, P.J., and B. C. JONES, Justice pro tem., concurred.

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50 Cal.App.2d 765

RATHJEN BROS., Inc., v. COLLINS et al.

Civ. 11911.

District Court of Appeal, First District, Division 1, California.

March 27, 1942.

Hearing Denied May 25, 1942.

1. Courts 🔑90(1)

A prior decision could not be relied on as compelling reversal of judgment on ground that findings in the two cases were identical, where the very finding lacking in prior case was made in instant case.

2. Intoxicating liquors 🔑92

Under statute creating presumption that all distilled spirits acquired by any wholesaler have been sold in California, figure resulting by deducting from total gallonage possessed or acquired during taxable year, gallonage on hand at close thereof, plus gallonage disposed of in nontaxable sales, plus reasonable loss tolerance, is presumptively gallonage disposed of in sales subject to excise tax. St.1937, p. 2145, § 24.2.

3. Intoxicating liquors 🔑92

Where large quantity of liquor is unaccounted for after deducting from total gallonage possessed or acquired by wholesaler during taxable year gallonage on hand at close thereof, plus gallonage disposed of in nontaxable sales, plus reasonable loss tolerance, wholesaler must show that it was disposed of in nontaxable transactions, and unless he does so equalization board has established a "prima facie case" with respect to gallonage disposed of in transactions subject to excise tax. St.1937, p. 2145, § 24.2.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Case".

4. Intoxicating liquors 🔑92

Equalization board, in determining amount of sales made by liquor wholesaler for purpose of computing deficiency excise tax by first ascertaining quantity of liquor possessed and acquired during taxable period and deducting amount of liquor on hand and amount shown by books to have been disposed of in nontaxable transactions, complied with statute. St.1937, p. 2145, § 24.2.

5. Intoxicating liquors 🔑96

Under statute creating presumption that all distilled spirits acquired by any wholesaler have been sold in California, wholesaler contending that deficiency excise taxes arrived at through application of that presumption are not correct has burden of showing why figure is not correct. St.1937, p. 2145, § 24.2.

6. Intoxicating liquors 🔑96

Under statute creating presumption that all distilled spirits acquired by any wholesaler have been sold in California, wholesaler, contending that amount of deficiency excise taxes as computed by equalization board was incorrect, had burden of proving what happened to gallonage unaccounted for in invoices of sales to on and off sale licensees. St.1937, p. 2145, § 24.2.

7. Intoxicating liquors 🔑96

Where liquor wholesaler seeking to recover deficiency excise taxes paid under protest contended that equalization board had to prove what became of gallonage unaccounted for in invoices of sales to on and off sale licensees, testimony that no liquor went to licensees without stamps constituted "conclusions", and, even if admissible, did not prove what happened to liquor unaccounted for. St.1937, p. 2145, § 24.2.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion".

8. Intoxicating liquors 🔑96

In liquor wholesaler's action to recover deficiency excise taxes paid under protest, evidence did not sustain finding that wholesaler purchased and delivered stamps on all sales made by it upon which excise tax was imposed. St.1937, pp. 2144, 2145, §§ 24, 24.2.

◆

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Rathjen Brothers, Incorporated, against R. E. Collins and others, as members of the State Board of Equalization, and others, to recover deficiency excise taxes collected under the Alcoholic Beverage Control Act, as amended in 1937. From a judgment for plaintiff, defendants appeal.

Reversed.

Hearing denied; GIBSON, C. J., and TRAYNOR, J., not participating; SPENCE, Justice pro tem., acting.

Earl Warren, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for appellants.

Sefton & Quattrin, of San Francisco, for respondent.

PETERS, Presiding Justice.

This action was brought by Rathjen Bros., Inc. to recover deficiency excise taxes collected by the State Board of Equalization under the Alcoholic Beverage Control Act, Stats. of 1935, p. 1123, ch. 330, as amended in 1937, Stats. of 1937, p. 2126, ch. 758. The plaintiff is a duly licensed distilled spirits rectifier and distributor engaged in business in California, and, as such, for the tax period commencing July 1, 1937, and ending June 30, 1938, paid to the state large sums of money under the tax statute here involved. The State Board of Equalization, pursuant to the authority conferred by the act, levied a deficiency assessment against plaintiff for that period. After a hearing, and after deducting from the original deficiency assessment a loss tolerance to which the taxpayer was entitled, the board determined there was a deficiency owing the state of $1,083.39. This sum was paid by the taxpayer under protest and this action instituted to recover the amount so paid. The trial court rendered judgment for the taxpayer, and the defendants appeal.

The act under which these taxes were paid was passed in 1935, and materially amended in 1937. The 1937 amendments are admittedly applicable to this proceeding. Generally speaking, the act imposes a stamp tax, stamps to be purchased by the wholesaler or rectifier, and such stamps must accompany delivery of the distilled spirits to the retailer, by whom they are affixed to the bottles and canceled.

The appellants contend that regardless of the other contentions made, the decision in Empire Vintage Co. v. Collins, 40 Cal. App.2d 612, 105 P.2d 391, decided by the First Appellate District, Division Two, requires a reversal. The Supreme Court denied a hearing in that case, three of the justices voting for a hearing, and two of the justices not participating. The same tax statute as that involved in the instant case was involved in the Empire Vintage Co. case, but the period in dispute was for the period July 1, 1935, to June 30, 1937. The action in the Empire Vintage Co. case, as in the instant case, was brought to recover a deficiency paid under protest by the wholesaler. On pleadings and evidence substantially similar to those here involved, the trial court rendered its judgment in favor of the taxpayer. The appellate court reversed this judgment on the sole ground that the findings did not support the judgment. The findings in that case were to the effect that the wholesaler there involved had made no sales to on- or off-sale licensees which were not tax paid. The appellate court properly held that this finding did not negative unlawful sales having been made to those who were not licensees, and, upon which unlawful sales, taxes had not been paid; that, although the wholesaler could lawfully sell only to licensees, the taxpayer could not recover a tax collected by the state on unlawful sales to non-licensees. The court also held that the findings did not negative sales having been made which were not shown on the books of the taxpayer. It is to be noted that the court did not hold that in fact unlawful sales had been made to non-licensees which were not tax paid, but simply passed upon the sufficiency of the findings to support a judgment of recovery. The exact holding of the court in that case is disclosed in the following quotation (40 Cal.App.2d at page 619, 105 P.2d at page 394): "The other findings are to the effect that the plaintiff had paid its taxes on those sales to on-sale and off-sale licensees. There is no finding that other sales, whether legal or not, were not made or that the tax had been paid thereon. But to support a judgment in favor of the plaintiff it is obvious the findings of the court should clearly show tha•

the plaintiff, for the period July 1, 1935, to June 30, 1937, had paid taxes on all sales, legal or illegal, and that the defendants arbitrarily compelled it to pay the amount sued for. The findings do not make that showing."

[1] In their closing brief the appellants urge that this decision compels a reversal of the judgment in the instant case for the asserted reason that the findings in the two cases are "identical." An examination of the records in the two cases demonstrates that the findings are not only not identical, but that in the instant case there is a positive finding on the very issue that the court failed to find on in the Empire Vintage Co. case. The complaint in the present case, as in the Empire Vintage Co. case, contained in paragraph VII, this allegation: "That plaintiff above named at all times complied with and performed the provisions of the said Alcoholic Beverage Control Act as the same was then in force and effect, and purchased and delivered as required therein Excise Stamps on all sales made by it upon which the said Excise Tax was imposed." In the Empire Vintage Co. case there was no finding of the truth of this allegation, but in the instant case the court found that this allegation was true. It should be mentioned that in the opinion in the Empire Vintage Co. case there are two obvious typographical errors. After correctly setting forth the allegations of the complaint the court stated, on page 616 of 40 Cal.App.2d: "The trial court found that all the allegations of the complaint contained in paragraphs I, II, III, IV, V, and VII, are true * * *." An examination of the clerk's transcript in that case shows that the "VII" should have read "VIII." (See 105 P.2d 393) That there was no finding of the truth of paragraph VII is correctly stated on page 618 of the decision in 40 Cal.App.2d, on page 394 of 105 P.2d. On the same page appears the statement that: "In paragraph VII the plaintiff alleged that the defendant board caused an examination to be made of plaintiff's books and records * * *." The correct reference is to paragraph VIII. The major premise of the court's opinion in the Empire Vintage Co. case was that there was no finding that the taxpayer had paid all taxes due—but simply a finding that such taxes had been paid on all sales to licensees. It was for that reason alone that the judgment was reversed. But the very finding that was lacking in that case was made in the instant case. For this reason, the argument that the prior decision compels a reversal is without merit.

The appellants next urge that the evidence does not support the findings. This contention, with which we agree, requires a reference to some of the provisions of the act as originally enacted, and as amended in 1937. Section 24, as amended in 1937, provides that "An excise tax is hereby imposed upon all distilled spirits sold in this State by rectifiers or wholesalers" in amounts as therein fixed. The tax is a stamp tax (§ 33). Section 27, as amended in 1937, gives the state authority to levy a deficiency assessment where an examination of the books of the taxpayer shows that stamps purchased by wholesalers or rectifiers are not sufficient to pay the tax on spirits sold by him. Section 24.2 was added to the act in 1937. So far as pertinent here, that section provides: "It shall be presumed that all distilled spirits acquired by any rectifier or distilled spirits wholesaler have been sold in this State by such rectifier or wholesaler unless proven to the satisfaction of the board, in verified reports on forms prescribed by the board, that such distilled spirits are [here follows a list of nontaxable disposals]." The proper application of this last-quoted section presents the basic problem on this appeal.

In determining the deficiency due from respondent, the state followed the following procedure: The auditor first determined from an examination of the books of respondent the quantity of distilled spirits possessed and acquired by it during the tax period. This totaled 103,210.48 gallons. This figure is not disputed by respondent. It then determined from such books the quantity of distilled spirits on hand at the close of the tax period and those disposed of in nontaxable transactions, amounting to 5,971.46 gallons. This figure is not challenged by respondent. The remainder of 97,239.02 gallons was adopted by the state as the figure for taxable sales. The tax on that many gallons is admittedly $77,791.22. The books of respondent showed that it possessed and acquired during the tax period stamps in the amount of $77,691.62; that stamps on hand at the close of the period, stamps returned to the board, etc., were of the value of $1,061.58. Deducting that amount from the value of the stamps acquired by respondent during the period results in the figure of $76,630.04—the amount of stamps applicable to the sale of 97,239.02 gallons on which a tax of $77,791.22 should have been paid. None of these figures are challenged by respondent. These figures obviously leave $1,161.18 as the amount of the deficiency. The board thereafter made a loss tolerance allowance of $77.79, which reduced the amount of the deficiency to $1,083.39. This was the amount assessed against respondent, and the amount for which recovery was allowed to it by the present judgment after the taxpayer had paid that amount under protest.

The above figures apply only to the Oakland office of respondent. The respondent also operates a San Francisco office, but except in one particular hereafter mentioned, the tax on sales from that office is not here involved. It will be noted that the quantity of distilled spirits sold, and the amount of the tax due thereon, were determined by the board by deducting from the spirits possessed at the beginning of the tax period and acquired during the period, the quantity on hand at the close of the period and the quantity disposed of in nontaxable transactions. That is in exact accord with the provisions of section 24.2 above quoted. Under that section, the figure so computed is presumed to represent the amount of taxable sales.

In spite of the fact that the board followed precisely the procedure outlined by section 24.2, the respondent urges that the deficiency assessed against it was not levied in the manner provided by the act. Throughout respondent's argument runs the statement that the board failed to examine respondent's books to determine the amount of taxable sales shown therein. It is urged that without that figure the tax could not be computed. It is contended that under the provisions of section 27 of the act, as amended in 1937, the tax can only be computed by adding up the sales made as disclosed by the taxpayer's books. The portion of the section relied upon reads as follows: "If, after giving effect to the provisions of section 24.2, any examinations or investigations made by the board shall disclose that the amount of excise stamps purchased from the board by any rectifier or wholesaler is not sufficient to represent payment of the excise tax imposed upon the sale of distilled spirits sold by such rectifier or wholesaler, the board shall have the power, and is hereby authorized, to make a levy against such rectifier or wholesaler in the amount of the deficiency in the payment of the distilled spirits excise tax so disclosed."

[2, 3] It will be noted that the board in computing the deficiency did not examine those of respondent's books which constituted the record of sales made. It determined the amount of sales made by first ascertaining the quantity of liquor possessed and acquired during the taxable period, and deducting from that figure the amount of liquor then on hand and the amount shown by the books to have been disposed of in nontaxable transactions. This figure—97,239.02 gallons—rather than a figure taken from sales records, was adopted by the board as the quantity sold and subject to tax. It is to be noted that the taxpayer in this action to recover the deficiency did not produce its sales records. It simply relied on its point that the board, by not examining the records of actual sales, did not follow the procedure required by the act. The obvious answer to respondent's argument is that the portion of section 27 above quoted and relied upon by it does not prescribe the manner in which total sales taxable shall be ascertained. The only section that refers to that matter is section 24.2, and that section creates a presumption which applies when the procedure here adopted has been followed, and in the absence of controverting evidence. Respondent, in its argument, simply disregards the presumption created by that section. The presumption is based on common sense. If, from the total gallonage possessed or acquired during the taxable year, there is deducted the gallonage on hand at the close thereof, plus the gallonage disposed of in nontaxable sales, plus a reasonable loss tolerance, the resulting figure is presumptively the gallonage disposed of in taxable sales. If, as here, there is a large quantity of liquor unaccounted for it is up to the wholesaler to show that it was disposed of in nontaxable transactions. But, unless he does so, the board has established a prima facie case as to the gallonage disposed of in taxable transactions.

[4-8] It, therefore, follows that the procedure adopted by the board in computing the deficiency was in exact compliance with the statute. The only other question necessary to discuss is whether the respondent in this action has produced other evidence sufficient to rebut the presumption, and sufficient to show that the figure for taxable sales arrived at by the board was wrong. Stated another way, is there any evidence in the record to sustain the finding of the trial court that this taxpayer "pur-

chased and delivered * * * Excise Stamps on all sales made by it upon which the * * * Excise Tax was imposed"? In determining this issue it must be kept in mind that the board followed the procedure set forth in the act, and that under the express terms of the act when that procedure is followed it is presumed the resulting figure correctly shows the gallonage disposed of in taxable sales. There can be no doubt that in view of the presumption created by section 24.2 of the act the burden is on the taxpayer to show why the figure arrived at through application of such presumption is not correct. The taxpayer, in trying to prove his case, did not offer any evidence to challenge the board's audit. It admitted that it had on hand during the taxable year the gallonage as fixed by the board; it admitted that the gallonage it had on hand at the close of the taxable year had been properly computed; it admitted that the quantity sold in nontaxable sales had been deducted and that a loss tolerance had been allowed, but contended that the resulting figure did not represent taxable sales. There was a certain gallonage not now in its possession that was unaccounted for in the invoices of sales to on- and off-sale licensees. The position it took was that the board had to prove what became of that unaccounted for gallonage. It did not offer any evidence as to what had become of that gallonage. It completely disregarded the presumption created by section 24.2 of the act. The real question is, who must prove what happened to the gallonage not accounted for? Obviously, under section 24.2 the taxpayer must do so. The taxpayer did not do so. It simply offered the testimony of its employees Hammerly and Pingree, persons in managerial positions in its business, to the effect that all deliveries to licensees were accompanied by stamps. For example, Mr. Hammerly was asked: "Now, during that period, did you buy sufficient stamps from the State Board of Equalization to cover all the shipments and sales to on- or off-sale distilled spirit licensees?" Over the defendants' objections that the question was incompetent, called for a conclusion, and that no proper foundation had been laid, the witness was permitted to answer, "Yes." The same witness was asked: "To your knowledge have any distilled spirits left the premises of the San Francisco Branch to on or off-sale distilled spirits retail licensees without the stamps going along, to stamp the merchandise?" Upon defendants' objection being overruled, the witness answered: "No, sir, not to my knowledge." Similarly, the witness Pingree, after first testifying that there was, according to the board's audit, an unaccounted for loss as computed by the board, was asked: "Was any merchandise represented by that amount sold or delivered to on- or off-sale retail distilled spirits licensees?" and over objection answered: "To my own knowledge, no." Both witnesses admittedly did not personally observe all liquor sale shipments that left the company's premises, and could not testify from personal observation of the facts. It is very doubtful whether such oral testimony was admissible at all to prove the ultimate fact in issue. The foundation was not laid for such testimony, and obviously it constituted nothing more than the conclusion of the witness. Moreover, even if admissible such testimony merely tended to show that on all sales to licensees the shipped liquor was accompanied by stamps. It did not prove what had happened to the liquor unaccounted for, or even that on all sales stamps were delivered. It may be that some of the sales were made to nonlicensees. The Empire Vintage Co. case, supra, properly held that the state may collect the tax on sales which are unlawful—i. e., made to non-licensees, as well as on lawful sales made to licensees. The burden was on the taxpayer to show that the deficiency computed by the board in exact accordance with the act was not correct. To do this, it would have to show what became of this unaccounted for liquor. It had full and complete books. If those books showed what became of the liquor it was the taxpayer's duty to present that evidence. If the books did not show what had become of that liquor, and there was no other evidence available on that point, it would appear that the taxpayer has no evidence to sustain its claim for a refund. The respondent simply failed to prove that it was not liable for the deficiency assessment, or that such deficiency had not been properly computed. The basic finding that the tax had been paid on all sales is unsupported by the evidence.

The respondent contends that as against the deficiency assessed against its Oakland office it is entitled to a credit of $273.04, which is the amount the board's auditor found that the San Francisco office had overpurchased stamps. All of the facts concerning this alleged overpayment do not appear in the record. Whether this sum was credited to the taxpayer is not entirely clear from the evidence. Separate board auditors examined the books of each office. They testified that they compared their analyses and reconciled the same. At any rate, inasmuch as the judgment must be reversed for reasons already set forth, this matter of the San Francisco overpayment is a matter that may properly be examined into on the new trial.

The judgment appealed from is reversed.

KNIGHT and WARD, JJ., concurred.

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50 Cal.App.2d 774

RATHJEN BROS., Inc., v. COLLINS et al.

Civ. 11912.

District Court of Appeal, First District,
Division 1, California.

March 27, 1942.

Hearing Denied May 25, 1942.

1. Intoxicating liquors 🔑96

Licensed liquor wholesaler suing to recover deficiency excise taxes paid under protest had burden of proof to sustain its contention that assessment was without authority of law. St.1935, p. 1132, § 24.

2. Intoxicating liquors 🔑92

Where equalization board, in making audit and examination for purpose of computing deficiency excise taxes owing by liquor wholesaler, determined quantity of liquor possessed and acquired by wholesaler during taxable period and deducted therefrom quantity disposed of in exempt transactions and quantity on hand, the state established a "prima facie case" that balance was disposed of in nonexempt transactions. St.1935, p. 1132, § 24.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Case".

3. Intoxicating liquors 🔑90(1)

The District Court of Appeal in interpreting statute imposing excise tax on distilled spirits sold in California must assume that the Legislature intended the tax to be paid. St.1935, p. 1132, § 24.

4. Licenses 🔑15(1)

Under statutes imposing taxes on sales with exemptions, the tax is imposed on total sales unless the taxpayer shows sales that are exempt.

5. Intoxicating liquors 🔑96

Liquor wholesaler seeking to recover deficiency excise taxes paid under protest had burden of showing what had become of unaccounted for gallonage if it desired to recover taxes paid thereon, as against contention that state had to show that unaccounted for gallonage had been disposed of in taxable transactions. St.1935, p. 1132, § 24.

6. Intoxicating liquors 🔑90(1)

Under statute imposing excise tax on all distilled spirits sold in California and requiring spirits delivered by wholesalers to be accompanied by stamps purchased from equalization board, wholesaler is made the "taxpayer", but, even if wholesaler is merely the statutory "agent" for collection, it would be liable for failure to collect and pay over tax. St.1935, pp. 1132, 1139, §§ 24, 33.

See Words and Phrases, Permanent Edition, for all other definitions of "Agent" and "Taxpayer".

7. Intoxicating liquors 🔑92

The tax imposed on distilled spirits sold in California is an "excise tax", and no assessment or reassessment is necessary to create liability for a deficiency or to make taxpayer personally liable therefor. St.1935, pp. 1132, 1139, §§ 24, 33.

See Words and Phrases, Permanent Edition, for all other definitions of "Excise Tax".

8. Intoxicating liquors 🔑92

Even if power to assess deficiency excise taxes on distilled spirits sold in California did not exist until amendment of statute in 1937, provision giving equalization board that power would apply to liabilities existing before effective date of amendment. St.1935, pp. 1132, 1139, §§ 24, 33; St.1937, p. 2147, § 27.

9. Constitutional law 🔑191

Legislation providing a new and additional procedure for the enforcement of a pre-existing tax liability enacted after time tax should have been paid is valid and proper.

10. Intoxicating liquors 🔑96

Where wholesaler sold liquor to dealer doing business in New York but not licensed in California, delivered it to dealer's salesman in California, and received payment by debiting its account with dealer, there was a "sale" in California to a nonlicensee, and wholesaler had burden of proving that transaction was a sale between wholesalers for resale not subject to excise tax. St.1935, pp. 1132, 1139, §§ 24, 33.

See Words and Phrases, Permanent Edition, for all other definitions of "Sale".

11. Intoxicating liquors ⚷90(1), 96

Under statute imposing excise tax on all distilled spirits sold in California, every sale of spirits in California, whether legal or illegal, is subject to tax unless sale is exempt, and taxpayer has burden of showing that a particular sale is exempt. St.1935, pp. 1132, 1139, §§ 24, 33.

12. Intoxicating liquors ⚷90(1)

Where wholesaler sold liquor to steamship companies in California and made delivery to them in San Francisco, sales were subject to excise tax even though liquor was in a bonded warehouse. St.1935, pp. 1132, 1139, §§ 24, 33.

13. Intoxicating liquors ⚷90(1)

Where excise tax stamps accompanied delivery of liquor sold by wholesaler to steamship company in California, transaction should not have been included in additional deficiency assessment. St.1935, pp. 1132, 1139, §§ 24, 33.

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Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Rathjen Brothers, Incorporated, against R. E. Collins and others, as members of the State Board of Equalization, and others, to recover deficiency excise taxes collected under the Alcoholic Beverage Control Act. From a judgment for plaintiff, defendants appeal.

Reversed.

Hearing denied; GIBSON, C. J., and TRAYNOR, J., not participating; SPENCE, Justice pro tem., acting.

Earl Warren, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for appellants.

Sefton & Quattrin, of San Francisco, for respondent.

PETERS, Presiding Justice.

This action was brought by Rathjen Bros., Inc., to recover deficiency excise taxes collected by the State Board of Equalization under the Alcoholic Beverage Control Act, Stats. of 1935, p. 1123, chap. 330. The plaintiff is a duly licensed distilled spirits rectifier and distributor engaged in business in California, and, as such, for the tax period commencing July 1, 1935, to June 30, 1937, paid to the state large sums of money under the tax statute here involved. The plaintiff operates two places of business, one in Oakland and one in San Francisco, separate books being kept for each place of business. Some time after July 1, 1937, the auditors of the board made an audit and examination of each set of books. As a result of such audits and examinations, the board determined that for the period July 1, 1935, to June 30, 1937, there was due and owing from plaintiff an additional excise tax for business done in the San Francisco office, the sum of $227.63, and for business done in the Oakland office an additional tax of $1,005.24. After such determinations the taxpayer petitioned for a relevy of the tax and demanded a hearing, which was granted. After such hearing the board determined that the above-mentioned sums were due from plaintiff. These sums were paid by the taxpayer, under protest, and this action instituted to recover the amount so paid. The trial court rendered judgment for the taxpayer for the total amount of $1,232.87. Although this is the same taxpayer involved in Rathjen Bros., Inc., v. Collins, et al., Civ. 11911, Cal.App., 123 P.2d 925, this day decided, the main issues in the two cases are different. Case numbered Civ. 11911 involved the tax period July 1, 1937, to June 30, 1938, while the instant case involves the period July 1, 1935, to June 30, 1937. On July 1, 1937, the statute involved was amended, Stats. of 1937, p. 2126, Chap. 758. In case No. 11911 those amendments were admittedly applicable to the proceeding there pending. In the instant case, one of the problems argued is whether those amendments are applicable to this proceeding.

The appellants urge on this appeal one of the points made on the appeal in Civ. 11911, that is, that the findings in this case and the findings in the Empire Vintage Co. v. Collins, 40 Cal.App.2d 612, 105 P.2d 391, on all material issues are identical, and that this case must be reversed for the same reasons set forth in that case. In this case, as in Civ. 11911, the court found that the tax had been paid on all sales. It was because no such finding had been made in the Empire Vintage Co. case that the cause was reversed.

After a trial in the instant case, as to the San Francisco deficiency, the court held that as to $70.04 of that deficiency the distilled spirits represented by that item were not sold by the taxpayer to licensees but were sold to a New York corporation and delivered to a representative of that corporation; that as to $7.20 of the additional assessment the distilled spirits were sold to California licensees, but the retailer had stamps already purchased sufficient to cover the sale; that $7.68 of the additional assessment was based on three transactions; that as to the first two, the sales of distilled spirits were made while the same were in United States bonded warehouses and were sold for use on the high seas; that as to the third transaction, stamps in sufficient quantity accompanied the distilled spirits; that the balance of $142.71 of the San Francisco assessment and all of the Oakland assessment of $1,005.24 were not based on taxable sales by the plaintiff. The court did not find what happened to the distilled spirits represented by these last mentioned items.

In computing the deficiency alleged to be due from plaintiff, the board auditors proceeded precisely as they did in the other Rathjen Bros. case, Civ. 11911, that is, the auditors first determined from an examination of the books of respondent the quantity of distilled spirits possessed and acquired by respondent during the tax period; from the same source they determined the quantity of distilled spirits on hand at the close of the tax period, and the quantity disposed of in what they considered to be nontaxable transactions. All breakage claimed by respondent was allowed as a deduction. The resulting figure was adopted as the quantity of distilled spirits subject to tax. When the quantity of stamps purchased, less stamps on hand, was applied to this figure, the deficiency was computed as above-indicated. Respondent at the trial, and, on this appeal, does not challenge the above figures, except as to the gallonage disposed of in nontaxable sales which involves the several minor items above-summarized from the findings. The major portion of the deficiency is represented by unaccounted for disposals. In Civ. 11911, supra, it was held that under § 24.2 of the act as amended in 1937 a presumption arose that such disposals had been disposed of in taxable sales, and that the burden to prove otherwise rested on the taxpayer. In the present case neither the taxpayer nor the state attempted to account for this gallonage. The state took the position that it had established a prima facie case by the method above-described, and that the burden of going forward to explain the shortage rested on the respondent. The latter took the position that the tax was imposed on sales to licensees, and that the state had the burden of proving that such sales had been made before a tax could be imposed.

[1-4] It is true that before July 1, 1937, there was no statutory presumption such as that contained in § 24.2. The litigants spend a large portion of their argument on the question as to whether that amendment applies to taxes computed subsequent to July 1, 1937, but for a period prior to that date. We do not think that this is the deciding factor on this phase of the case. The real question is, did the respondent prove that it was entitled to a refund? The proper solution of this problem turns, in part at least, upon whether the state had any basis at all for the challenged assessment. It is elementary, of course, that in this proceeding to recover the portion of the tax paid under protest the burden of proof was upon respondent to sustain its contention that the assessment was without authority of law. Malley v. Walter Baker & Co., 1 Cir., 281 F. 41; Miller v. People, 76 Colo. 157, 230 P. 603, 39 A.L.R. 269; Annotation 39 A.L.R. 273. When the respondent demonstrated the manner in which the board computed the assessment did it show that the assessment was without authority of law? It is our opinion that not only did the respondent fail to sustain the burden of proof, but that the board established a prima facie case that the tax was due. Even if the evidence showed that stamps accompanied all sales to licensees that would not be sufficient to show that the tax was not due. As was held in the Empire Vintage Co. case, supra, and reaffirmed in Civ. 11911, supra, the tax was due on all nonexempt sales, and that applies to illegal as well as to legal sales. When the board, in making its audit and examination, determined the quantity of distilled spirits possessed and acquired by the respondent during the taxable period (and that computation is conceded correct) and deducted therefrom the quantity disposed of in exempt transactions and the quantity then

on hand, the state established a prima facie case that the balance was disposed of in nonexempt transactions. What did the respondent show to rebut that prima facie case? It contended the computation as to exempt sales was incorrect in certain minor particulars. Those contentions will be discussed later. It offered no proof at all as to what had happened to the unaccounted for gallonage, and contended that before the tax could be lawfully collected from it the state had to show that the unaccounted for gallonage had been disposed of in taxable transactions. If this were the proper interpretation of the act, it would make the collection of a large portion of the tax very difficult, if not impossible. Obviously, in interpreting the act, we must assume that the legislature intended that the tax be paid. To interpret the statute as claimed by respondent would mean that the state would have to prove a fact that rests solely within the knowledge of the taxpayer. This respondent admittedly had on hand a certain quantity of distilled spirits. Some of those spirits were sold in nontaxable transactions. Some were broken, and allowances were made for all claimed breakage. Some were disposed of and stamps accompanied the sales. But there was a large quantity unaccounted for. Obviously, the owner of those spirits has the only facilities for knowing where those spirits went. It is for these many reasons that in every case interpreting statutes imposing a tax on sales, with exemptions, the courts have held that necessarily the tax is imposed on total sales unless the taxpayer shows the sales that are exempt. See cases collected in Annotation in 39 A.L.R. 273.

[5] We, therefore, conclude this portion of the opinion with the holding that, so far as the unaccounted for disposals are concerned, the respondent had the burden of showing what had become of those distilled spirits if it desired to recover the tax paid on them. The finding that the taxpayer paid all taxes collectible is unsupported by the evidence. This portion of the opinion is not based on the 1937 amendments to the act.

There are other contentions made by respondent relating to the question as to whether any tax at all was due from it. As already indicated, the tax statute here involved was first passed in 1935. The two sections primarily involved on this appeal are §§ 24 and 33 as enacted in that year. Section 24 then provided: "An excise tax is hereby imposed upon all distilled spirits sold in this State on and after July 1, 1935" at rates set forth in the balance of the section. In 1937 this section was amended by adding after the word "State" the words "by rectifiers or wholesalers thereof." In this case, however, we are concerned with the section as it read in 1935. Section 33, as first enacted, provided in part:

> "The tax imposed by section 24 of this act upon the sale of distilled spirits shall be collected by means of attaching to each package containing such distilled spirits a stamp or stamps of a denomination equivalent to the amount of excise tax imposed upon the sale of the contents of such package. Such stamps shall be attached by the holders of on- or off-sale distilled spirits licenses issued under this act and by the holders of on-sale licenses for liquor other than beer and wine issued under the State Liquor Control Act, immediately upon opening the original cases in which the distilled spirits were packed and in which such distilled spirits were purchased from the manufacturer, rectifier, importer or wholesaler. In the case of distilled spirits not in original cases at the time of purchase the stamps shall be attached immediately upon bringing such distilled spirits upon the premises for which such on- or off-sale licenses are issued.
>
> "Such stamps shall be sold by the board only to persons holding valid distilled spirits manufacturer's licenses, rectifier's licenses, distilled spirits and wine importer's licenses or distilled spirits wholesaler's licenses issued under this act or the State Liquor Control Act; provided, that until July 1, 1935, the board shall sell a sufficient number of such stamps, to stamp stocks of distilled spirits on hand, to persons holding valid on- or off-sale licenses for liquor other than beer and wine issued under the State Liquor Control Act; provided further, that the board may thereafter, in its discretion, sell such stamps to such holders of on- or off-sale distilled spirits licenses as it may determine.
>
> "On and after July 1, 1935, all distilled spirits delivered by any manufacturer, rectifier, importer or wholesaler of distilled spirits to any person holding an on- or off-sale distilled spirits license issued under this act or an on-sale license for liquor other than beer and wine issued under the State Liquor Control Act, must be ac-

companied by a sufficient number of stamps purchased from the board, to stamp the packages containing such distilled spirits. Every manufacturer, rectifier, importer or wholesaler of distilled spirits who delivers distilled spirits in violation of this section shall be guilty of a misdemeanor. * * *

"At the time such stamps are attached to the packages of distilled spirits, they shall immediately be canceled by indelibly writing or stamping thereon the number of the licensee attaching the stamp and the date of cancellation."

By an amendment to § 27 of the act in 1937 the board was expressly authorized to levy deficiency assessments against wholesalers who failed to pay the full amount of their tax and to collect the same.

As passed in 1935, the general plan of the statute was that the wholesaler was required to buy the tax stamps from the board; such wholesaler was then required to accompany all sales to nonexempt transferees with the requisite number of stamps; the purchaser upon opening the case was then required to attach the stamps to the bottles and to cancel the same.

[6] Respondent urges, in support of the judgment, that, under the statute as it read until the effective date of the 1937 amendments, the taxpayer was the purchaser, and that the wholesaler was not the taxpayer at all. Respondent argues that its license could be canceled for failure to accompany sales with stamps, but urges that it was not made liable for the tax until the 1937 amendment to § 24. It urges that § 24, as it read in 1935, does not state that the tax is imposed on the wholesaler. In support of this contention it relies on certain language appearing in the case of People v. Tux Winery Co., 20 Cal.App.2d 700, 67 P.2d 752. The sole problem involved in that case was whether a sale from one wholesaler to another wholesaler was taxable. The court properly held that such sales were exempt—that it was the sale from wholesaler to retailer that was taxable. In support of this holding it pointed out that the tax was not finally collected until the retailer affixed the stamps to the bottles. The court stated (page 704 of 20 Cal.App.2d, at page 754 of 67 P.2d): "While it is true that the money is paid when the stamps are purchased; nevertheless the stamps may be used for the liquor involved or they may be used to evidence the tax on other liquors, and so for all practical purposes the tax is not collected until the stamps are attached to specific packages." This was not a holding that the tax was not collectible from the wholesaler. That point was not involved nor discussed in the case.

A reading of the provisions of the 1935 act demonstrates that either the taxpayer was the wholesaler, who prepaid the tax and reimbursed himself from the retailer, or the wholesaler was the agency designated by the act to collect the tax on behalf of the state from the actual taxpayer. In either event the wholesaler is liable for the amount of the tax. The most reasonable interpretation of the act is that it is the wholesaler who was made the taxpayer. The wholesaler, in all but exceptional cases, under § 33, was the one who actually bought the stamps from the state, and distributed them to retailers. The courts have consistently held, in such cases, that it is the one who pays the state that is the taxpayer. Thus under the sales tax act, there was much more reason than exists under the statute here involved to hold that it was the consumer who was the taxpayer and that the retailer was only the agent for collection. The Supreme Court properly held that the retailer was the taxpayer. De Aryan v. Akers, 12 Cal.2d 781, 87 P.2d 695. But, even if the wholesaler was merely the statutory agent for collection it would be liable for failure to collect and pay over the tax. State of California v. Poulterer, 16 Cal. 514; Miller v. People, supra. It should also be mentioned that in the Empire Vintage Co. case, supra, it was expressly held that the tax was due from the wholesaler. See, also McKesson & Robbins, Inc. v. Collins, 18 Cal.App.2d 648, 64 P.2d 469.

Respondent next urges that prior to 1937 there was no provision for collecting the tax, and certainly no provision for deficiency assessments. In the Empire Vintage Co. case, supra, 40 Cal.App.2d at page 619, 105 P.2d at page 395, the court, in response to somewhat similar contentions, held: "Again the plaintiff contends the board could not collect the alleged deficit except by making a reassessment and that under the act of 1935 it was not given power to reassess. That it was not given power to reassess is true. But bearing in mind we are dealing with an excise tax, it is obvious no assessment or reassessment is involved. Section 24 in effect was both the assessment and levy of the tax. Dollar Sav. Bank v. United States, 19 Wall. 227, 86 U.S. 227, 240, 22 L.Ed. 80. He who would object to the amount of the tax was bound to present his objection to the legislature having said section under consideration. Finally the plaintiff contends that under the statute no provision is made for collecting a deficiency tax. It says the following questions must be answered: 'From whom? Under what procedure? Was there a deficiency in this case?' Of course, the answers are immediately at hand. The tax is to be collected from the wholesaler, this plaintiff (sec. 33). It is to be collected under the procedure hereinabove indicated and the amount of the deficiency is to be ascertained as the board ascertained it in the present case. Bearing in mind that the Act of 1935 was a revenue act, that the very gist of it was to collect revenue, and that efficiency was of the utmost importance, the record presents no serious questions. The statute makes no distinction between acts whether past or present. It provides one procedure. It is not even claimed that such procedure is not fair and just. The same procedure applies whether there is one violation or several violations of the statutory duty to collect and pay over the tax imposed. These conclusions find complete support in State Board of Equalization v. Superior Court, 5 Cal.App.2d 374, 42 P.2d 1076."

[7-9] It is true, as urged by respondent, that in the Empire Vintage Co. case, the procedure adopted was to determine the deficiency, as was done in the instant case, and then to proceed against the wholesaler by way of complaint to suspend or revoke its license for failure to deliver the tax stamps with all taxable sales. However, the same reasoning is applicable. As held in that case, this is an excise tax. Section 24 imposed the tax, and no assessment or reassessment was necessary to create the liability or to make the taxpayer personally liable therefor. Dollar Sav. Bank v. United States, supra; United States v. Chamberlin, 219 U.S. 250, 31 S.Ct. 155, 55 L.Ed. 204. Moreover, even if the power to assess a deficiency did not exist until 1937, the provision giving to the board that power would apply to liabilities existing prior to the effective date of the statute. The tenor of the respondent's argument is that although it owed the tax the procedure followed to collect it was not proper. Even if a taxpayer could urge impropriety of the procedure adopted by the state to collect a due tax after the tax has been paid in an action to recover the tax, which is doubtful, it has been settled in this state from an early date that legislation providing a new and additional procedure for the enforcement of a pre-existing tax liability enacted subsequent to the time the tax should have been paid is valid and proper. People v. Seymour, 16 Cal. 332, 76 Am.Dec. 521; Moore v. Patch, 12 Cal. 265; see, also, Roth Drug, Inc., v. Johnson, 13 Cal.App.2d 720, 57 P.2d 1022. Under any one of these various theories the arguments advanced by respondent in this issue are unsound.

This disposes of the main points urged by respondent. In addition, however, it urges that the evidence supports the findings that certain of the transactions included within the deficiency were in fact tax exempt as found by the trial court. These transactions fall into the following classifications:

[10,11] A. The trial court found in reference to the San Francisco assessment, that distilled spirits represented by $70.04 of the assessment were not sold by the respondent to on- or off-sale licensees and never received by such licensees, but "were sold to a corporation located in the State of New York not licensed as an on- or off-sale retail distilled spirits licensee in the State of California and delivered to a representative of said corporation." According to the evidence, the facts in reference to this item were that respondent sold the distilled spirits to a distilled spirits dealer doing business in New York, but not licensed in California, and delivered the same to the New York company's salesman in California. Apparently these distilled spirits were to be used by the salesman in California as samples. The respondent had purchased liquors from the New York company, and received payment for these liquors delivered to the salesman in California by debiting its account with the New York company. Thus, there was a sale in California to a non-licensee, and the liquor left the control of respondent in California. Apparently it was the theory of the trial court, and it is the theory of respondent, that only sales to on- or off-sale retail licensees were taxable. That point has been disposed of adversely to the contentions of respondent in the Empire Vintage Co. case, supra, and reaffirmed in Civ. 11911, supra. Every sale of distilled spirits in California is subject to the tax unless the sale is exempt. The burden of showing that a particular sale is exempt rests on the taxpayer. It should be noted that this was not a sale between respondent, as a wholesaler, to the New York company as

a wholesaler within the meaning of People v. Tux Winery Co., 20 Cal.App.2d 700, 67 P.2d 752. The rule of that case applies only where the purchasing wholesaler uses the purchased distilled spirits for resale. The burden to show that rested on respondent The respondent, having failed to sustain the burden resting upon it as to these sales, is not entitled to a refund.

[12] B. *Sales to Steamship Companies.* One of the items of the additional assessment levied on the San Francisco office of respondent amounting to $7.68, represented the tax on sales made to steamship companies. The trial court found that this sum was made up of three items. As to two of these sales the court found they were made while the distilled spirits were in a bonded warehouse and were sold for use on the high seas, and that as to the third sale the requisite tax stamp accompanied the delivery. It was the theory of the trial court that since this liquor was in a bonded warehouse its sale was not subject to tax. That factor has no relevancy to the issue. The sale was in California and delivery was made to the purchaser in San Francisco. The respondent had no further control of the merchandise after it was delivered in San Francisco. Respondent in no sense exported these distilled spirits. These points have been fully considered and passed upon in the case of Gooderham & Worts, Ltd. v. Collins, Cal.App., 123 P.2d 922. As there held, and for the reasons there stated, this type of sale is subject to the tax.

[13] As to the third item on which the stamps accompanied delivery, this transaction should not have been included in the additional assessment. On the retrial, this item should be fixed as to amount and an allowance made to respondent.

C. The auditors for the board found that certain sales made to retail licensees in admittedly taxable transactions on which the tax totaled $7.20 had not been accompanied by stamps at the time of delivery. During the trial the respondent expressly waived this item. Nevertheless, the trial court found that the board had no information that such liquor had been sold to, or received by, retail licensees, and, secondly, that the retail licensees purchased stamps for such liquor from other sources. The first part of the finding is based on a misconception of the law. As already held, the burden to show that the sales were nontaxable rested on respondent. As to the second part of the finding, neither litigant has seen fit to refer to the record where the evidence, if any, on this issue may be found. If supported by the evidence, obviously the respondent is entitled to a refund of the additional tax paid for this item. This may be clarified on the retrial.

For the foregoing reasons the judgment appealed from is reversed.

KNIGHT and WARD, JJ., concurred.

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50 Cal.App.2d 786

SAUERS WHOLESALE CO. v. COLLINS et al.

Civ. 11959.

District Court of Appeal, First District, Division 1, California.

March 27, 1942.

Hearing Denied May 25, 1942.

1. Intoxicating liquors 🔑96

Liquor wholesaler seeking to recover deficiency excise taxes paid under protest had burden of proving that transactions involving salesmen's samples were not taxable as representing sales between wholesaler and other wholesalers for resale. St.1935, p. 1123.

2. Intoxicating liquors 🔑90(1)

The statute imposing excise tax on distilled spirits sold in California as originally enacted did not require or contemplate that, if retailers already had stamps sufficient to cover purchases from a wholesaler, wholesaler was required to accompany delivery of liquor with more stamps. St.1935, p. 1123.

3. Intoxicating liquors 🔑96

Liquor wholesaler seeking to recover deficiency excise taxes paid under protest had burden of proving that sales to retail licensees not accompanied by proper amount of stamps involved sales to retailers who represented that they had stamps in their possession sufficient to cover purchases and that therefore transactions were not taxable to wholesaler. St.1935, p. 1123.

4. Intoxicating liquors 🔑96

Liquor wholesaler seeking to recover deficiency excise taxes paid under protest had burden of accounting for disposals of liquor not accounted for in wholesaler's books, and, if wholesaler was unable to do so, transactions were taxable. St.1935, p. 1123.

5. Intoxicating liquors 🔑96

In liquor wholesaler's action to recover deficiency excise taxes paid under protest, record did not support wholesaler's contention that figures testified to by auditor on direct examination showed that wholesaler had purchased more stamps than it was required to purchase during period in question. St.1935, p. 1123.

Appeal from Superior Court, City and County of San Francisco; Benjamin C. Jones, Judge Assigned.

Action by Sauers Wholesale Company against R. E. Collins and others, as members of the State Board of Equalization, and others, to recover deficiency excise taxes collected under the Alcoholic Beverage Control Act. From a judgment for plaintiff, defendants appeal.

Reversed.

Hearing denied; GIBSON, C. J., and TRAYNOR, J., not participating; SPENCE, Acting Justice pro tem.

Earl Warren, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for appellants.

Sefton & Quattrin, of San Francisco, for respondent.

PETERS, Presiding Justice.

This action was brought by Sauers Wholesale Co. to recover deficiency excise taxes collected by the State Board of Equalization under the Alcoholic Beverage Control Act, Stats. of 1935, p. 1123, ch. 330. The plaintiff during the period July 1, 1935, to June 30, 1937, was a duly licensed distilled spirits rectifier and distributor engaged in business in California, and, as such, for the two-year period above-mentioned paid to the state large sums of money under the tax statute here involved. Some time after July 1, 1937, the auditors of the board made an audit and examination of the books and records of the plaintiff. As a result of this audit and examination the board determined that for the two years in question there was due and owing from plaintiff an additional tax of $1,722.09. The plaintiff thereafter petitioned for a relevy of the tax and demanded a hearing, which was granted. The board thereafter determined that the above-mentioned sum was due from plaintiff. This sum was paid by the taxpayer under protest and this action instituted to recover the amount so paid. The trial court rendered judgment for the taxpayer for the total amount of $1,722.09. The trial court did not make specific findings concerning the items making up the total of the judgment. It was the theory of the trial court that prior to July 1, 1937, there was no provision of law authorizing the proceedings taken by the board against plaintiff.

On this appeal many of the points discussed are identical with those raised in the two Rathjen Bros. cases, Rathjen Bros. v. Collins, Cal.App., 123 P.2d 925, and Id., Civ. 11912, Cal.App., 123 P.2d 930; in fact, by stipulation the cases have been submitted on the same briefs. No useful purpose would be served by repeating what was said in those two opinions. For the reasons therein set forth, it is obvious that the judgment here appealed from must be reversed.

There are certain items in the alleged deficiency peculiar to this case. According to the report of the auditors the total deficiency of $1,722.09 was made up of the following items:

A.	Salesmen's Samples	$ 36.72
B.	Sales to retail licensees not accompanied by proper amount of stamps	51.32
C.	Unaccounted for disposals ..	1,634.05

[1] As to the first item—salesmen's samples—the court made no finding as to the facts, no such finding being required under its theory of the case. If these represented transactions similar to those involved in Civ. 11912, supra, they are governed by the rule therein announced, and are taxable. On the other hand, if they represented sales between plaintiff and other wholesalers or rectifiers, the purchased liquor to be used by the latter for resale, such sales are not taxable under the holding in People v. Tux Winery Co., 20 Cal.App.2d 700, 67 P.2d 752. On the new trial the exact factual background of such transactions may be ascertained, subject to the rule announced in the two Rathjen Bros. cases, supra, that the burden of proof to show that these transactions were nontaxable rests on plaintiff.

[2, 3] The second item of $51.32 represents the proper tax that should have been paid on several sales to retail licensees that were either not accompanied by any

stamps or had attached to the invoices an insufficient amount of such stamps. Such transactions were admittedly taxable. In partial explanation of this item the president of plaintiff testified that some of those sales were to retailers who represented to plaintiff that they had stamps in their possession sufficient to cover the purchase. If such was the fact, such transactions were not taxable to respondent. As originally enacted in 1935 the act recognized the possibility of retailers securing the requisite stamps from others than wholesalers or rectifiers. The appellants' witnesses testified that during part of the period here involved the state permitted stamps to be sold directly to retailers. Obviously, if retailers already had stamps sufficient to cover purchases from the plaintiff, if the plaintiff had to accompany delivery of the distilled spirits with more stamps it would mean that the tax would be paid twice on the same liquor. Such double payment was, of course, not required or contemplated by the act. The trial court made no specific finding as to the quantity of distilled spirits that were involved in such transactions. Again keeping in mind the rule above-announced that the burden rests on respondent to show that any particular transaction was exempt, or did not require stamps, this is a matter which can be inquired into on the new trial.

[4] The third item of $1,634.05 represents the proper tax that should have been paid on disposals of distilled spirits where the books of respondent did not account for the disposals. As in the two Rathjen Bros. cases, supra, the respondent admits that during the taxable period it had on hand the gallonage as found by the auditors. It admits that the figures concerning the gallonage on hand at the close of the taxable period are correct, as well as the figures concerning its purchases of stamps. The only challenge of the figures of the auditors was in reference to the two items above-discussed. The respondent also concedes that all breakage shown by its books was allowed by the auditors as a deduction. In other words, there were certain disposals of distilled spirits not accounted for by the books of respondent. For the reasons set forth in full in Civ. 11912, supra, the burden was on respondent to account for these disposals. If it is unable to do so, the transactions are taxable.

[5] Respondent urges that the figures testified to by the auditor on direct examination by it showed that in fact respondent had purchased more stamps than it was required to purchase during the period in question. It is urged that because of this testimony the "auditor testified the State out of court." The contention is without merit and is based on a distortion of the record. On direct examination respondent's counsel did not bring out all the facts. He permitted the auditor to show the total stamps purchased and the total tax, and then asked no further questions on this issue. He did not ask whether, at the close of the tax period, the respondent had any of the purchased stamps on hand. This figure was correctly set forth in the audit, and brought out on cross-examination. The record is without conflict that, if the stamps on hand at the close of the tax period be deducted from the total purchases, the deficiency exists as found by the board.

The judgment appealed from is reversed.

KNIGHT and WARD, JJ., concurred.

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50 Cal.App.2d 790

TONKIN DISTRIBUTING CO., Inc., v. COLLINS et al.

Civ. 11958.

District Court of Appeal, First District,
Division 1, California.

March 27, 1942.

Hearing Denied May 25, 1942.

1. Intoxicating liquors ⇨90(1)

If excise tax stamps were affixed to bottles by liquor retailer, subsequent breakage would not affect wholesaler's liability for taxes on broken bottles, and subsequent replacements should have been accompanied by stamps, but, if cases had not yet been broken, wholesaler could properly replace broken bottles, and stamps sent with first shipment could be used to pay tax. St.1935, p. 1123.

2. Appeal and error ⇨1008(1)

In liquor wholesaler's action to recover deficiency excise taxes paid under protest, whether certain sales to retail licensees were accompanied by a sufficient number and amount of stamps was for the trial court. St.1935, p. 1123.

3. Intoxicating liquors ⚷90(1)

Sale of liquor to retail licensee was not taxable to wholesaler where retailer had on hand a sufficient number of stamps purchased from another wholesaler. St.1935, p. 1123.

4. Intoxicating liquors ⚷96

Liquor wholesaler seeking to recover deficiency excise taxes paid under protest had burden of proving that certain sales to retail licensees unaccompanied by stamps were exempt. St.1935, p. 1123.

5. Intoxicating liquors ⚷96

Liquor wholesaler which paid deficiency excise taxes under protest was entitled to refund with respect to sale to steamship company where sufficient quantity of stamps accompanied delivery. St.1935, p. 1123.

6. Intoxicating liquors ⚷90(1)

The statute imposing an excise tax on all distilled spirits sold in California does not exempt sales of spirits capable of use for beverage purposes, where buyer represents that they are to be used for a nonbeverage purpose. St.1935, p. 1123.

7. Intoxicating liquors ⚷96

Liquor wholesaler which paid deficiency excise taxes under protest was not entitled to refund with respect to sale of liquor to steamship companies on ground that liquor sold was not intended for beverage use. St. 1935, p. 1123.

8. Intoxicating liquors ⚷90(1)

Sales of liquor by wholesaler to steamship companies were subject to excise tax where sales were completed by wholesaler in California, and full control over liquor passed to buying companies in California. St.1935, p. 1123.

9. Intoxicating liquors ⚷96

Liquor wholesaler seeking to recover deficiency excise taxes paid under protest had burden of proving that sales to nonlicensees were exempt on ground that liquor was actually exported from California and delivered for resale or consumption outside California. St.1935, p. 1135, § 30.

10. Intoxicating liquors ⚷90(1)

Under statute imposing excise tax on distilled spirits sold in California, transfers of samples directly given away by wholesaler for purpose of encouraging sale of wholesaler's product are not in the true sense "gratuitous", and the equalization board acted within its rule-making power in adopting rule requiring stamps to be attached to such samples. St.1935, pp. 1124, 1132, 1139, 1140, 1147, §§ 2(*l*), 24, 33, 34, 51.

See Words and Phrases, Permanent Edition, for all other definitions of "Gratuitous".

11. Intoxicating liquors ⚷96

Liquor wholesaler seeking to recover deficiency excise taxes paid under protest was entitled to refund with respect to assessment based on stamps returned from retailers because wholesaler had originally sent too many stamps with liquor involved when sold. St.1935, p. 1123.

12. Intoxicating liquors ⚷94

A liquor wholesaler who sends too many excise tax stamps to retailer for purchase made is entitled to a credit when stamps are returned by retailer. St.1935, p. 1123.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Tonkin Distributing Company, Incorporated, a copartnership, against R. E. Collins and others, as members of the State Board of Equalization, and others, to recover deficiency excise taxes collected under the Alcoholic Beverage Control Act. From a judgment for plaintiff, defendants appeal.

Reversed.

Hearing denied; GIBSON, C. J., and TRAYNOR, J., not participating; SPENCE, Acting Justice pro tem.

Earl Warren, Atty. Gen., and J. Albert Hutchinson, Deputy Atty. Gen., for appellants.

Sefton & Quattrin, of San Francisco, for respondent.

PETERS, Presiding Justice.

This action was brought by Tonkin Distributing Co., Inc., a partnership, to recover deficiency excise taxes collected by the State Board of Equalization under the Alcoholic Beverage Control Act, Stats. of 1935, p. 1123, chap. 330. The plaintiff during the period December 30, 1935, to June 30, 1937, was a duly licensed wholesaler, rectifier and importer engaged in business in California and, as such, for the year and a half period paid to the state large sums of money under the tax statute here involved. Some time after July 1, 1937, the auditors of the board made an audit and examination of the books and records of the plaintiff. As a result of this audit and examination the board determined that for the year and a half in question there was due and owing from plaintiff an additional tax of $554.27. The plaintiff thereafter petitioned for a relevy of the tax and demanded a hearing, which was granted. The board thereafter determined that the abovementioned sum was due from plaintiff. This sum was then paid by the plaintiff under protest, and this action instituted to recover the amount so paid. The trial court rendered judgment for the taxpayer for the total amount of $554.27. In addition to general findings the trial court made detailed findings concerning the respective items making up the total of the judgment. One of the theories of the trial court, and it so found, was that prior to July 1, 1937, there was no provision of law authorizing the proceedings taken by the board against plaintiff.

On this appeal many of the points discussed are identical with those raised in the two Rathjen Bros. cases, Rathjen Bros. v. Collins, Cal.App., 123 P.2d 925, and Id., Civ. 11912, Cal.App., 123 P.2d 930, and in Sauers Wholesale Co. v. Collins, Civ. 11959, Cal.App., 123 P.2d 936; in fact, by stipulation the cases have been submitted on the same briefs. No useful purpose would be served by repeating what was said in those three cases. For the reasons therein set forth it is obvious that the judgment here appealed from must be reversed.

The total alleged deficiency amounted to $554.27. This was made up of the following six items:

1.	Sales to retail licensees unaccompanied by stamps	$ 26.18
2.	Sales to steamship companies..	8.44
3.	Sales to non-licensees.........	396.30
4.	Samples	35.47
5.	Return of stamps from retailers	2.64
6.	Unaccounted for disposals....	85.24

1. Sales to retail licensees unaccompanied by stamps—total tax liability $26.18.

[1] This item involves nine different transactions. All transactions here involved were with retail licensees and were admittedly taxable. As to three of the transactions, on which the total tax was forty-eight cents, the trial court found that they involved "the replacement of broken distilled spirits bottles previously sold to retailers with deliveries of sufficient tax stamps to stamp properly said distilled spirits." The trial court did not find whether the breakage occurred before transit had ended and before the stamps were affixed, or whether the breakage occurred after the stamps were affixed by the retailer. If the stamps were affixed, the subsequent breakage would not affect the liability for taxes on the broken bottles, and the subsequent replacements should have been accompanied by stamps. Three G Distillery Corp. v. Johnson, 39 Cal.App.2d 431, 103 P.2d 429. But if the cases had not yet been broken the wholesaler may properly replace the broken goods and the stamps sent with the first shipment used to pay the tax.

[2] As to the fourth and fifth transactions, with a total tax liability of $19.30, the court found each of the sales was accompanied by a sufficient number and amount of stamps. The evidence supports the finding, and as to this item the taxpayer is entitled to a refund.

[3] As to the sixth transaction, with a tax liability of $1.92, the court found that the proper quantity of stamps were delivered to the retailer, but were returned because the retailer had on hand a sufficient number of stamps purchased from another wholesaler. Under the ruling in the case of Sauers Wholesale Co. v. Collins, Civ. 11959, supra, on this same issue this particular sale was not taxable to respondent. The respondent was entitled to a refund on this item.

[4] As to the remaining three items, the court found that the board had no evidence that the transactions were taxable. This finding is based on an incorrect theory. The burden was on the respondent in this proceeding to show that the transactions were exempt. It did not sustain this burden.

2. Sales to Steamship Companies—total tax liability $8.44.

[5] This item was made up of eight separate transactions. As to one of them, on which the tax amounted to $2.40, the court found a sufficient quantity of stamps accompanied delivery. As to this item the respondent is entitled to a refund.

[6, 7] As to the second and third transactions, on which the tax liability was seventy-two cents, the court found that the distilled spirits were not intended for beverage use. There is no exemption in the act for sales of distilled spirits capable of

being used for beverage purposes where the purchaser represents they are to be used for a nonbeverage purpose. The respondent is not entitled to a refund of this item.

[8] As to the remaining five transactions, they involved situations identical with those present in Civ. 11912, supra, 123 P.2d 930, and in Gooderham & Worts, Ltd. v. Collins, Cal.App., 123 P.2d 922. For the reasons there set forth, these transactions were taxable. The evidence shows without conflict that these sales were completed by respondent in California. Full control over the distilled spirits passed to the purchaser in California.

3. Sales to Non-Licensees—total tax liability $396.30.

[9] As to this item the findings of the trial court are not entirely clear. It was found that the distilled spirits represented by this portion of the assessment were not sold for resale in California, but were actually exported from California and delivered for resale or consumption outside California. Some of the transactions involved actual deliveries to the purchaser's agent in California. If control of the liquor passed to the purchaser or his agent in California the transaction is taxable for the same reasons set forth in the discussion of sales to steamship companies. By section 30 of the act as passed in 1935 it was provided:

> "None of the provisions of this act shall apply, or be construed to apply, to commerce with foreign Nations or commerce with the several States, except in so far as the same may be permitted under the provisions of the Constitution and laws of the United States. * * *
>
> "In support of any exemption from excise taxes claimed under this section on account of the exportation of alcoholic beverage every manufacturer must execute an export certificate in such form as shall be prescribed, prepared and furnished by the board containing a sworn statement made by some person having knowledge of the fact of such exportation that the alcoholic beverage has been exported from this State, and giving such detail with reference to shipment as said board may require. All exportation certificates must be completed and on file in the office of the board within thirty days after the close of the calendar month in which the shipments were made and no certificate not completed and filed within such period shall be recognized for any purpose by the State or any agency thereof. The board may demand of any manufacturer or importer such additional data as is deemed necessary by said board in support of any such certificate and failure to supply such data will constitute waiver of all right to exemption claimed by virtue of said certificate."

The last paragraph of the section deals with how this exemption must be claimed. There is no finding as to whether compliance was had with these requirements. The burden was on respondent to show that the sale was exempt. This matter may be clarified by proper evidence and findings on the new trial.

4. Samples—total tax liability $35.47.

[10] As to this item the trial court found that the distilled spirits involved "were given away as donations or samples without any consideration of any kind being given to the plaintiff for the same; and I further find that said distilled spirits were not given away in connection with the sale of any distilled spirits." This case, unlike the problem present in Civ. 11912, supra, and in the Sauers Wholesale Co. case, Civ. 11959, supra, involves samples directly given away by the wholesaler, rather than sales of liquor to another to be used by the purchaser for samples. By board rule it is provided that such samples must be accompanied by stamps. The question as to whether samples given away by wholesalers must be accompanied by stamps is not an easy one. By section 24 of the act the tax is imposed on "distilled spirits sold" in California. Section 2 (*l*) defines the terms "sell" or "sale" or "to sell" very broadly, and, among other things, provides that the terms shall include: "to traffic in or deliver for value or in any way other than gratuitously." Sections 33 and 34 require the stamping of all distilled spirits not on the premises of licensed manufacturers, wholesalers, etc., and under section 51 all unstamped distilled spirits found outside the premises of licensees were made subject to seizure and forfeiture or destruction. Obviously, the use of samples is for the purpose of encouraging the sale of the product. For that reason such transfers are not, in the true sense, gratuitous. Under these circumstances, we think the board acted within its rule-making power in adopting the rule requiring stamps to be attached to samples. These transactions were therefore taxable.

5. Return of Stamps from Retailers—tax liability $2.64.

[11, 12] As to this item the trial court found that the assessment was "based on excise stamps returned from retailers to the plaintiff because the plaintiff had originally, in selling the distilled spirits involved, sent too many stamps with said distilled spirits." Obviously, if the wholesaler sends too many stamps for the purchase made, when the stamps are returned the wholesaler is entitled to a credit. The respondent was entitled to a refund on this item.

6. Undisclosed disposals—tax liability $85.24.

The problems here presented are identical with those presented in Civ. 11912, supra, 123 P.2d 930, and Civ. 11959, supra, 123 P.2d 936. For reasons there set forth the findings in reference thereto are not supported by the evidence.

For the foregoing reasons the judgment appealed from is reversed.

KNIGHT and WARD, JJ., concurred.

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50 Cal.App.2d 810

RIVES-STRONG BLDG., Inc., v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N.

Civ. 13280.

District Court of Appeal, Second District, Division 2, California.

March 27, 1942.

1. Arbitration and award 🔑1

The determination of values or other calculations involved in voluntary contracts, between individuals, and therein for convenience left to third persons, not being the subject of a civil action, the arbitration statute is not intended to apply to such type of agreement. Code Civ.Proc. § 1280 et seq.

2. Arbitration and award 🔑1

In determining whether there was an arbitration agreement within meaning of statute, the use of the word "arbitrator" was not controlling. Code Civ.Proc. §§ 1280, 1281.

3. Landlord and tenant 🔑201

In action by lessor to set aside an award under an arbitration agreement in lease, on ground that it was contrary to the provisions of statute dealing with arbitration and award, and to have court determine reasonable monthly rental to be paid by lessee, burden was on lessor to show that award was invalid. Code Civ.Proc. §§ 1280, 1281.

4. Landlord and tenant 🔑201

In action by lessor to set aside an award under an arbitration agreement in lease, if lessor chose to attack award for procedural defects, and trial court found that statutory processes required in cases of arbitration had not been followed, award would not be invalidated if such omitted procedure was unnecessary to validity of award. Code Civ.Proc. §§ 1280, 1281.

5. Landlord and tenant 🔑201

Lease provision, which was merely a method agreed on for determining rental value by arbitrators, was not an "arbitration agreement" within contemplation of arbitration statute, and hence there was no basis for declaring award made by arbitrators invalid because of their failure to observe the requirements of arbitration statute. Code Civ.Proc. §§ 1280, 1281.

See Words and Phrases, Permanent Edition, for all other definitions of "Arbitration Agreement".

◆

Appeal from Superior Court Los Angeles County; Clement L. Shinn, Judge.

Action by the Rives-Strong Building, Incorporated, against the Bank of America National Trust and Savings Association, to set aside an award of arbitrators and to have the court determine the fair, just and reasonable monthly rental of premises to be paid by defendant and received by plaintiff, wherein the defendant filed a cross-complaint seeking confirmation of the award. From an adverse judgment, the defendant appeals.

Judgment reversed, and judgment ordered for defendant on complaint and for cross-defendant on cross-complaint.

Edmund Nelson and William C. Day, both of Los Angeles, for appellant.

Vernon Bettin, L. W. Andrews, and Mortimer Kline, all of Los Angeles, for respondent.

STEPHENS, Justice pro tem.

Appeal by defendant from a decree of the superior court nullifying an award made by a majority of a board designated in a lease as "arbitrators," and directing further proceedings in the trial for the purpose of determining the fair, just and reasonable monthly rental to be paid by defendant.

Appellant and the predecessor of respondent entered into a lease on October 1, 1925, by which respondent, as lessor, leased to appellant's predecessor, as lessee, the ground floor and certain other portions of a business building in Los Angeles for banking purposes, for a term of 24 years and 5 months. The lease was not introduced into evidence, but the complaint alleged and the court found "that said lease by its terms provided a fixed rental for the first four years and five months of said term, ending December 31, 1929; and that thereafter the rental for each succeeding five-year period was to be adjusted up or down as conditions warranted, so as to arrive at a fair and just rental of said premises, and in that behalf, in fixing the rental for the next five-year period,—commencing January 1, 1930, and ending December 31, 1934,—the parties, between the first day of August and the first day of October, 1929, would give consideration to the various factors and elements affecting the situation, and by mutual agreement fix the rental for such period; and if after due consideration the parties were unable to agree upon the amount of rental for such period, and there was such difference of opinion as resulted in a controversy between the parties, then that the amount of said rental for said five-year period would be determined by arbitration, and for that purpose each party to the lease should appoint one arbitrator at least eighty days prior to January 1, 1930, and notify the other party in writing of such appointment, and the two arbitrators so selected should thereupon and within the next five days name a third arbitrator, mutually agreed upon by them, and the three arbitrators so selected should proceed with the arbitration, to the end that they should, within five days thereafter, make an award determining upon a fair and just rental for the demised premises for the ensuing five-year period subsequent to January 1, 1930. Said lease further provides that the amount of rental to be paid for each ensuing five-year period, subsequent to said five years expiring December 31, 1934, should be determined between August 1st and October 1st of the last year of each such five-year period, in the same manner, by conferences and consideration of the then existing conditions and such changes as might have intervened, affecting the situation, and by agreement of the parties; and in event there was such controversy with respect to the matters, that the parties could not agree within said time upon the amount of rent to be fixed for the next five years, the same should be determined by arbitration in the manner above specified."

On April 10, 1929, a modification of the lease was entered into between the parties, fixing the rental for the five-year period beginning January 1, 1930, permitting lessee to make certain alterations, and making some minor modifications not affecting the rental, and in all other respects leaving the lease unchanged.

When the parties attempted by negotiation to fix the rental for the period commencing January 1, 1940, they were unable to agree, and thereupon, pursuant to the lease, each appointed an "arbitrator" and these two appointed a third. After making such investigation as they deemed necessary, interviewing the parties, inspecting the premises, collecting data from various sources and otherwise satisfying themselves that they had acquired all the necessary information, the three members held a final meeting and two of them agreed upon and signed an award fixing the rental for the period. No formal hearings were had at which witnesses were sworn to testify or subjected to cross-examination, and no notices of meetings were given to lessor or lessee.

Respondent (lessor) thereafter served upon appellant a written notice rejecting the award as being contrary to law and particularly to the provisions of the Code of Civil Procedure with respect to arbitration and award, and then brought the present action seeking to set aside the award and praying that the court "determine the fair, just and reasonable monthly rental of said premises to be paid by defendant and received by plaintiff during the five-year period commencing January 1, 1940, and ending December 31, 1944." Defendant (appellant) answered and also filed a cross-complaint seeking confirmation of the award. Upon the trial it was stipulated that the court first hear and determine the issue whether the award be vacated as prayed in the complaint or confirmed as requested in the cross-complaint, and that all other issues be reserved for future determination.

The trial court found "that the arbitrators acted in good faith but they were not informed and did not know that as arbitrators they were required to have a hearing or hearings and that the parties to the arbitration had the right to be advised in advance of the time and place of such hearings and the right to attend and offer evidence for the consideration of the arbitrators, question witnesses and respectively present their case to the arbitrators." The court also found, however, "that it is not true that said arbitrators or some of them refused to consider evidence pertinent or material to the controversy or refused to take into consideration pertinent or material facts in reaching a determination of the controversy." The court then proceeded to find that the arbitrators had failed to observe the requirements and to accord the parties the rights to which they were entitled under the provisions of the Code of Civil Procedure governing arbitration and award, and concluded therefrom that the arbitrators had been guilty of misconduct as defined by the statute and "that no arbitration was conducted by said arbitrators as required by law." There is nothing in the findings or decree in any way reflecting upon any of the three appointees or questioning their good faith or ability, or the thoroughness or accuracy of their work. The decree declares the award null and void and directs further proceedings to determine the fair, just and reasonable monthly rental, etc.

Appellant does not attack the findings, but contends that they do not support the conclusions of law; that a proper construction of the lease discloses that it was never intended by the parties as, and did not amount to, an agreement for formal arbitration of a controversy as contemplated by Code of Civil Procedure, section 1280 et seq., but was a simple method of determining the rental value at the beginning of each five-year period through the customary method of accepting a valuation fixed by three disinterested appraisers. It is apparent, therefore, that the determination of this appeal rests upon the question of whether or not the provisions of the lease constitute an arbitration agreement as contemplated by Code of Civil Procedure, section 1280 et seq., or possibly as recognized by common law. It should be noted that the provisions of the Code of Civil Procedure governing this subject have undergone substantial change since the making of the lease, and the latter should be construed in the light of the statute as it existed at that time, notwithstanding the subsequent modification which in no way affected the provision now under consideration. However, in the view we take of it this does not assume the importance accorded it in the briefs.

[1] The subject of agreements for submission of controversies to arbitration has engaged the attention of the courts since very early times. They were frowned upon by the courts as being a substitute for the established judicial machinery, and it was thought that individuals should not be deprived of the right to have their controversies heard by the courts, even by their own acts. It was well established that courts would not enforce an executory agreement to submit to arbitration. Levy v. Superior Court, 15 Cal.2d 692, 698, 699, 104 P.2d 770, 129 A.L.R. 956. In the early case of Holmes v. Richet, 56 Cal. 307, 314, 38 Am.Rep. 54, we find a quotation from Coleridge, J., in the House of Lords in which he discusses the subject and points out the recognized difference between an agreement to arbitrate an existing controversy and a provision in a contract by which valuations are to be determined by reference to third persons as appraisers. This case is also cited by the Supreme Court in Blodgett Co. v. Bebe Co., 190 Cal. 665, 668, 214 P. 38, 26 A.L.R. 1070, in which the same distinction is discussed and recognized. The general subject was incorporated in our codes (Code Civ.Proc., § 1281 et seq.), and this statute when enacted confined such contracts to controversies "which might be the subject of a civil action between" the parties thereto. As the determination of values or other calculations involved in voluntary contracts between individuals, and therein for convenience left to third persons, could not be the subject of a civil action, it seems clear that the statute was not intended to apply to this type of agreement. In other words, the statute recognized the distinction that had been long established by the courts.

In California Annual Conference of M. E. Church v. Seitz, 74 Cal. 287, 15 P. 839, defendant was the owner of a parcel of land and one Perkins, plaintiff's assignor, owned certain buildings upon it. Defendant leased to Perkins with the provision that at the expiration of the term the latter should have the option to remove the buildings or to require defendant to take them at a valuation "to be ascertained by two persons, one to be chosen by each party;

and, in case the persons so chosen disagree, those two shall choose an umpire, whose decision shall be final and binding on the parties." Pursuant thereto the persons were selected and determined upon a figure, but defendant refused to pay and plaintiff sued for the amount of the award. Defendant contended that the agreement amounted to an arbitration and that the award was invalid because the arbitrators were not sworn, the parties had no notice of meetings and no opportunity to be heard. After stating that "the question presented, then, is whether the agreement amounts to a submission to arbitration," the court said:

"There are two time-honored rules in relation to arbitrators,—one that courts will not enforce an agreement to submit to arbitration, or, in other words, that it can be revoked; and the other that arbitrators must give notice of their sessions so as to afford the parties a right to be heard. These rules rest upon the same idea, viz., that an arbitration is a substitute for proceedings in court. It being considered against sound policy to allow parties to deprive themselves of their right of resort to the courts, agreements to that effect are not binding so long as they are executory; but if the parties choose to resort to other tribunals, such tribunals are held to the more important rules which govern courts in their proceedings.

"It was found, however that to apply the above rules to all agreements in which parties regulated their action by the determination of third persons would interfere with the ordinary transactions of mankind, and put unnecessary clogs upon business. Accordingly in the well-considered case of Scott v. Avery, 5 H.L.Cas. 811, it was held that a condition in a policy of insurance in a mutual company, that the loss should be 'ascertained and settled by the committee,' was not a submission to arbitration in its proper sense, but was a condition precedent to the right of action. Similar decisions have been made in this and other states. Holmes v. Richet, 56 Cal. 307 [38 Am.Rep. 54]; Loup v. [California Southern] R. R. Co., 63 Cal. [97], 103; Cox v. McLaughlin, 63 Cal. [196], 207; Old Saucelito etc., Co. v. Commercial U. A. Co., 66 Cal. 253, 5 P. 232; Adams v. [South British, etc.], Ins. Co., 70 Cal. 198, 11 P. 627; Carroll v. [Girard Fire] Ins. Co., [72 Cal. 297], 13 P. 863; [President, etc., of D. & H.] C. Co. v. [Pennsylvania] Coal Co., 50 N.Y. 250; Hudson v. McCartney, 33 Wis. [331], 344; Haley v. Bellamy, 137 Mass. [357], 359; Flint v. Pearce, 11 R.I. [576], 577; Gauche v. London Ins. Co., C.C., 10 F. [347], 355; Fox v. [Hempfield] R. Co., [Fed Cas. No. 5,010], 3 Wall. Jr. 243, 245.

"These cases hold that a contract by which the value of property or the amount of damage is, for the purpose of the contract, to be fixed by third persons, is not a submission to arbitration, and therefore to enforce it does not trench upon the jurisdiction of the courts. Now, if this is so, if such a proceeding is not analogous to the investigation by a court of a controversy between the parties, why need it be conducted according to the rules which govern courts in their investigations? We think that it need not; that the proceeding is a mere appraisement or valuation, which, although binding upon the parties, is not the submission of a controversy to arbitration, and is, therefore, not subject to the rules which govern arbitrators. And to this effect are the best-considered cases."

After reviewing and quoting from numerous cases the court then quotes from a Massachusetts case, Palmer v. Clark, 106 Mass. 373, as follows:

" 'A reference to a third person to fix by his judgment the price, quantity, or quality of material, to make an appraisement of property and the like, especially when such reference is one of the stipulations of a contract founded on other and good considerations, differs in many respects from an ordinary submission to arbitration. It is not revocable. The decision may be made without notice to or hearing of the parties, unless such notice and hearing be required by express provision or reasonable implication; and it may be made upon such principles as the person agreed on may see fit honestly to adopt, or upon such evidence as he may choose to receive.' See, also, Garred v. Macey, 10 Mo. [161], 164; Willingham v. Veal, 74 Ga. [755] 759; Gustaveson v. McGay, 12 Daly, N.Y., [423] 427."

Following this principle, it has been held that where the parties have agreed that a valuation shall be fixed in a certain manner they are entitled to have it fixed in that manner and not by a court in lieu thereof. Hooper v. Los Angeles Valve & F. Co., 55 Cal.App. 17, 21, 202 P. 911; Luedinghaus Lbr. Co. v. Luedinghaus, 9 Cir., 299 F. 111, 115.

Applying what has been said in these cases to the matter before us, it is difficult to see any difference in principle between a reference to determine rental value for a period of five years and one for the determination of the value of land, or of buildings, or of the amount and value of standing timber.

[2] Turning to the lease itself to determine what the parties intended, we find a very simple wording, with no conditions or restrictions placed upon the persons named, no method of procedure suggested and no hearings or notices mentioned. In fact, the provision is so aptly worded for the purpose of requiring a mere appraisal or valuation that if the word "appraiser" is substituted for the word "arbitrator" in the lease no serious contention could be made that the parties intended it to be a statutory arbitration agreement. The use of the word "arbitrator" is of course not controlling. Thompson v. Newman, 36 Cal.App. 248, 251, 171 P. 982. Particularly is this true in view of the almost interchangeable manner in which these terms are commonly used in agreements.

Rental adjustments by appraisers at stated intervals are now extremely common in long term business leases, and by their very nature they require prompt action. They are usually intended to avoid, rather than invite, long hearings in the nature of court procedure. That the parties herein had this in mind is indicated by the provision that the award should be made within five days. The three persons appointed were in fact all expert realtors, experienced as appraisers. It is obvious from an examination of the transcript that they considered themselves appointed for just one purpose, viz., to determine what in their judgment was a fair and just rental for the premises for the five-year period. From their actions in interviewing the parties, requesting certain information, inspecting the premises, etc., this construction of their duties by the three appointees must have been obvious as well to the parties. It does not appear that prior to the award either party made any objection to this procedure or made any demand or even request for a formal hearing. Of course, this would not be necessary if it was in fact a statutory arbitration agreement, but it is a circumstance indicating a construction of the document acquiesced in by the parties themselves. The statement is made in respondent's brief that the appraisers refused to permit the president of respondent corporation to appear at a hearing, but no such finding is made and the only testimony in that connection was by Mr. Strong, who said, "I simply asked him [Mr. Culver, one of the appraisers] if I could be there," and "he said it was not necessary for me to be there."

Counsel for respondent strongly urge that appellant has adopted a new theory on appeal that is inconsistent with the theory upon which the case was tried, and cite authorities which undoubtedly support the general rule contended for. It is not necessary to discuss the existence of the rule, but only to determine its applicability to the present proceeding. It should be remembered that respondent here is the plaintiff, who is seeking to have the award set aside for the reason that the so-called arbitrators did not comply with the requirements of the statute governing the subject of arbitration. The pertinent provisions of the lease were before the court and are set forth in the findings. The evidence describes in great detail exactly what the "arbitrators" did in performing their duties as they understood them, all of which the trial court specifically found was in good faith. It is difficult to see how the evidence could have been more full and complete, regardless of the theory of the trial. If, then, with all the facts before us in the findings, including the wording of the document which was the basis of the award, it appears that the legal conclusions of the trial court thereon were erroneous, does the rule go so far as to require us to follow the trial court in this error merely because counsel for defendant (appellant) contended for too much? We do not think so, nor would the ends of justice be served by such application of a rule established by the courts themselves as a means of furthering justice.

[3, 4] The burden was upon plaintiff to show that the award was invalid. If it chose to attack the award for alleged procedural defects, and the trial court found that the statutory processes required in cases of arbitration had not been followed, this still does not invalidate it if, in fact and in law, such omitted procedure was not at all necessary to the validity of the award.

[5] We hold that the lease provision under consideration was not an arbitration

agreement within the contemplation of the statute, but that it constituted a method devised and agreed upon by the parties for determining the rental value of the property for the period in question, and that the persons chosen had no other duty to perform than to make this valuation. There were no conditions or restrictions or procedure laid down for them, and so far as appears from the findings and the evidence they went about their duties in good faith and to the best of their abilities, in the general manner customarily followed by appraisers. We therefore find no basis for declaring the award invalid. On the other hand, no arbitration agreement being involved, there is, of course, no basis for the action requested by the cross-complaint.

The judgment is reversed and judgment is ordered for defendant on the complaint and for cross-defendant on the cross-complaint. Appellant to recover costs.

W. J. WOOD, Acting P. J., and McCOMB, J., concurred.

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50 Cal.App.2d 684

HUNTON et al. v. CALIFORNIA PORTLAND CEMENT CO. et al.

Civ. 2726.

District Court of Appeal, Fourth District, California.

March 24, 1942.

1. Automobiles 🔑145

A 17-year-old truck driver colliding with another truck was not contributorily negligent because of his failure to have a chauffeur's license. Vehicle Code, §§ 71, 258, 267, 268, St.1935, pp. 98, 130, 131.

2. Automobiles 🔑138

A 17-year-old minor occasionally assisting father in trucking business and sometimes driving truck, without being employed for particular purpose of driving truck, and receiving money for clothing and incidental expenses, was not a "chauffeur" required by statute to have a license. Vehicle Code, §§ 71, 258, St.1935, pp. 98, 130.

See Words and Phrases, Permanent Edition, for all other definitions of "Chauffeur".

3. Automobiles 🔑245(17, 62, 83, 90)

Evidence whether driver of a cement truck, voluntarily parking on curve which cut down visibility, or driver of sugar truck colliding with cement truck on misty day, was guilty of negligence proximately causing collision, was for jury.

4. Automobiles 🔑172(6)

A motorist stopping on pronounced curve on paved highway should anticipate that following motorist will have obstructed vision of highway ahead, particularly where visibility is affected by atmospheric conditions.

5. Trial 🔑165, 178

A nonsuit or directed verdict may be granted only when, disregarding conflicting evidence and giving plaintiff's evidence value and indulging in every legitimate inference deducible therefrom, evidence is insufficient to support verdict for plaintiff.

6. Judgment 🔑199(3)

A judgment notwithstanding verdict should be granted where motion for directed verdict which should have been granted has been denied and verdict has been rendered against moving party.

7. Appeal and error 🔑930(1)

All intendments are in favor of jury's verdict if opposing inferences can be drawn from the testimony.

8. Appeal and error 🔑978(1)

The conclusions of trial court granting new trial for errors in instructions will not be disturbed in absence of abuse of discretion.

9. Appeal and error 🔑978(1)

An order granting new trial for error in not giving instruction explaining rule correctly laid down in given instruction would not be disturbed, where trial court believed there had been miscarriage of justice and justification for order was fairly debatable.

10. Automobiles 🔑246(13)

An instruction that person parking on highway prima facie violates the law, and that he must show that it was necessary to park, was not error, the word "necessary" being used as synonym for "practicable". Vehicle Code, § 582, St.1935, p. 190.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary" and "Practicable".

11. Evidence ⚷507

In action involving collision with truck parked in highway, refusal to admit expert testimony of whether shoulder was fit to carry truck was proper, where condition of shoulder was observable to anyone at scene of accident.

12. Evidence ⚷507

Where there is clear evidence as to physical condition existing, expert testimony is unnecessary, for jury is as competent to draw conclusions from physical facts as is the expert.

13. Appeal and error ⚷882(10)

Defendants objecting to expert testimony offered by plaintiff could not complain of refusal to admit expert testimony offered by defendants on same subject matter.

◆

Appeals from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by G. M. Hunton and others against the California Portland Cement Company and others for damages for alleged wrongful death of Merlin Hunton, deceased, and for damage to a truck. The jury returned a verdict for the plaintiff. From an order granting a new trial, the plaintiff appeals, and, from an order denying motion for judgment notwithstanding the verdict, the defendants appeal.

Orders affirmed.

Nottbusch & Nottbusch, of San Diego, and Head, Wellington & Jacobs, of Santa Ana, for plaintiffs and appellants.

Luce, Forward, Lee & Kunzel, of San Diego, for defendants and appellants.

WEST, Justice pro tem.

There are two appeals involved in this litigation. The plaintiff instituted the action to recover damages for the alleged wrongful death of his son, Merlin Hunton, who was killed when a truck he was driving ran into a cement truck owned by the California Portland Cement Company and operated by Wise. Plaintiff also seeks to recover for damage to his truck occasioned by the same accident.

Upon the completion of testimony defendants moved the court for a directed verdict, which motion was denied. The jury returned a verdict for plaintiff in the amount of $6,500. Thereafter, defendants made a motion for judgment notwithstanding the verdict. This motion was also denied. Defendants moved for a new trial which was granted by the trial court specifically upon the ground of errors of law alone. From the order granting a new trial plaintiff appealed. From the order denying the motion for judgment notwithstanding the verdict defendants appealed.

The facts out of which the litigation arose are as follows: At about the hour of six o'clock a.m. the plaintiff's son, Merlin Hunton, aged seventeen, was driving a Ford V-8 tractor with semi-trailer loaded with ten tons of sugar in a southerly direction on U. S. Highway No. 101, in what is known as Rose Canyon, north of the city of San Diego. At the time of the accident the highway at the point where the collision occurred, and also northerly and southerly of said point, was under construction. The east side of the highway had been excavated preparatory to paving. The west side consisted of three ten-foot strips of concrete suitable for driving purposes. North of the scene of the accident, at intervals, there were a number of signs indicating that the highway was under construction. Westerly of the highway was a shoulder of the width of from six to ten feet. Sometime prior to the accident the shoulder had been scratched or scarified preparatory to oiling.

The defendant Wise was driving a truck loaded with approximately nineteen tons of cement. He stopped on the westerly lane of traffic with the idea of unloading his cement, stepped out of his truck on the left-hand side and after taking a step or two from the truck observed the sugar truck driven by deceased proceeding southerly in the lane where he was parked. He jumped back into his truck and immediately thereafter the sugar truck collided with the rear of his vehicle. According to the testimony of Wise his truck had been standing a matter of seconds, or perhaps one minute, at the time of the impact.

At the point where Wise stopped the highway curves to the right. Several witnesses testified as to the distance the rear of the cement truck could be seen by one approaching from the north in a vehicle. This distance varied from three hundred to six hundred feet. There was no question but that there remained open for traffic at least twenty feet of pavement to the left or east of the defendant's truck.

Wendell Tedrow, who was riding in the sugar truck with the deceased at the time of the accident, testified that he did not see the standing cement truck until the vehicle in which he was riding was about one hundred fifty feet northerly of the point of impact, at which time deceased was driving at about fifteen miles per hour. He further stated that when they had arrived at a point about seventy-five feet to the rear of the cement truck decedent started to turn left to go around it but that the truck did not respond to the turning of the steering wheel and was directly in the rear of the parked truck at the time of the impact, at which time decedent had slowed the sugar truck to a speed of about six miles an hour. There was testimony to the effect that it is common for vehicles of the type of plaintiff's truck to fail to respond to turning while the brakes are applied, the tendency being for such vehicles under such conditions to go directly forward in spite of the effort made to change course.

Immediately after the impact the sugar truck caught fire and plaintiff's son was cremated in the vehicle.

At the trial defendants contended that it was impracticable for their truck to have been driven off the highway onto the shoulder to park in view of the torn or scarified condition of the shoulder, which had been dug to a depth of some three inches in the scratching operation. Defendant Wise said that he had observed the shoulder and that it was wet, loose and torn up.

There was evidence that the pavement was damp due to a heavy mist and also that the shoulder was damp from the same cause, and in addition that some water had been turned on the shoulder shortly before the accident occurred.

There was some difference of opinion as to whether the mist was still heavy or had cleared before the impact. There was no traffic approaching from the south and had decedent's turn to the left been successful he had ample room to clear the standing vehicle and to continue on towards San Diego. However, it should be stated that in view of the fact that the cement truck was parked on a curve there was not a clear view of the two open lanes for any great distance south of the parked cement truck.

Skid marks for approximately one hundred feet were visible on the pavement indicating the course of the plaintiff's truck.

The foregoing statement of facts was practically agreed upon as there was very little conflict with regard to the physical facts surrounding the occurrence.

We will consider first the appeal taken by defendants.

Defendants contend that the evidence without conflict establishes that the proximate cause of the accident was not the negligence of defendants but was the negligence of plaintiff's deceased son in not avoiding the standing truck in front of him; that plaintiffs were guilty of contributory negligence as a matter of law in not avoiding the truck in spite of the fact that there was ample opportunity to do so, and further because at the time of the accident the deceased was less than eighteen years of age and was operating the sugar truck without a chauffeur's license in violation of the law.

It is the contention of defendants that the negligence of defendants' driver, Wise, was in no way a proximate cause of the accident but that the negligence of decedent in failing to avoid the stopped vehicle constitutes a separate, independent, negligent act and therefore becomes the proximate cause of the accident and makes the negligent conduct of Wise remote. Under such circumstances they affirm that the trial court erred in not granting their motion for a directed verdict and their subsequent motion for judgment notwithstanding the verdict.

In support of their contention defendants rely upon the cases of Johnson v. Union Furniture Co., 31 Cal.App.2d 234, 87 P.2d 917, and McMillan v. Thompson, 140 Cal.App. 437, 35 P.2d 419.

In the first of these cases it appeared from plaintiff's complaint that the defendant had removed a bed from the home of deceased and had agreed that it should be returned before night; that defendant failed to return the bed, which necessitated decedent sleeping on the floor, and that while so sleeping decedent contracted pneumonia, from which his death ensued. The matter came up on an appeal from an order of the trial court sustaining a demurrer without leave to amend. The District Court of Appeal affirmed the action of the trial court on the ground that the wrong alleged and the resulting damages claimed were not such as would be known by common experience to be usually and naturally in sequence, and that subsequent to the initial cause, to-wit, the failure to return the bed, there was a new intervening efficient cause, to-wit, the action of decedent himself, having its origin independent of the initial cause, which intervening cause could not reasonably have been foreseen by the defendant; that therefore there was a breaking of the connection between the act of the defendant and the incurring of the pneumonia and subsequent death and thus the initial cause became remote.

In McMillan v. Thompson, supra, defendant's truck was stopped on the right-hand portion of the paved highway. Plaintiff observed the truck when he was about 450 feet away and could see that it was completely stopped. He started to pass the truck when another car proceeding in the same direction crashed into the rear of plaintiff's vehicle. It was contended that under such circumstances the negligence, if any, of defendant was not a proximate cause of the accident because of the intervening act of the third person. This court upheld such contention under the facts stating that while it was true that the driver of the stopped truck must have known that other vehicles would be likely to pass he could not have anticipated reasonably that while a car was passing his truck a third car would come from behind and crash into the passing car, and that therefore the injury resulted not only from the intervening act but from one which was not reasonably to have been anticipated by the driver of the stopped truck as the result of his own act.

We do not believe that either of the foregoing cases are determinative of the situation here. Wise stopped his truck voluntarily upon a curve and while there was evidence to indicate that a view of the rear of the cement truck was unobstructed for a distance of from 300 to 600 feet away, nevertheless it does not appear that at that distance it could have been determined whether the cement truck was on the paved portion of the highway or on the shoulder. Furthermore, there was substantial evidence in the record that there was a mist prior to and at the time of the accident and which the jury might easily have concluded prevented the deceased from determining either the position of the stopped truck or whether it was moving until he arrived at a point some 150 feet back of the stopped truck, which was the point where the witness Tedrow first observed it. In addition thereto the curve in the road obviously would interfere to some extent with a determination by deceased as to whether there was any traffic approaching from the south. As heretofore observed, both of the cases relied upon by defendants clearly point out that so far as the facts there involved were concerned there was an intervening act on the part of a third person which broke the causal connection between the alleged negligence of the defendant and the damage complained of. Here such intervening cause does not appear. Defendant stopped his truck in a matter of seconds before the impact at a point where good visibility at least was affected to some extent by the curve in the road and perhaps by the misty character of the atmosphere.

Defendants contend that the decedent driver and his father, the plaintiff, were both guilty of contributory negligence, the decedent because he was driving the sugar truck as a chauffeur, when less than eighteen years of age, and the plaintiff because he permitted such driving, knowing that decedent had no chauffeur's license, and that he was ineligible to receive one, because of the prohibition of section 258 of the Vehicle Code, St.1935, p. 130, which provides: "No chauffeur's license shall be issued to any person under the age of eighteen years."

Section 71 of the Vehicle Code provides as follows: " 'Chauffeur' is a person who is employed by another for the principal purpose of driving a motor vehicle on the highways and receives compensation therefor."

Defendants contend that since sections 267 and 268 of the Vehicle Code require careful examination of the applicant for a license before the issuance thereof that the Legislature must have intended to prevent all persons under the age of eighteen years from operating trucks as chauffeurs, upon the theory that a person of immature years should not attempt the intricate task of propelling such vehicles along the highway.

The record discloses that the deceased was the possessor of an operator's license, but defendants seek to point out some difference in theory between the provisions involving the issuance of operators' licenses and those governing the issuance of chauffeurs' licenses. As an abstract proposition it may be that more skill is required in the operation of a heavy truck than in the management of a pleasure vehicle, but it does not follow that the question of possession of a chauffeur's license is material in a particular case irrespective of causal connection between the violation of a statute in failing to have such license and the damage complained of.

[1, 2] We believe the question is disposed of in the case of Strandt v. Cannon, 29 Cal.App.2d 509, 85 P.2d 160, where the proposition was clearly laid down that the driver's negligence is to be determined by the facts of the accident, and that the failure to have an operator's license is not evidence of the driver's incompetence or negligence, or that such negligence, if any, was the proximate cause of the accident. We believe this sufficiently disposes of defendants' contention in this regard, but it may be added that the evidence presented at the time of the trial indicated that decedent was not paid compensation by his father for his services in driving the truck, but rather that he was given from time to time such amounts of money as he needed for clothing, spending money and incidental expenses. It further appears that decedent was not employed for the principal purpose of driving a motor vehicle, but that he assisted his father from time to time in the trucking business in which his father was engaged. The decedent was therefore probably not a chauffeur in the sense referred to in section 71 of the Vehicle Code.

[3-7] We are unable to say as a matter of law that there is no other reasonable conclusion deducible from the evidence than that the proximate cause of the accident was the negligence of the decedent himself.

It seems obvious that when a driver of a vehicle stops it upon a paved highway where there is a pronounced curve he must anticipate that the driver of any vehicle following him would have an obstructed vision of the highway ahead and this is particularly true under circumstances where the evidence fairly discloses that visibility is affected by atmospheric conditions.

In Re Estate of Lances, 216 Cal. 397, 14 P.2d 768, the rule with regard to directing a verdict is set down as follows: "It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given.'"

In Hubbert v. Aztec Brewing Co., 26 Cal.App.2d 664, 80 P.2d 185, 1016, it was held that a judgment notwithstanding the verdict should be granted when a motion for a directed verdict which should have been granted has been denied and a verdict rendered against the moving party.

We are of the opinion that bearing in mind that all intendments are in favor of a verdict of a jury if opposing inferences can be drawn from the testimony, that this court should not disturb the action of the trial court in denying the motion.

As heretofore stated, the trial court granted defendants' motion for a new trial on errors of law alone. These alleged errors, as reflected by the briefs, pertain to two matters: first, alleged errors in instructions to the jury; and, second, the refusal of the trial court to permit expert testimony as to the condition of the shoulder west of the highway and the safety and practicability of defendant parking his truck thereon.

The following instruction was requested by the defendants and was refused by the court: "You are further instructed that in order to warrant a finding by you that negligence or an act not amounting to wanton wrong is the proximate cause of an injury, it must not only appear that the injury is the natural and probable consequence of the negligent and wrongful act, but that it ought to have been foreseen in the light of attending circumstances."

The court, however, did instruct the jury as follows: "Negligence, to be actionable, must be a proximate cause of the accident and injuries. The proximate cause of an injury is that which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injuries. It may operate directly or by putting intervening agencies in motion."

Defendants contend that the instruction on proximate cause given, left out the element of foreseeableness, and that they were prejudiced by the refusal to give their instruction supplying that element. They cite in support of their position Johnson v. Union Furniture Co., supra; Newman v. Steuernagel, 132 Cal.App. 417, 22 P.2d 780, and two out-of-state cases.

It is their contention that in order for an act of negligence on the part of a defendant to be a proximate cause of an injury it must appear that the injury was the natural and probable consequence of such act of negligence and that the party committing the act ought in reason to have foreseen the consequences in the light of attending circumstances.

It is true that the instructions on proximate cause failed specifically to include foreseeableness as an element of proximate cause.

Plaintiff concedes that the refused instruction is a proper one but contends that had it been given by the court it would have been merely an explanation of the instruction which was given on the subject. In this connection they direct attention to the case of Baillargeon v. Myers, 180 Cal. 504, 182 P. 37, where a definition of proximate cause substantially identical with that given here was designated as "satisfactory" by the Supreme Court and to the case of Queirolo v. Pacific Gas & Electric Co., 114 Cal.App. 610, 300 P. 487, 491, where the court instructed the jury as follows: "I instruct you that the proximate cause must be understood to be that which in the natural and continuous sequence, unbroken by any new independent cause, produces that event and without which the event would not occur."

In the latter case an instruction was refused which stated the test by which to determine the question of proximate cause by defining natural and probable consequences of a negligent act or omission as those which ought to have been foreseen or which could reasonably have been anticipated.

In commenting upon the propriety of the court's refusal to clarify or elucidate upon the meaning of the instruction last quoted the court held that the failure to give the requested instruction was not prejudicial error and used the following language: "Appellant concedes the correctness of this instruction, but complains that another offered by it, stating the test by which to determine the question of proximate cause, was improperly rejected. To constitute proximate cause, the injury must have been the natural and probable consequence of the negligent act (Williams v. San Francisco & N. W. R. Co., 6 Cal.App. 715, 93 P. 122; Marton v. Jones, 44 Cal. App. 299, 186 P. 410; and it has been held that the consequence must be one which in the light of the circumstances an ordinarily prudent man ought reasonably to have foreseen might probably occur as the result of his negligence. (Benson v. Central Pac. Co., 98 Cal. 45, 32 P. 809, 33 P. 206; Marton v. Jones, supra; Henry v. Southern Pac. Co., 50 Cal. 176.) As has been stated, the latter rule is usually given in connection with the first as explanatory of it; that is to say, the natural and probable consequences of a negligent act or omission are those which ought to have been foreseen or could reasonably have been anticipated. 45 Cor.Jur., 'Negligence,' § 483, pp. 913, 917. The instruction given has, however, been approved as a satisfactory definition (Baillargeon v. Myers, 180 Cal. 504, 182 P. 37); and, while the offered instruction correctly explained the rule and might properly have been given, we cannot say that its refusal was prejudicially erroneous."

One distinction clearly appears between the situation confronting us and the situation in the Queirolo case. Here the trial court granted a new trial and we must determine whether its action in so doing was an abuse of discretion whereas there the appeal was by the defendant from the judgment.

[8, 9] It is fundamental that where the trial court grants a new trial on the ground of errors in instructions its conclusions will not be disturbed unless it appears that its discretion has been abused. Pozzobon v. O'Donnell, 1 Cal.App.2d 151, 36 P.2d 236; Pettigrew v. O'Donnell, 32 Cal. App.2d 502, 90 P.2d 93; Nance v. Fresno City Lines, Inc., 44 Cal.App.2d 868, 113 P. 2d 244. However, here a somewhat different question is presented in that there is no contention that the instruction on proximate cause did not properly state the rule but rather that the error occurred in failure to give an instruction, the effect of which was merely to explain to the jury the rule correctly laid down in the

given instruction. We must conclude, however, that the trial court was in a better position to determine whether a miscarriage of justice resulted from its failure to make the explanation and, as was said in Pettigrew v. O'Donnell, supra, "so long as the case presents an instance showing a reasonable or even fairly debatable justification for the order, such action will not be set aside on appeal."

[10] In view of the foregoing we need dwell only briefly upon the other errors of law contended for by the defendants, but since any question should be avoided on the new trial, we will briefly allude to another instruction complained of. The court instructed the jury as follows: "You are instructed that one who parks his truck upon the paved or main traveled portion of a highway is prima facie a violator of the law, and it is incumbent upon him to show affirmatively that it was necessary to so park it at the time and place. It is not the duty of the plaintiff in a collision under such circumstances to show that such parking was not necessary, but it is the duty of the defendant to bring himself within the exception provided by the statute, as given to you in other instructions."

We are of the opinion that this instruction properly states the rule. In Casey v. Gritsch, 1 Cal.App.2d 206, 36 P.2d 696, and Smarda v. Fruit Growers' Supply Co., 1 Cal.App.2d 265, 36 P.2d 701, almost the identical language was used by the court. Defendants contend, however, that the instruction requires the defendant to prove that it was necessary for him to park on the highway whereas the statute (sec. 582, Vehicle Code) enjoins a parking on the highway when it is practicable to park off the highway. We must assume, however, that in both Casey v. Gritsch and Smarda v. Fruit Growers' Supply Co., supra, the word "necessary" was used advisedly and as a synonym for the word "practicable." We can find no error in this instruction.

The last specification of error, so far as reflected in the briefs, has to do with the refusal of the trial court to permit expert testimony as to whether the shoulder on the west side of the highway could safely carry defendants' truck and furthermore whether it was practicable to drive such truck onto the shoulder at the scene of the accident.

[11-13] We believe the court's original ruling was correct. The physical conditions were such as to be observable to anyone at the scene of the accident. Whether or not the condition described was such as to render the shoulder unfit to carry the defendants' truck or made it impracticable to drive on the shoulder was a matter of such common knowledge that the question was one of fact to be determined by the jurors without the aid of expert testimony. The expert evidence, if allowed, would be tantamount to a declaration by the trial court that the jury might side-step its duty of judging an ultimate fact and accept the judgment of the expert. Where there is clear evidence as to the physical condition existing, expert testimony is unnecessary for the jury is as competent to draw a conclusion from the physical facts as is the so-called expert. Furthermore, the record before us discloses that defendants objected to expert testimony concerning the practicability of parking on the shoulder when such evidence was offered by the plaintiff, and therefore it is difficult to see how they can complain because the court ruled in accordance with their own theory. The text writer in 3 Am.Jur., p. 432, succinctly states the rule as follows: "* * * a party cannot complain of the exclusion of evidence and of a consequent defect in the proof if it was excluded at his request. Neither can he complain of the exclusion of evidence offered by himself, where he has successfully objected to the admission of evidence of the same character offered by the adverse party."

No other matters require attention.

Both of the orders appealed from are affirmed.

BARNARD, P. J., and MARKS, J., concurred.

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20 Cal.2d 133

CHELEDEN v. STATE BAR OF CALIFORNIA.

S. F. 16659.

Supreme Court of California.

April 2, 1942.

1. Attorney and client 🔑53(1)

In disciplinary proceeding, Supreme Court considered attorney's prior record in reviewing a recommendation of disbarment.

2. Attorney and client 🔑53(2)

Evidence showing that attorney had frequent difficulties with his clients concerning money transactions and that he failed to give reasonably prompt attention to matters confided to his care warranted disbarment.

In Bank.

Petition by Algerdas N. Cheleden to review the action of the State Bar of California in recommending petitioner's disbarment.

Ordered that petitioner be disbarred.

Carey Van Fleet and Alfred J. Hennessy, both of San Francisco, for petitioner.

W. Eugene Craven, of Merced, and Joseph J. Webb, of San Francisco, for respondent.

PER CURIAM.

By this proceeding petitioner seeks to have reviewed the recommendation of the Board of Governors of the State Bar that he be disbarred from the practice of the law by reason of conduct involving moral turpitude, and of violation of his oath and duties as an attorney at law. The proceedings heretofore had were based on six separate orders to show cause, which were issued during the period from February 16, 1940, to December 9, 1940. In the aggregate eight charges were embraced therein, each containing an accusation of professional misconduct by petitioner.

On May 8, 1940, petitioner entered a plea of guilty to a charge of petty theft, a misdemeanor involving moral turpitude. He was convicted, but was thereafter granted probation for the period of one year. On receipt of a certified copy of the record of conviction on such charge, this court on January 23, 1941, entered an order by which petitioner was suspended from the practice of the law until further order of the court. Following such proceeding, the State Bar conducted an independent investigation with respect to the misconduct with which petitioner was charged in the several orders to show cause. After hearings were had thereon, the examining committee found petitioner guilty of all the charges except two which were embraced in Proceeding No. 1261 and which were subsequently dismissed. Thereafter the Board of Governors adopted the findings thus made and approved the recommendation of the examining committee that petitioner be disbarred.

The factual situations on which the several charges were found to be sustained are hereinafter referred to, as follows:

S. F. No. 1246 Petty Theft Charge.

On or about December 4, 1939, petitioner obtained from one Cameron, the barkeeper of a liquor tavern in the town of San Mateo, the sum of $15, for which he gave a check in that amount signed by him as drawer. At the hearings had in these proceedings, petitioner admitted that at the time he cashed the check he had no funds on deposit in the bank on which it was drawn, and claimed it was intended to constitute merely an evidence of indebtedness in the nature of an "I. O. U." Cameron testified that such was the understanding, although he admitted the check was placed in the cash drawer with other receipts and that on the following day it was endorsed and deposited in the bank together with other currency and checks. The bank refused to honor the check and it was returned to the owner of the tavern. Petitioner was requested to repay the sum of $15, which he failed to do, and on March 16, 1940, at the instance of Cameron, who laid a complaint before the district attorney of San Mateo County, petitioner was charged with a violation of section 476a of the Penal Code. Thereafter, and on May 8, 1940, the charge was dismissed and a new complaint charging a violation of section 484 of the Penal Code (petty theft) was issued against petitioner. He entered a plea of guilty to the charge and was convicted, but was granted probation on condition that he make restitution of the sum of $15. Petitioner testified that he repaid such sum and that he had entered a plea of guilty in order to avoid being tried in the superior court. The order of suspension by this court, heretofore referred to, was based on such conviction.

S. F. No. 1246 Second Count.

On March 12, 1940, petitioner visited a restaurant and bar in Burlingame, California, and in the presence of the bartender, R. E. Burkhead, he wrote a check in the sum of $25 which he made payable to himself, signing the name of Stephen Von Nagy as the drawer thereof. He endorsed the check and presented it to Burkhead, the latter testifying that petitioner told him he was the attorney for Von Nagy, who was out of town, and that he was authorized to draw checks on Von Nagy's account. Burkhead cashed the check for petitioner and it was deposited in the bank the following day, but in due course was returned by the bank for lack of an account in the name of Von Nagy. Thereupon petitioner was requested to repay the $25 and on his failure to do so Burkhead thereafter discussed the matter with the district attorney of San Mateo County, although no charges were brought against petitioner who later redeemed the check. Petitioner testified he had received Von Nagy's permission over the telephone to use the latter's name in signing a check; that it was not intended that the check would be deposited in the bank but that it was to be held as a memorandum of indebtedness until petitioner repaid the $25. According to Von Nagy's testimony, petitioner had previously represented him in two legal matters, and on one occasion during a period of time in which he owed petitioner the sum of about $35 the latter had telephoned him and asked permission to use his name for the purpose of raising some money. He testified that he gave petitioner such permission but was not informed of the manner in which his name would be used; that at no time had he authorized petitioner or anyone else to sign his name to a check, and that he had no account in the bank on which such check was drawn.

S. F. No. 1235 The Pulley Matter.

On or about June 26, 1940, petitioner entered into an agreement to represent William C. Pulley, who was then awaiting trial in the federal court on a charge of forgery. At that time petitioner was paid the sum of $50 and, Pulley contended, it was understood he was to receive another $50 if an acquittal were secured on the criminal charges. However, on the following day petitioner asked for and received from Pulley an additional $50 which he claimed would be required for the services of a handwriting expert, one Inspector LaTulipe. Petitioner then signed a written receipt indicating he had received the sum of $50 as a retainer fee and the $50 intended for the services of the handwriting expert, also that he was to receive another $50 if Pulley were acquitted on the criminal charges. Petitioner did not engage the services of LaTulipe or of any other handwriting expert, nor did he offer to return to Pulley the $50 he had received for such purpose. Pulley testified that a few days after he had given petitioner the second $50 he asked him if LaTulipe had been engaged to do the work, to which petitioner responded in the affirmative, stating further that LaTulipe had expressed the opinion that the handwriting on the instruments assertedly forged by Pulley was not in fact his handwriting and that LaTulipe would so testify at the trial. Mrs. Pulley testified that petitioner told her he had talked with LaTulipe and had paid him the $50, but that LaTulipe had stated he was too busy to take the case. Petitioner denied having told either Pulley or his wife that he had talked with LaTulipe—contending he had ascertained the services of LaTulipe were not available, and that he therefore attempted to secure the services of another handwriting expert. He stated that he had kept the $50 which was intended to be expended for La Tulipe's services for the reason that such sum was due him as a part of his fee (which he testified was the sum of $150), although, he asserted, he had intended to advance the $50 for LaTulipe's services had he been able to secure them. He stated that the receipt which he had signed to the contrary "did not mean anything." On July 3, 1940, petitioner made another demand upon Pulley for $50, assertedly required for the purpose—as testified to by Pulley and his wife—of defraying the expenses of entertaining certain federal investigators who, petitioner stated, were acting for the government in connection with Pulley's case. Pulley refused to advance the money requested. Petitioner denied that he requested the $50 for the purpose mentioned, but stated that such sum was due him as the balance of his fee, which he claimed he was entitled to receive at that time because of certain misstatements Pulley had made to him in connection with his case. On July 11, 1940, Pulley made a complaint concerning petitioner's conduct to United States District Judge Roche, before whom his case was pending, and at a hearing held on the charges made against him petitioner agreed to withdraw as Pulley's attorney and to refund to the latter, within a stated period, the sum of $100. The money was not so refunded and on July 27, 1940, Judge Roche made an order by which petitioner was denied the right to appear in that court as an attorney until further order of the court.

S. F. No. 1201 The Ruelle Matter.

On September 15, 1939, petitioner agreed to institute an action on behalf of Mrs. Ora Ruelle, who resided in Mendocino County, to recover possession of a tractor and certain other farming equipment belonging to her, which assertedly had been wrongfully seized under judicial process. At the outset Mrs. Ruelle paid him the sum of $100, with the understanding that the action would be filed immediately. During the period from September 15, 1939, to February 1, 1940, she wrote petitioner several letters and made frequent trips to his office in San Francisco for the purpose of urging him to file her action. On December 11, 1940, upon his representation that $25 was needed in connection with bonds to be used in the action, she paid him such additional sum. The money was not so used, nor was it returned to her. Contrary to her claim in that respect petitioner testified that after he had received the $25 Mrs. Ruelle had instructed him not to file bonds in the action, but had told him he could retain the money to apply on his fee. On each of at least four occasions prior to February 1, 1940, petitioner sent a telegram to Mrs. Ruelle stating that he would file the complaint in her action on a definite date, but in each instance he failed to do so. On February 1, 1940, Mrs. Ruelle lodged charges of misconduct against petitioner with the State Bar. However, on that day petitioner filed the complaint in Mrs. Ruelle's case and thereafter, on his representation to her that he would proceed promptly with the prosecution thereof, and at his request, she withdrew the charges she had made against him. In due course, a demurrer to the complaint was sustained with leave to amend. Petitioner filed no amended complaint and a default was taken against Mrs. Ruelle. She then secured the services of another attorney, and as a result of his efforts the default was set aside. Petitioner claimed the delay in filing the complaint was due to his efforts towards securing a settlement. However, the evidence showed that on December 13, 1939, Mrs. Ruelle had instructed him to file the action immediately, and that thereafter his delay in the matter was contrary to his client's instructions. He failed to advance any meritorious reason for having permitted the default to be entered against his client—the evidence indicating that at the time the default was entered petitioner was the attorney of record for Mrs. Ruelle.

S. F. No. 1202 DeBarbe Matter.

On September 28, 1939, petitioner was paid the sum of $100 by J. J. DeBarbe of the city of Santa Rosa, under an agreement that he was to file bankruptcy proceedings in DeBarbe's behalf. There was evidence to show that on such occasion petitioner was given the names of the creditors and full information with respect to the financial status of his client, and that it was understood the necessary papers would be ready for filing within a period of two weeks. During the following four months DeBarbe made twelve trips from Santa Rosa to petitioner's office in San Francisco for the purpose of inquiring with regard to the progress of the bankruptcy matter and on each occasion, DeBarbe stated, petitioner informed him the papers would be ready for filing in about two weeks. On February 1, 1940, DeBarbe lodged a complaint against petitioner with the State Bar. On February 14, after petitioner had learned of the complaint so made, he prepared a petition in bankruptcy on behalf of DeBarbe which the latter signed. Petitioner then typed a letter to the State Bar requesting dismissal of the proceedings against him and, at petitioner's request, DeBarbe signed such letter. In defense of the charge of neglect in this matter petitioner claimed the delay in preparing the necessary papers was due to the fact that he had not been furnished with all the required information with respect to DeBarbe's financial status. Petitioner contended also that the sum of $100 which had been paid to him on September 28 was not advanced by DeBarbe but by a friend of the latter, and that such sum was intended to serve as partial payment for prior services assertedly performed by petitioner on behalf of DeBarbe. No substantial evidence was adduced to support petitioner's claims in either of those respects.

S. F. No. 1238 The Kenyon Matter.

On July 8, 1940, petitioner was engaged by Mrs. Frances Kenyon to represent her in divorce proceedings. She testified he was to prepare the necessary papers the following day; that it was agreed his fee would be $65, including costs, and on that date she paid him the sum of $25 on account of his fee (which he told her she could pay in installments); and that she thereupon signed a verification of the proposed complaint and supplied him with the facts on which she predicated her right to a divorce. Mrs. Kenyon further stated that on July 12, in response to petitioner's request, she paid him the sum of $5, and again on July 15, an additional $5, which amounts, he informed her, were required to secure a "certified decree." No action was filed, however, and on July 29, 1940, Mrs. Kenyon made a complaint against petitioner to the State Bar. When petitioner learned of such complaint he telephoned to Mrs. Kenyon and stated he would file the action without further delay. She then informed him she did not desire to have him represent her further, whereupon he promised to immediately refund the moneys paid to him in the sum of $35. However, he failed to make such repayment then or at any time thereafter. According to Mrs. Kenyon's testimony, petitioner told her it would not be necessary for her to appear at the preliminary hearing before the State Bar, and intimated that if she did appear he would cause trouble for her. Petitioner contended it was understood he was to receive the entire sum of $65 before he commenced the divorce proceedings, and that the initial payment of $25 and the additional $10 which Mrs. Kenyon later paid him were to be credited as part of his fee. He further contended he had delayed instituting the proceedings for the reason that the facts on which the action would be predicated were "vague," and that he needed additional factual data before commencing the action, in order to circumvent any possible claim of collusion between Mrs. Kenyon and her husband.

[1] Among other things, some of the matters just related indicate that during a considerable portion of his brief period of practice of the law petitioner has had frequent difficulties with his clients concerning money transactions and his failure to give reasonably prompt attention to the matters confided to his care. His prior record, which this court will consider in proceedings of this character (Hennessy v. State Bar, 18 Cal.2d 685, 117 P.2d 326; Kennedy v. State Bar, 13 Cal.2d 236, 88 P.2d 920; Petersen v. State Bar, 16 Cal.2d 57, 104 P.2d 769), indicates a history of acts and conduct growing out of the attorney and client relationship similar to those last discussed. In each of seven previous instances complaint had been made to the State Bar—although after formal proceedings were had on two such complaints the proceedings were dismissed and on the remaining complaints no formal proceedings were instituted.

[2] Petitioner is thirty-six years of age and was admitted to the practice of the law in October, 1934. He is now employed in the shipyards in the bay region. He is married and has three small children. The present record shows that during the times involved in the charges here under review his family was often in want. It may be, therefore, as is suggested by the record, that in some instances where petitioner failed to return to his clients small sums of money which he had secured from them on the representation that such moneys were needed for costs or expenses incidental to their cases but were not so used, he was motivated by the necessities of his family in retaining such sums. However, on this record such a fact, even if it were satisfactorily established, cannot operate against the making of an order of disbarment at this time where it is shown that in addition to the existing order of suspension an independent investigation by the State Bar has disclosed further acts of professional mis-

conduct which warrant the making of such an order.

It is therefore ordered that petitioner be disbarred from the practice of the law in this state and that his name be stricken from the roll of attorneys, the order to become effective thirty days after the filing of this decision.

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20 Cal.2d 158

PLUMMER v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 16661.

Supreme Court of California.

April 2, 1942.

As Corrected April 21, 1942.

Rehearing Denied April 30, 1942.

1. Divorce 🔑269(2)

The provisions of property settlement agreement, which is complete in itself and is merely referred to in divorce decree or approved by court but not actually made a part of decree, cannot be enforced by contempt proceedings.

2. Divorce 🔑249(2)

The provisions of property settlement agreement become a part of order of court and may be enforced as such, where language of agreement discloses intent to make agreement a part of future divorce decree, and agreement is actually incorporated in decree.

3. Divorce 🔑261

Property settlement agreement provisions can be enforced only if courts, in divorce decree, have ordered performance of such provisions.

4. Divorce 🔑269(2)

Support and maintenance provisions of property settlement agreement, complete in itself, could not be enforced by contempt proceeding, where divorce decree merely recited that agreement was ratified, approved and confirmed, and did not order performance of provisions thereof.

5. Judgment 🔑21

The rights of parties under mandatory judgment, whereby they may be subjected to punishment as contemnors for violation of its provisions, should not rest on conjecture, but language declaring such rights or imposing burdens should be clear.

6. Evidence 🔑5(2)

It is common knowledge that property settlement agreements often contain provisions which cannot be specifically enforced.

7. Divorce 🔑249(2)

Where trial court and parties intend that certain provisions of property settlement agreement should constitute part of divorce decree, trial court should set forth such provisions in decree and provide for their performance.

In Bank.

Mandamus proceeding by Gertrude E. Plummer against the Superior Court of the City and County of San Francisco, and I. L. Harris, Judge thereof, to compel the respondents to hear and determine a contempt proceeding instituted by the petitioner against her former husband.

Writ denied.

Rehearing denied; EDMONDS, J., dissenting.

Albert Picard, of San Francisco, for petitioner.

Phillip Barnett, of San Francisco, for respondent.

CARTER, Justice.

Petitioner has applied for a writ of mandate to compel the respondent Superior Court to hear and determine a contempt proceeding instituted by her against her former husband.

On October 19, 1937, petitioner commenced an action for divorce against her husband, C. T. Plummer, and on the same day the parties entered into an agreement providing for the settlement of their property rights, for stipulated monthly payments to be made by petitioner's husband to her for her support and maintenance, and forever releasing him from any other claims. The agreement recited that the parties had separated about a month before. It provided that Plummer was to pay premiums on a life insurance policy in which petitioner was to have rights "Until the remarriage of first party (petitioner) * * *;" that the monthly payments were for support and maintenance of petitioner and were to continue until she died or remarried; and that neither of the parties should have any claim against the other except as set forth in the agreement and each releases the other from contributing to "her or his maintenance as a wife or husband, as the case may be, during their natural lives * * *;" that it is the intention of the parties to "forever adjust all property rights growing out of said marriage, including the right to support and maintenance." Nothing is expressly stated with reference to the agreement being subject to the approval of the court, its being made a part of a divorce decree, or that a divorce action was contemplated. Petitioner alleged in her complaint in the divorce action: "That prior to the commencement of this action, by a written agreement, plaintiff and defendant settled and adjusted between themselves their respective rights in and to all community property of said marriage, which said settlement plaintiff hereby requests the court to approve and confirm." She prayed for the approval and confirmation of the agreement. The interlocutory decree of divorce entered on November 22, 1937, provided: "It is further ordered, adjudged and decreed that that certain contract dated as of the 19th day of October, 1937, a copy of which is annexed hereto and made a part hereof, wherein the parties hereto agree upon a division of all of their community property be and it is hereby ratified, approved and confirmed." The final decree stated "that that certain contract dated as of the 19th day of October, 1937, a copy of which is annexed to the Interlocutory Decree of Divorce herein, wherein the parties hereto agree upon a division of all of their community property, be and it is hereby ratified, approved and confirmed." Petitioner alleges in her petition and it is not denied that the agreement was made in contemplation of divorce.

Petitioner's husband failing to make the payments as provided in the agreement, she instituted proceedings to have him declared in contempt for such failure. The court issued an order to show cause but dismissed the same at the time fixed for hearing and refused to hear the same on the ground that it was without jurisdiction because there was no order of the court that the payments be made. The issue presented is whether the provision for the monthly payments for support of petitioner is merely a part of a contract between the parties and enforceable only by ordinary contract remedies, or is an operative part of the divorce decrees to the extent that it may be enforced by contempt proceedings.

The problem was first presented for solution by an appellate court of this state in Tripp v. Superior Court, 61 Cal.App. 64, 214 P. 252, where the agreement was made after the divorce action was commenced and recited its commencement and indicated that the agreement was subject to approval of the court. The property rights of the parties were put in issue by the pleadings. The decree stated that the agreement was incorporated therein and it was then set forth in the body of the decree. To the contention that the decree did not order the making of the payments for which provision had been made in the agreement, the court stated at page 67 of 61 Cal.App., at page 253 of 214 P.:

"It is true that neither of the decrees contained such an order in express terms, but we are nevertheless of the opinion that petitioner's contention cannot be upheld. The agreement recited the fact that a divorce action was pending between the parties, and contained a formal stipulation that it should be subject to the approval of the court and that, when so approved, it should be embodied in the decree, in the divorce action. This stipulation surely contemplated that the terms of the agreement, when it should be embodied in the decree, should have the compelling power of the court behind its every covenant. The court had full power to deal with the matters covered by the agreement and to render its judgment thereon, at least to the extent of making proper provision for the support and maintenance of the wife, provided that it were first ascertained that petitioner was guilty of the charges made against him in the divorce action. Notwithstanding this power of the court, the parties undertook to stipulate a decree as to property matters, subject, under the law as well as under the agreement, to the approval of the court. This approval was evidenced by the fact that the agreement was incorporated in terms in both the interlocutory and final decrees, preceded in each instance by the statement that the agreement was made part of the decree. Under these circumstances we are convinced that the terms of the agreement, except in so far as they were executed either before or at the time of the interlocutory decree, became enforceable as mandates of the court." That case was followed by Andrews v. Superior

Court, 103 Cal.App. 360, 284 P. 494, where the agreement was made after the divorce action was commenced; the complaint said nothing concerning the agreement. The decree provided that the agreement theretofore entered into was made a part thereof. The court held that was not sufficient to make the agreement an enforceable part of the decree, stating at page 363 of 103 Cal.App., at page 495 of 284 P.:

"Before proceeding further, it is necessary to determine the legal effect or force of that part of the interlocutory judgment complained of. A close study thereof shows only that a property settlement is made a part and portion of the judgment. The phrases, 'heretofore entered into between plaintiff and defendant,' 'and providing for payments to plaintiff of two hundred ($200.00) dollars per month,' and 'and on file in this case,' clearly are matters only of identification of a certain property settlement, and in no wise state any order for the payment of any sum. The interlocutory judgment contains no order, decree, or judgment for the payment of any sum." In regard to the Tripp case the court said at page 365 of 103 Cal. App., at page 496 of 284 P.: "* * * the court, after setting forth the property settlement in full in the interlocutory judgment, ordered in said judgment 'that said plaintiff shall take all of the community property as set forth in said property settlement and agreement as aforesaid.' Therefore that case is not authority for the contention that a mere incorporation by reference of a property settlement (not set forth in any pleading) in an interlocutory judgment of divorce is equivalent to a direct order for payment in accordance with such property settlement." Next was Ex parte Weiler, 106 Cal.App. 485, 289 P. 645, 646, in which the agreement was made before the divorce action was commenced and said nothing about divorce other than that it was to be referred to in and made a part of any divorce judgment. The complaint asked for an approval of the agreement, and the decree approved it and made it "a part of this decree." The court held that the agreement was enforceable as a part of the decree by contempt proceedings. In Schnerr v. Schnerr, 128 Cal.App. 363, 17 P.2d 749, the agreement was made before the divorce action was commenced and contained no provision that it was to be approved by the court or made a part of a divorce decree. The complaint merely referred to an agreement having been made and the divorce decree approved the agreement. It was held not to be enforceable as part of the decree. In Baxter v. Baxter, 3 Cal.App.2d 676, 40 P.2d 536, 537, the agreement was made the same day the action was commenced; it mentioned a possibility of divorce but no suggestion of approval by the court appeared. The complaint did not mention the agreement; it was introduced as an exhibit. The decree approved the agreement and stated that it "is hereby * * * made a part of this * * * decree." The court held that the agreement was not an enforceable part of the decree stating at page 682 of 3 Cal.App.2d, at page 539 of 40 P. 2d:

"Where a property settlement agreement contains a provision that it shall not go into effect until it is approved by the court, and is therefore rather in the nature of a stipulation of the parties than a final agreement, and the complaint in a divorce action contains the proper allegations and prayer looking toward the settlement of the property rights of the parties, an order of the court that the terms of the contract be carried out will be implied from the incorporation of the agreement in the decree, either bodily or by reference. Tripp v. Superior Court, 61 Cal. App. 64, 214 P. 252, 253; Ex parte Weiler, 106 Cal.App. 485, 289 P. 645, 646. But if the agreement is complete in itself, without reference to action by the court, and the plaintiff does not ask for a property settlement, the court does not, by merely approving the settlement or even by incorporating it in the decree, order the performance of the contract." The agreement in Petry v. Superior Court, 46 Cal. App.2d 756, 759, 116 P.2d 954, 956, was made after the divorce was commenced, and it was introduced into evidence at a default hearing and a request was made by the plaintiff that it be incorporated into the decree. The decree expressly ordered the performance of the agreement, but the court stated the rule to be:

"The mere approval of a property settlement, with nothing further, is not such an order. Miller v. Superior Court, [9 Cal.2d 733, 72 P.2d 868]; Schnerr v. Schnerr, 128 Cal.App. 363, 17 P.2d 749. If an agreement is complete in itself, without reference to action by the court, and the plaintiff does not ask for a property settlement, the court does not, by merely approving the settlement, or even by incorporating it in the decree, order the performance of the contract. Andrews v. Superior Court, 103 Cal.App. 360, 284 P. 494; De Haven v. Superior Court, 114 Cal.App. 253, 300 P. 95. On the other hand, where a property settlement agreement contains a provision that it shall not go into effect until it is approved by the court, and is therefore rather in the nature of a stipulation of the parties than a final agreement, and the complaint in a divorce action contains the proper allegations and prayer looking toward the settlement of the property rights of the parties, an order of the court that the terms of the contract be carried out will be implied from the incorporation of the agreement in the decree, either bodily or by reference." In Miller v. Superior Court, 9 Cal.2d 733, 72 P.2d 868, an agreement was made prior to the institution of the divorce action and contained a clause for monthly payments for maintenance. The complaint requested that the agreement be made a part of the decree; the decree approved the agreement and ordered the payment of the money. Finally, in an endeavor to reconcile and rationalize the various rules theretofore announced, this court set forth the controlling principles in Lazar v. Superior Court, 16 Cal.2d 617, 620, 107 P.2d 249, 250, as follows:

[1-3] "If a property settlement agreement is complete in itself and is merely referred to in a divorce decree or approved by the court but not actually made a part of the decree, then the provisions of such agreement cannot be enforced by contempt proceedings. Baxter v. Baxter, 3 Cal. App.2d 676, 40 P.2d 536; Schnerr v. Schnerr, 128 Cal.App. 363, 17 P.2d 749. On the other hand, if, by the language of the agreement itself, it is shown that the intent was to make the agreement a part of a future divorce decree and, if the agreement is actually incorporated in the decree, then such provisions become a part of the order of the court and may be enforced as such." Whatever may have been the rule before the Lazar case, it is now settled that in order to authorize the enforcement of the provisions of a property settlement agreement by a contempt proceeding, the court must order the performance of such provisions.

[4] Applying the foregoing rule to the case at bar we find that, even if it be assumed that the agreement was so incorporated into the decree that an order for compliance therewith could be implied, there is nothing in the agreement which necessarily shows an intent to make it a part of a future divorce decree. Nothing is said therein regarding the approval of the agreement by the court, nor that it should become a part of a subsequent decree. The reference therein to the payments being for maintenance and support, and a release of all other claims for support are wholly consistent with the agreement being in view of separation with no divorce involved. The agreement is complete in itself. However, the divorce decrees do not order or direct either party to do or perform any act or carry out any provision or stipulation provided for in the agreement. The interlocutory decree simply by way of recital states that a copy of the contract "annexed hereto and made a part hereof * * * is hereby ratified, approved and confirmed." The final decree contains a similar recital.

In the Lazar case, supra, certain provisions of the agreement were set forth in the decree in haec verba following the words "It is ordered, adjudged and decreed" that the acts provided for therein be performed. In other words, the court expressly ordered that such provisions be performed. Such is not the case here, and it cannot be said that it was the intention of either the parties or the court that the provisions of the agreement be made a part of the decrees to the extent they were reduced to a final mandatory judgment, ordering and commanding the performance of certain acts, a failure to perform which would constitute a contempt of court.

[5] The rights of the parties under a mandatory judgment whereby they may be subjected to punishment as contemnors for a violation of its provisions, should not rest upon implication or conjecture, but the language declaring such rights or imposing burdens should be clear, specific and unequivocal so that the parties may not be misled thereby.

[6, 7] Situations may arise where a trial court may be disposed to approve a property settlement agreement in a divorce action, and for the purpose of identifying such agreement, cause the same to be annexed to the interlocutory decree of divorce, but for obvious reasons would refrain from making a mandatory order

that the parties be required to perform each and every provision of such agreement or be subjected to a charge of contempt of court for failure to do so. It is a matter of common knowledge that such agreements often contain provisions which cannot be specifically enforced, and it would be idle for a court to make a mandatory order directing the performance of such provisions. In those cases where it is the intention of the parties and the court to have certain provisions of such an agreement constitute a part of the decree or judgment and made enforceable as such, the court may set forth such provisions in the decree and provide therein that the same be performed. This is the usual practice and when it is followed all doubt as to the effect of such provisions is removed.

No such intention appears from the decrees in the case at bar, and we therefore hold that the provisions of the agreement cannot be enforced by a contempt proceeding.

The peremptory writ of mandate prayed for is denied.

GIBSON, C. J., and SHENK, CURTIS, HOUSER, and TRAYNOR, JJ., concurred.

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20 Cal.2d 82

STRACKE v. FARQUAR, City Clerk.

S. F. 16737.

Supreme Court of California.

March 31, 1942.

Mandamus 🔑16(1)

The city clerk would not be compelled by mandamus to omit names of candidates for councilman from municipal election ballot, where ballot had been printed and distributed to certain voters.

◆

In Bank.

Mandamus proceeding by Walter Stracke against Agnes S. Farquar, as city clerk, etc., to compel the omission of names from a ballot.

Writ denied.

G. H. Van Harvey, of San Francisco, for petitioner.

L. G. Hitchcock, of Santa Rosa, for respondent.

De Meo & De Meo and Clarendon W. Anderson, all of Santa Rosa, Amici Curiae, for respondent.

PER CURIAM.

The petition for a peremptory writ of mandamus to compel the respondent, as City Clerk of Santa Rosa, to omit the names of seven persons as candidates for the office of councilman from the ballot to be used at the municipal election to be held April 7, was denied in the exercise of the discretion of the court for the reason that it appeared from the answer and stipulation of the parties that the ballot already had been printed and distributed to certain voters. Such denial should not be taken or understood as an adjudication in any way of the questions of law presented by the petition.

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20 Cal.2d 77

BECK v. SUPERIOR COURT OF MENDOCINO COUNTY et al.

Sac. 5470.

Supreme Court of California.

March 30, 1942.

1. New trial 🔑157

A motion for new trial is not a motion noticed for hearing under the practice and procedure with reference to motions made on notice by one party to another, but is set for hearing by order of court. Code Civ. Proc. § 661.

2. New trial 🔑114

The order of court setting for hearing a motion for new trial may be made either by the trial judge or a judge acting in his place subject to a continuance for the convenience of the judge who is to hear and determine the motion. Code Civ.Proc. § 661.

3. New trial 🔑155

Under the statute providing for the hearing and determination of motions for new trial, it is not necessary that such a motion be heard on the day first appointed. Code Civ.Proc. § 661.

4. New trial 🔑114

Under the statute providing for the hearing and determination of motions for new trial, where the trial judge is absent from the county on the day set for the hearing thereof, the motion may be heard by another judge qualified to preside in such court, notwithstanding that such other judge may find it necessary or desirable to continue the hearing to a later time. Code Civ. Proc. § 661.

5. New trial 🔑114

Where the trial judge was absent from the county on the day set for hearing of a motion for new trial and the judge of a neighboring county, who was qualified to preside in place of the trial judge under an assignment by the chairman of the judicial counsel, continued the hearing to familiarize himself with the evidence, he was qualified to finally determine the motion notwithstanding that the trial judge was in the county some or all of the time of the subsequent hearing. Code Civ.Proc. § 661.

◆

In Bank.

Writ of Review to Superior Court, Mendocino County; Donald Geary, Judge Assigned.

Proceedings for certiorari by Ethel Beck against the Superior Court of Mendocino County and others to review an order granting a new trial.

Order affirmed.

For prior opinion, see 115 P.2d 201.

William S. Van Dyke and W. H. Brunner, both of Ukiah, for petitioner.

Lilburn Gibson and Mannon & Brazier, all of Ukiah, for respondents.

SHENK, Justice.

By this proceeding in certiorari the petitioner seeks the annulment of an order granting a new trial.

In the matter of the Estate of Chris Norgard, deceased, the petitioner contested the will after probate. The contest was tried in the Superior Court in and for Mendocino County before Judge W. D. L. Held of that county sitting with a jury. A verdict in favor of the contestant was returned by the jury on October 26, 1940, and an order was entered on October 30, revoking the probate of the will. A notice of intention to move for a new trial was filed on November 7. On November 22 Judge Held made and entered in the minutes of the court an order reciting the presence of counsel for both parties and ordering that "the motion for a new trial is hereby set for December 6, 1940."

The minutes of the court of December 6, with Judge Held presiding, show the following: "said matter [Estate of Chris Norgard] is hereby continued to December 9, 1940 for hearing on motion for new trial." On December 9, Judge Donald Geary of the Superior Court in and for Sonoma County was presiding in the Superior Court in Mendocino County in the place of Judge Held, and in turn Judge Held was presiding on the same day in Sonoma County in Judge Geary's place. When the motion for a new trial was called by Judge Geary on December 9, both parties were represented by counsel. The minutes of the court for that day show: "This matter came on for hearing on motion for new trial * * * upon the statement of Judge Geary that Judge Held was supposed to be holding court in Sonoma County, it was stipulated that Judge Held is out of the County. Hearing is hereby continued by consent to December 18, 1940, in order that Judge Geary may read the transcript prepared in this matter." The minutes of December 18 show: "This matter came regularly on for hearing of motion for new trial. * * * Respective counsel stipulated that trial Judge Hon. W. D. L. Held is at this time absent from the County of Mendocino." After argument on that day the motion was submitted for decision. On December 28, Judge Geary signed an order granting a new trial upon the ground of insufficiency of the evidence and other grounds, which order was filed on December 30, 1940. No appeal was taken from this order.

On February 5, 1941, the contestant, petitioner here, filed a notice of motion to vacate the order granting a new trial on the ground "that said order granting a new trial is void as being in excess of the jurisdiction of the Hon. Donald Geary, the Judge who made and entered the same." In his affidavit which accompanied the notice of motion petitioner's counsel alleged that Judge Held was not absent from the County of Mendocino on December 18, 1941, but was merely absent from the city of Ukiah, the county seat, during the morning of that day. On February 10, 1941, the motion to vacate was heard by Judge Geary, affidavits and oral testimony were introduced and received on behalf of the respective parties, and an order was made denying the motion. The present proceeding was then commenced by the petitioner and the writ of certiorari issued.

It further appears from the petition and the return to the writ that when Judge Held called his calendar on December 6, 1940, he did not hear or otherwise entertain the motion for a new trial except to make an order continuing the same to December 9, 1940; that when the motion was called for hearing by Judge Geary on December 9, 1940, the transcript of the evidence taken at the trial was presented to the court for consideration on the motion; that Judge Geary then took note of the size and extent of the transcript so presented and stated that he wanted to read the transcript before he made a ruling on the motion; that in order that he might read the transcript in the meantime the further consideration of the motion was continued to December 18, 1940; that on the latter date Judge Geary heard the argument on the motion and made an order of submission; that counsel for the petitioner saw Judge Held at Ukiah, the county seat of Mendocino County, on that day after the motion for a new trial was submitted for decision to Judge Geary and suspected that Judge Held had been in Mendocino County when the motion was argued and submitted but had no definite information on that subject until January 23, 1941.

The petitioner relies on section 661 of the Code of Civil Procedure which provides in part as follows: "The motion for a new trial shall be heard and determined by the judge who presided at the trial; provided, however, that in case of the inability of such judge or if at the time noticed for hearing thereon he is absent from the county where the trial was had, the same shall be heard and determined by any other judge of the same court. Upon the expiration of the time to file counter-affidavits the clerk forthwith shall call the motion to the attention of the judge who presided at the trial, or the judge acting in his place, as the case may be, and such judge thereupon shall designate the time for oral argument, if any, to be had on said motion."

It is the contention of the petitioner that on the record here presented Judge Geary was not qualified to hear and pass upon the motion for a new trial. In disposing of the contention it is of course taken as a fact that Judge Held was in Mendocino County on December 6, and it will be assumed, notwithstanding the stipulation to the contrary made by counsel for petitioner in open court on December 18, 1940, that Judge Held was not absent from the County of Mendocino on that day. With those facts in view counsel for petitioner insists that under the provisions of section 661 above quoted, Judge Geary had no power to hear and determine the motion.

[1-5] In the consideration of the meaning and effect of the quoted language of section 661 it is at once observed that a motion for a new trial is not such a motion as is "noticed for hearing" under the practice and procedure with reference to motions made on notice by one party to another. Such a motion is not set for hearing on such a notice but is set for hearing by order of court. This order need not be made by the judge who tried the case but may be made by a "judge acting in his place." Whether made by the judge who presided at the trial or the judge acting in his place the time so appointed may not suit the convenience of the judge who is to hear and determine the motion and a continuance may be necessary. There is nothing in the section which requires that the motion be heard on the day first appointed. In other words, as applied to the present proceeding, there is nothing in the section which could have prevented Judge Held from making the order, as he did on December 6, continuing the motion to a later date, and the motion would come on regularly for hearing on such later date before any judge qualified to hear the same. The date to which the motion was continued was December 9. Judge Geary was qualified to preside in the Superior Court in and for Mendocino County on that day under an assignment by the chairman of the Judicial Council. Judge Held was admittedly absent from the county on that day. Judge Geary was therefore qualified to hear the motion on that day and if he had both heard and determined the same on that day no question of his qualifications to do so could properly have arisen. Likewise if Judge Geary actually entered upon the hearing of the motion on that day he had the right to conclude the hearing at a later time even though a continuance for that purpose was found to be necessary or desirable.

The record shows that the hearing on the motion commenced on December 9. The motion was called on that day. The transcript of the evidence taken at the trial was thereupon submitted to the court, and was partially examined by Judge Geary. Because of the rather voluminous record and the fact that the main ground of the motion was the insufficiency of the evidence to support the verdict it was appropriate that the judge should desire to familiarize himself with the record before disposing of the motion. The consideration of the record so submitted to the court on December 9 should be deemed as much a part of the hearing on the motion as the subsequent argument on December 18 to which date the motion was continued for further hearing.

Since, therefore, the hearing on the motion had commenced on December 9, Judge Geary unquestionably had the right to continue the same for further hearing without affecting his qualifications to finally determine the motion notwithstanding the fact that Judge Held might have been within the county during some or all of the time of the subsequent hearing.

The order is affirmed.

GIBSON, C. J., and EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.

20 Cal.2d 124

In re WEAR'S ESTATE.

MILLER et al. v. ROLKIN et al.

S. F. 16301.

Supreme Court of California.

April 2, 1942.

Rehearing Denied April 30, 1942.

1. Executors and administrators 🔑513(9)

The final settlement of an account is conclusive as to all matters necessarily involved therein against all persons interested in the estate, except those under a legal disability. Probate Code, § 931; Code Civ. Proc. § 1911.

2. Executors and administrators 🔑513(9)

Where executor while acting as special administrator pending will contest reported that he and estate each had an interest in the unpaid balance on a note, the decree settling his final account as special administrator was "res judicata" and binding upon all persons concerned in the estate, of the respective interests of executor and estate in the note precluding subsequent dispute of executor's right to withhold his share of the payments on the note as received. Probate Code, § 931; Code Civ.Proc. § 1911.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

3. Executors and administrators 🔑510(13)

Where reversal by District Court of Appeal of order settling executor's account contained no instructions to trial court, the case was returned to that court for a new trial on all issues that might be raised, as though case had never been tried before.

4. Executors and administrators 🔑510(13)

Where decree settling executor's account was reversed without instructions requiring a new trial on all issues that might be raised, executor was not "estopped" from raising plea of res judicata to objections to his account for the first time on such new trial by his acquiescence to appointment of referee in first trial.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

5. Executors and administrators 🔑510(13)

Where settlement of final account of special administrator determined interest of executor and estate in a note, executor's valid plea of res judicata rendered unnecessary consideration of objections to account of executor on ground that executor had filed no claim against estate with reference to the note. Probate Code, § 703.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Warren V. Tryon, Judge.

In the matter of the estate of Katie Richards Wear, deceased. From an order and decree settling the first account of Edward Rolkin as executor of the deceased's will contested by Theodore J. Miller and others, the executor appeals, and after his death pending appeal, Arline M. Rolkin and another, executors of his estate, were substituted as appellants.

Reversed.

Prior opinion, 113 P.2d 732.

Frank J. Mahoney, of San Francisco, for appellants.

James M. Hanley, William B. Hornblower, and Herbert Chamberlin, all of San Francisco, for respondents.

TRAYNOR, Justice.

Mrs. Katie Richards Wear owned certain real property in Sonoma County encumbered by deeds of trust securing promissory notes for $27,800 and by a mortgage securing a note for $3,525. In 1920 she entered into a written contract with Edward Rolkin providing that he would advance the money to purchase these notes and the instruments securing them; that she would sell her property in Sonoma County and apply the money received from the sales in payment of the notes to him; that upon payment of the notes he would receive 25% of all additional proceeds from the sale of the lands, and that she would convey a one-fourth undivided interest to him in any lands that might remain unsold after six years. Pursuant to the agreement, Rolkin purchased the notes and the instruments securing them. In 1922, Mrs. Wear sold certain property in Sonoma County to Thomas H. Corcoran and his wife for $49,000. The purchasers paid $9,000 down and gave a note of $40,000 for the balance, secured by a mortgage and deed of trust. The note, mortgage, and deed of trust were made out and delivered to Rolkin. He in turn executed and delivered to Mrs. Wear a declaration of trust, subsequently recorded, that he held them only as security for the money owed to him by Mrs. Wear. In 1927, according to Rolkin, he entered into an oral agreement with Mrs. Wear whereby she assigned to him a portion of the balance due on the Corcoran note in payment of her indebtedness, and from that time, with her consent, he gave her credit for only her portion of the payments on the note.

Mrs. Wear died in 1930. Her will named Rolkin as executor, and pending a contest of the will, he was appointed special administrator. When the will was admitted to probate in 1932 he was appointed executor. In his final account as special administrator he reported receipts of $5,212.78, disbursements of $2,768.35, and cash on hand of $2,829.43. He also reported that the estate had an interest in the promissory note of Thomas Henry Corcoran and Emily C. Corcoran payable to Edward Rolkin for $40,000; that at the time of decedent's death this note had been reduced by payments on the principal to $26,000, of which $11,954.39 represented decedent's share; and that $3,220 belonging to the estate had been collected since her death. Only the estate's proportionate share of the payments on the note was reported under the purported oral agreement of 1927. All payments from other sources were reported in full. Following a hearing at which respondents Theodore Miller and Harry Miller were represented by one of the attorneys now appearing for them, the probate court found the account to be a full and correct accounting of all money received by Rolkin as special administrator, and of all property of the estate that had come into his possession. It entered a decree approving and settling the account as rendered and ordered that the residue of the estate, remaining in the hands of the special administrator after the payment of fees amounting to $1,300, be distributed to Edward Rolkin, executor. No appeal was taken from the decree.

In 1934 Rolkin filed his first account as executor. He reported the cash on hand belonging to the estate as $1,677.32 and the interest of the estate in the Corcoran note as $8,740. Respondents, legatees under the will, objected to this account contending that the entire balance of the Corcoran note and all payments received thereon belonged to the estate, that Rolkin had previously been paid in full for his indebtedness by Mrs. Wear and therefore had no further interest in the note, and that his failure to file a claim against the estate precluded him from asserting any other indebtedness. Rolkin denied having received any payment for the indebtedness other than Mrs. Wear's oral assignment to him of a portion of the Corcoran note, and contended that under this assignment his share of the payments and unpaid balance did not belong to the estate. An order sustaining the objections to this account was reversed on appeal. In re Wear's Estate, 17 Cal.App.2d 703, 62 P.2d 779.

At the second trial Rolkin contended for the first time that the question of the estate's interest in the Corcoran note and payments thereon was res judicata by virtue of the order settling his final account as special administrator, and objected to the introduction of evidence on the matter on this ground. This objection was overruled. It was then stipulated that the case should be submitted upon the evidence contained in the record on appeal from the order that was reversed, together with the referee's reports made at the first hearing; that the executor had testified that his account was correct; that no claim against the estate had been filed by appellant; and that the plea of res judicata was not prejudiced by the foregoing stipulations.

The lower court decided that the executor's account was incorrect and that an additional $5,773.34 received by him as payment on the Corcoran note and the entire unpaid balance of the note were assets of the estate. It then issued an order settling the account on this basis. The executor appeals from this order on the grounds that the court erroneously rejected the plea of res judicata. Because of his death pending the appeal his executor and executrix have been substituted as appellants in his place.

[1, 2] The final settlement of an account is conclusive as to all matters necessarily involved therein against all persons interested in the estate, except those under a legal disability. Prob.Code, sec. 931; Code Civ.Proc., sec. 1911; In re Rider's Estate, 199 Cal. 742, 251 P. 805; In re Grant's Estate, 131 Cal. 426, 63 P. 731. The respondents contend, however, that the settlement of Rolkin's account as special administrator did not involve a consideration of the rights of the parties under the agreement of January 31, 1920, or of the accounts of Rolkin as trustee, and that these matters were therefore not concluded by the first settlement. They were necessarily decided, however, by the settlement of the earlier account. In that account Rolkin stated that he was the payee of the Corcoran note and indicated that both he and the estate had an interest therein. He set out that at the time of Mrs. Wear's death, only $11,954.39 of the $26,000 balance unpaid on the Corcoran note belonged to her. In the hearing on that account the court had to determine the amount received by Rolkin in payment on the Corcoran note, the amount of these payments to be credited to the estate under his agreement with Mrs. Wear, and the interest of the estate in the unpaid balance of the note. The decree settling the account fixed the interest of the estate in the note, and adjudged the credits given the estate for payments made on this note before the filing of the administrator's account to be correct. The decree therefore involved a determination, binding upon all persons concerned in the estate, of the respective interests of appellant and the estate in the note. In re Hall's Estate, 154 Cal. 527, 533, 98 P. 269; In re Simonton's Estate, 183 Cal. 53, 56, 190 P. 442; Security-First Nat. Bank v. Superior Court, 1 Cal.2d 749, 755, 37 P.2d 69; In re Grant's Estate, supra, 131 Cal. at page 429, 63 P. 731. It necessarily determined that Rolkin had a right to a portion of the payments and unpaid balance separate from the interest of the estate. Since this determination is conclusive, respondents cannot now dispute Rolkin's right to withhold his share of the payments as they are received.

[3-5] Since reversal by the District Court of Appeal of the first order settling the executor's account contained no instructions to the trial court, the case was returned to that court for a new trial on any and all issues that might be raised, just as if it had never been tried before. In re Pusey's Estate, 177 Cal. 367, 370, 170 P. 846; Glassell v. Hansen, 149 Cal. 511, 514, 87 P. 200; Goss v. Security Insurance Co., 2 Cal.App.2d 459, 462, 38 P.2d 188. The appellant was therefore free to raise the issue of res judicata for the first time at the second trial (Ibid.), and was not estopped from asserting the plea by acquiescing in the appointment of a referee in the first trial. Respondents do not claim to have suffered any disadvantage on the retrial by reason of the referee's appointment at the first trial, and the parties stipulated in the second trial that the evidence before the court would not prejudice appellant's plea of res judicata. Since appellants' plea of res judicata is valid, it is unnecessary to consider respondents' contention that appellant could not assert any right to the principal and interest of the Corcoran note without filing a claim against the estate under section 703 of the Probate Code.

The order and decree appealed from are reversed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and CARTER, JJ., concurred.

20 Cal.2d 129

BURNS v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 16643.

Supreme Court of California.

April 2, 1942.

1. Mandamus ⟹4(4)

Where court had denied petitioner's motion to set aside a portion of an order revoking letters of guardianship of the guardian of petitioner's testatrix after court had expressed an opinion that petitioner's pending action against guardian's surety for sums allegedly converted from the estate was barred by limitations, petitioner was not entitled to mandamus to compel court to set the disputed order aside, but was required to await an adverse judgment and prosecute an appeal therefrom. Probate Code, § 1487.

2. Mandamus ⟹4(1)

The proceeding in mandamus may not be employed to review error.

In Bank.

Original application by May G. Burns, as executrix of Mary O'Connor, deceased, for a writ of mandamus to be directed against the Superior Court of the City and County of San Francisco, Franklin A. Griffin, Judge, to compel respondent to set aside a portion of an order in a guardianship matter.

Writ denied.

Jewell Alexander, James M. Thomas, and Redman, Alexander & Bacon, all of San Francisco, for petitioner.

Thomas E. Davis, of San Francisco, for respondents.

SHENK, Justice.

This is a proceeding in mandamus to compel the respondent Superior Court to set aside an order theretofore made by it "revoking" letters of guardianship of the person and estate of Mary O'Connor, duly issued to her brother Joseph P. Donahue.

Joseph P. Donahue was appointed guardian of the person and estate of Mary O'Connor, an incompetent, on May 21, 1930. He filed a bond in the sum of $17,000, executed by the Massachusetts Bonding & Insurance Company as surety. The estate was valued at $60,567.98. He filed four annual accounts and a final account. During the guardianship proceedings he converted to his own use property belonging to the incompetent. In re Estate and Guardianship of O'Connor, 28 Cal. App.2d 527, 83 P.2d 65. On June 29, 1935, he filed a petition praying that Mary O'Connor be restored to competency. The court granted the petition and on July 16, 1935, ordered that "said Mary O'Connor be, and she is hereby, restored to capacity, and that the guardianship of said Mary O'Connor cease." The court also included in the order the following: "that the order heretofore made appointing Joseph P. Donahue guardian of the person and estate of said Mary O'Connor be, and is hereby set aside; that the letters of guardianship issued to said Joseph P. Donahue be and they are hereby revoked, and that said Joseph P. Donahue surrender to the said Mary O'Connor all the estate of said Mary O'Connor, and file herein an account of said estate."

On September 11, 1935, Mary O'Connor filed exceptions to the five accounts claiming that property of the value of $24,185.17 had been misappropriated. A hearing on the accounts was conducted by a referee appointed by the court. The court confirmed the referee's report in part and decreed that Mary O'Connor was entitled to the additional sum of $15,152.70. The court denied her claim for interest. She appealed from that part of the order which denied interest on the additional sum found to be due to her. On appeal it was held she was entitled to interest compounded, and the portion of the order refusing to allow interest was reversed. In re Estate and Guardianship of Mary O'Connor, supra.

The order settling the guardian's final accounts was made on July 1, 1937. That order contained the following provision: "It is also further ordered, adjudged and decreed that * * * upon the filing of vouchers, release or satisfaction therefor, the said guardian be discharged from further liability on his bond given in this proceeding." The guardian appealed from the whole of said order. The order was affirmed on January 31, 1940. In re Estate and Guardianship of Mary O'Connor, 37 Cal.App.2d 63, 98 P.2d 769.

Mary O'Connor died on October 13, 1938. The petitioner is the executrix of her will. On May 3, 1940, the executrix commenced an action in the same court against the Massachusetts Bonding and Insurance Company to recover the principal of the guardian's bond in the sum of $17,000 and interest. That action came on for trial on October 29, 1940. On January 30, 1941, the trial judge announced an opinion that the cause of action of the plaintiff, petitioner herein, was barred by the terms of section 1487 of the Probate Code. On February 27, 1941, the petitioner moved the respondent court in another department and before another judge to set aside that portion of the order of July 16, 1935, which purported to terminate as of that date the entire guardianship proceeding and thus purport to effect a discharge of the guardian as contemplated by section 1487 of the Probate Code, on the ground that the same was in excess of the jurisdiction of the court and void. Counsel for the petitioner notified the trial judge of the pendency of said motion with the request that he defer the making of findings of fact and conclusions of law and the entry of judgment until after the other judge had passed upon the motion. The request was granted. The other judge denied the motion on June 23, 1941. On July 25, 1941, the present proceeding was commenced.

The return to the alternative writ, filed December 2, 1941, discloses that findings of fact and conclusions of law have not been made and filed in the action on the bond, and there is no showing that findings have been waived or judgment entered. Section 1487 of the Probate Code provides: "No action may be maintained against the sureties on a bond given by a guardian unless commenced within three years from the discharge or removal of the guardian * * *."

It is the petitioner's contention that although the order of July 16, 1935, was effective to restore Mary O'Connor to capacity it did not and could not finally discharge the guardian for the reason that the accounts of the guardian had not then been settled; that insofar as said order purported to discharge or remove the guardian as of that date, as contemplated by section 1487, the order to that extent was in excess of the jurisdiction of the court; that the order of July 1st, 1937, which settled the guardian's accounts very properly provided in effect that the guardian should not be discharged until he has filed his "vouchers, release or satisfaction," and that there is no showing that he has ever complied with that part of the order; that the portion of the order of July 16, 1935, which purported to terminate the guardianship proceeding ab initio is void on its face and should be stricken from the order; that the order of the respondent court refusing to strike it is not an appealable order, and that she has no plain, speedy and adequate remedy in the ordinary course of law.

It is the position of the respondents that it is the purpose of the petitioner in this proceeding to have this court construe the portion of the order of July 16, 1935, to which she objects contrary to the construction placed thereon, at least tentatively, by the trial court in the pending action on the bond; that the same question sought to be adjudicated in this proceeding is involved in the action on the bond and that the petitioner's remedy under the authorities is by appeal from any judgment in that case concerning which the petitioner may feel aggrieved.

A case involving a similar situation was recently decided by this Court. Maloney v. Massachusetts Bonding & Insurance Co., 20 Cal.2d 1, 123 P.2d 449. It was there held in effect that a guardian should not be deemed "discharged" or "removed" as contemplated by section 1487 of the Probate Code except by a plain and unequivocal order of the court for that purpose; that later proceedings to settle the guardian's accounts made it clear that orders theretofore made did not in terms effect a discharge or removal of the guardian, and that such orders should be strictly construed to the end that the remedy of the ward for breach of conditions of the guardian's bond be not defeated by lapse of time where final approval of the guardian's accounts within the statutory period showed the default of the guardian and disclosed for the first time that a right of action on the bond had accrued pursuant to section 1486 of the Probate Code.

[1] The contention of the respondents that the remedy of the petitioner is by way of an appeal in the pending action and that she is not, on the facts disclosed, entitled to relief in mandamus must be sustained. The obvious purpose of this proceeding is to obtain a ruling by this court that the order of July 16, 1935, should be so construed as not to be effective as a bar to the cause of action in the suit on the bond, and to compel the elimination therefrom of that portion of the order to which the petitioner objects. The construction of that order and the effectiveness of the objec-

tionable portion thereof are directly involved in that action. A ruling thereon at this time would be a ruling on the precise issue involved in the pending action and, if permitted would, as the petitioner unquestionably desires, necessarily influence any subsequent action of the trial court in said action.

[2] The proceeding in mandamus may not properly be employed to review error. Dankert v. Oroville-Wyandotte Irr. Dist., 211 Cal. 87, 293 P. 785; Grivi v. Superior Court, 3 Cal.2d 463, 45 P.2d 181. Here the trial court has not finally acted in the suit on the bond. Error in that case will not now be anticipated and even if findings of fact, conclusions of law and judgment be made and entered in accordance with the forebodings of the petitioner her appropriate remedy will be by an appeal from that judgment. Petaluma, etc., Water, etc., Dist. v. Superior Court, 194 Cal. 183, 228 P. 24.

The peremptory writ is denied.

GIBSON, C. J., and CURTIS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.

EDMONDS, J., concurred in the judgment.

* * *

20 Cal.2d 118

GORE et al. v. BINGAMAN et al.

S. F. 16287.

Supreme Court of California.
April 2, 1942.

Rehearing Denied April 30, 1942.

1. Appeal and error 🔑14(2)

A final judgment of a superior court under an appellate court's direction is appealable.

2. Appeal and error 🔑1099(1)

Questions of law determined on prior appeal cannot be presented for redetermination on a subsequent appeal.

3. Appeal and error 🔑1096(1)

A second appeal must be limited to questions arising from trial court's actions which were not involved in a prior appeal.

4. Appeal and error 🔑1097(1)

Where a question of law once determined is sought to be relitigated on a second appeal to the same appellate court, the first determination is the "law of the case" and will not be re-examined, in absence of unusual circumstances leading to injustice, even though issue sought to be raised involved jurisdiction of court on prior appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

5. Appeal and error 🔑1097(1)

Generally, questions determined by an intermediate appellate court constitute the "law of the case" after the judgment becomes final, if the party seeking the second appeal failed to challenge the prior determination in the court of last resort, or if the court of last resort refused to review the prior determination of the intermediate appellate court.

6. Appeal and error 🔑1097(1)

The doctrine of the "law of the case" will be applied to decisions of District Courts of appeal after those decisions have become final.

7. Appeal and error 🔑1097(1)

Where defendants permitted District Court of Appeal's decision to become final, without raising a jurisdictional question, determination was the "law of the case" and could not be considered by the Supreme Court on subsequent appeal from judgment of the trial court entered pursuant to remittitur of the District Court of Appeal.

8. Appeal and error 🔑1097(1)

The "law of the case" doctrine is a procedural rule generally followed, not because the court is without power to consider a former determination, but because the orderly processes of judicial procedure require an end to litigation.

9. Courts 🔑486

Where the Supreme Court determined that the law of the case, as laid down by the District Court of Appeal on first appeal, was controlling, appeal from trial court's judgment entered pursuant to remittitur of the District Court of Appeal was transferred by the Supreme Court to the District Court of Appeal. Const. art. 6, § 4a; Rules of Supreme Court and District Courts of Appeal, rule 32.

In Bank.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Eva Gore and others against Joseph W. Bingaman, trustee, etc., and others to quiet title to a share of income from trust property and for a declaratory judgment to establish plaintiffs' rights under a trust. From a judgment of the Superior Court entered pursuant to a remittitur of the District Court of Appeal, the defendants appeal.

Appeal transferred to District Court of Appeal. See 126 P.2d 462.

Fitzgerald, Abbott & Beardsley, C. A. Beardsley, and Clark & Heafey, all of Oakland, for appellants.

Weinmann, Quayle & Berry, of Oakland, and George Olshausen, of San Francisco, for respondents.

GIBSON, Chief Justice.

Plaintiffs brought this action to quiet title to a share of the income from certain trust property and for a declaratory judgment to establish their rights under the terms of the trust, as set forth in a decree of distribution. The trial court rendered a judgment in favor of defendants, and plaintiffs appealed to the District Court of Appeal, First Appellate District. That court reversed the judgment, and thereafter a hearing was denied in this court. See Gore v. Bingaman, 29 Cal.App.2d 460, 85 P.2d 172. The trial court thereupon entered judgment for plaintiffs in accordance with the decision of the District Court of Appeal. Defendants now prosecute this appeal from the judgment of the superior court entered pursuant to the remittitur of the District Court of Appeal.

[1-3] This court has hitherto denied petitions for writs of certiorari and prohibition both of which challenged the judgment of the superior court entered after the remittitur. The denial of these writs was based, in part, upon the ground that defendants had a remedy by appeal. A final judgment entered by a superior court under the direction of an appellate court is appealable. Lambert v. Bates, 148 Cal. 146, 148, 82 P. 767; Randall v. Duff, 107 Cal. 33, 36, 40 P. 20; Klauber v. San Diego St. Car Co., 98 Cal. 105, 109, 32 P. 876. It is true that this right may be a mere naked right of appeal where every issue which might be presented has been determined upon the previous appeal. Lierly v. McEwen, 208 Cal. 645, 646, 283 P. 943. Thus, questions of law which were determined upon the first appeal cannot be presented for a redetermination. Lambert v. Bates, supra; Security-First National Bank v. Marxen, 19 Cal.2d 100, 119 P.2d 131. The second appeal must be limited to questions arising from the action of the trial court which were not involved in the prior appeal. Klauber v. San Diego St. Car Co., supra; Harris v. Hensley, 214 Cal. 420, 422, 6 P.2d 253; Phillips v. Patterson, 34 Cal.App.2d 481, 487, 93 P.2d 807. In this case no claim is made that the superior court did not follow the remittitur. Defendants, appellants herein, contend that the judgment of the superior court is void because it was based solely upon the decision of the District Court of Appeal. That decision, it is contended, was a nullity because the action is a case in equity which should have been appealed directly to the Supreme Court under the constitutional provision conferring exclusive appellate jurisdiction over cases in equity upon this court.

The question thus presented is whether this action is legal or equitable in character within the meaning of the constitutional provision. Where a statutory remedy is involved which was created long after the historic distinctions between actions at law and cases in equity were formulated, there is extreme difficulty in applying the sections of the Constitution basing the division of appellate jurisdiction between the Supreme Court and District Courts of Appeal upon that distinction. We have recently referred to the unfortunate aspects of this constitutional requirement. De Garmo v. Goldman, 19 Cal.2d 755, 123 P.2d 1. Similar considerations make it difficult to determine whether an action for declaratory relief is to be classified as legal or equitable for the purposes of appellate jurisdiction. The code provisions do not characterize the remedy as legal or equitable in this state (Code Civ.Proc., §§ 1060 et seq.), and while authorities agree that its historical sources are almost exclusively equitable, the remedy has been stated to be sui generis rather than strictly legal or equitable. Borchard, Declaratory Judgments [2d ed. 1941], pp. 238, 248, 399, 439. Thus, it has been suggested that where it becomes important under constitutional provisions to classify a particular action for declaratory relief as legal or equitable, the determination should depend upon the issues involved in the particular action. See 13 So.Cal.L.Rev. 170, et seq.; 28 Cal.L.Rev. 638.

[4] The issue sought to be raised upon this appeal, however, is no longer open for determination in this case. Although it may have been decided erroneously, the question whether the present action is legal in nature and properly appealable directly to the district court of appeal is one which was determined by that court upon the prior appeal. As the court said in Clary v. Hoagland, 6 Cal. 685, 688: "The first point decided by any Court, although it may not be in terms, is, that the Court has jurisdiction, otherwise it would not proceed to determine the rights of the parties." See, also, Scrimsher v. Reliance Rock Co., 1 Cal.App.2d 382, 393, 36 P.2d 688. Where a question of law once determined is sought to be relitigated upon a second appeal to the same appellate court it is clearly established that the first determination is the law of the case and will not be re-examined in the absence of unusual circumstances leading to injustice or unfairness even though the issue sought to be raised involves the jurisdiction of the court on the prior appeal. Clary v. Hoagland, supra; Scrimsher v. Reliance Rock Co., supra; Washington Bridge Co. v. Stewart, 44 U.S. 413, 3 How. 413, 424, 11 L.Ed. 658; Lincoln Joint Stock Land Bank v. Brown, 224 Iowa 1256, 278 N.W. 294; Farmers' Bank & Trust Co. v. Stanley, 190 Ky. 762, 228 S.W. 691; Grand Cent. Mining Co. v. Mammoth Mining Co., 36 Utah 364, 104 P. 573, Ann. Cas.1912A, 254; 3 Am.Jur. 552; 5 C.J.S., Appeal and Error, § 1834, p. 1290; Black, Law of Judicial Precedents, p. 278. This is so, even though it is contended that absence of jurisdiction renders the decision on the prior appeal a nullity and ineffective as a determination of any question. See Clary v. Hoagland, supra, 6 Cal. at page 688.

[5] Where the first appeal was decided by an intermediate appellate court and the second appeal is taken to the court of last resort, there is a variance among the courts of different states as to whether the doctrine of law of the case is applicable to the decision of the intermediate appellate court. See, 41 A.L.R. 1078, 118 A.L.R. 1286. In certain states if there is no opportunity to challenge the intermediate appellate court's determination of the first appeal in the higher court, the court of last resort will not consider itself bound by the first decision when the case finally reaches that court. Cf. Wright v. Risser, 378 Ill. 72, 37 N.E.2d 778; Weiner v. Pictorial Paper Package Corp., 303 Mass. 123, 20 N.E.2d 458. It is generally held, however, that questions determined by an intermediate appellate court constitute the law of the case after the judgment becomes final if the party seeking the second appeal failed to challenge the prior determination in the court of last resort (Chandler v. Lafferty, 282 Pa. 550, 128 A. 507; State ex rel. Anderson Motor Serv. Co. v. Public Serv. Comm., 234 Mo.App. 470, 134 S.W.2d 1069, affirmed Mo.Sup., 154 S.W.2d 777) or if the higher court refused to review the prior determination of the intermediate appellate court. Life & Casualty Ins. Co. v. Jett, 175 Tenn. 295, 133 S.W.2d 997; Huntington v. Westerfield, 119 La. 615, 44 So. 317; Adams Express Co. v. Hoeing, 88 Ky. 373, 11 S.W. 205; South Bend Home Tel. Co. v. Beaning, 181 Ind. 586, 105 N.E. 52; 41 A.L.R. 1078; 118 A.L.R. 1286; 5 C.J.S., Appeal and Error, § 1829, p. 1285.

[6, 7] Whatever may be the rule in other jurisdictions it is established in this state that the doctrine of law of the case will be applied to decisions of the District Courts of Appeal after those decisions have become final. Otten v. Spreckels, 183 Cal. 252, 191 P. 11; United Dredging Co. v. Industrial Acc. Comm., 208 Cal. 705, 284 P. 922; Hill v. Maryland Casualty Co., 28 Cal.App. 422, 152 P. 953. "Conceding the doctrine that the law of the case applies only to decisions of a court of last resort, we are nevertheless of the opinion that as to the decision on the former appeal, this court was the court of last resort. While appellant, which was respondent in the former appeal, might have applied to the Supreme Court for a transfer of the case after the rendition of the decision, it did not do so, but rested upon the decision as final." Hill v. Maryland Casualty Co., supra, 28 Cal.App. at page 426, 152 P. at page 955. In this case the question whether the District Court of Appeal had jurisdiction on the prior appeal was not raised. Defendant could have made a motion for a transfer of the case upon the ground that the District Court of Appeal lacked jurisdiction while the appeal was pending in that court. Also, defendant might have based his petition for a hearing in this court upon the ground that no appellate jurisdiction was vested in the District Court of Appeal. Instead, defendant permitted the District Court of Appeal's decision to become final, without raising the jurisdictional question. Under such circumstances, we think the rule

discussed above is applicable and the prior determination of the very question sought to be raised here constitutes the law of the case.

[8] It is true that the law of the case doctrine is a procedural rule which is generally followed, not because the court is without power to reconsider a former determination, but because the orderly processes of judicial procedure require an end to litigation. In the absence of exceptional circumstances of hardship and injustice the need for attributing finality to considered judicial determinations compels adherence to the previous decision. But the rule should never be made the instrument of injustice. Thus, where the controlling rules of law have been altered or clarified in the interval between the first and second appeal and adherence to the previous decision would result in defeating a just cause, it has been held that the court will not hesitate to reconsider its prior determination. See England v. Hospital of Good Samaritan, 14 Cal.2d 791, 795, 97 P.2d 813; 42 Harv.L.Rev. 938. No comparable situation is present in this case. The only ground upon which a re-determination of the jurisdictional question is sought is that if defendant's contentions are sustained upon the second appeal, the case should have been appealed directly to the Supreme Court in the first place. In view of the distribution of appellate jurisdiction in this state, such an argument does not present any element of injustice which impels us to reconsider the prior determination of the issue made by the district court of appeal. This is especially true since appellate jurisdiction may be conferred upon the Supreme Court, where it improperly assumes to hear a law case, or upon a district court of appeal, where it improperly assumes to hear an equity case by the mere procedural formality of an order transferring the cause to the proper court followed by an order transferring the case back to the first court. Constitution, art. VI, §§ 4, 4b, 4c. Under such circumstances there is no fundamental injustice present which requires a re-examination of the decision reached upon the first appeal. Defendants have been deprived of no fundamental rights. As was said in Scrimsher v. Reliance Rock Co., supra, 1 Cal.App.2d at page 393, 36 P.2d at page 693, in holding that the determination of jurisdiction reached upon the first appeal constituted the law of the case, "To hold otherwise * * * would be lending encouragement to a dilatory and highly technical procedure subversive of an effective disposition of an appeal fully briefed and decided on the merits. It would give encouragement to a respondent to await the event of an appeal by arguing the substantive questions involved, and, if dissatisfied with the decision of the court * * * for the first time, raise the question of the jurisdiction of the court of review to entertain the appeal in the first instance. This would certainly give rise to a most chaotic procedure and constitute a stumbling block to the orderly and speedy administration of justice." The merits of defendant's case are not involved and the issue which he seeks to raise concerns nothing more than the proper distribution of appellate business among the courts of the state. See, 2 Am.Jur. 851.

[9] The conclusions which have been reached in this case require us to transfer this appeal to the District Court of Appeal. While examination of the record convinces us that there is no longer any substantial question presented, the conclusion that the law of the case as laid down on the first appeal is controlling means that the second appeal should also have been taken to the District Court of Appeal. Since this appeal is taken to the wrong court, we are required to transfer the cause to a court which does have jurisdiction over the appeal. Constitution, art. VI, § 4a; Rules of the Supreme Court and District Courts of Appeal, XXXII.

The appeal in this case is hereby transferred to the District Court of Appeal, First Appellate District, Division One, in order that the appeal may be disposed of by the proper court.

SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

20 Cal.2d 894

In re Joseph P. LACEY.

S. F. 16221.

Supreme Court of California.
April 2, 1942.

In Bank.

Application for readmission to practice law in this state after disbarment. Granted.

See, also, 11 Cal.2d 699, 81 P.2d 935.

PER CURIAM.

In accordance with the report and recommendation of the Board of Governors of the State Bar of California, it is ordered that Joseph P. Lacey be reinstated as a member of the State Bar of California, upon payment of the fees and taking the oath required by law.

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20 Cal.2d 150

SALOPEK v. SCHOEMANN et al.

S. F. 16285.

Supreme Court of California.

April 2, 1942.

1. Attorney and client 🔑134(1)

An attorney, discharged by client for sufficient cause, is entitled to no more than reasonable value of services rendered before discharge.

2. Attorney and client 🔑77

While procedure to protect client's interest is generally for attorney to decide, client is not without control over objectives to be attained thereby.

3. Attorney and client 🔑76(1)

Where attorney, directed by client to do nothing jeopardizing legacies of client's son under will, procured client's signature to contract obligating attorney to take steps necessary to invalidate will by advising client that son's legacies would not be affected by successful contest of will, client was justified in discharging attorney.

4. Attorney and client 🔑76(1)

Where attorney misstates legal effect of facts or procedure to his client through ignorance, carelessness or mistake and indicates by his advice and pursues course of action which will lead unquestionably to results contrary to client's declared and proper objectives, client is not bound to continue attorney's employment.

5. Attorney and client 🔑76(1)

A client may discharge his attorney at any time, unless attorney's power is coupled with an interest. Code Civ.Proc. § 284.

6. Appeal and error 🔑1122(4)

In action to enforce attorney's lien for services after discharge by client, where facts found supported only a finding that there was sufficient cause for discharge, but trial court's finding was construable as stating that attorney's discharge was without sufficient cause, Supreme Court's conclusion that attorney's discharge was justified could serve as a finding contrary to the trial court's finding. Const. art. 6, § 4¾; Code Civ.Proc. § 956a.

7. Attorney and client 🔑185

An assignee of attorney, justifiably discharged by his client, was entitled to enforce attorney's lien to extent of reasonable value of services performed before discharge.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by E. C. Salopek against Robert Schoemann and others to foreclose a lien for legal services performed by plaintiff's assignor. From a judgment for plaintiff in less than the amount claimed, he appeals.

Affirmed.

Torregano & Stark, August B. Rothschild, and M. C. Symonds, all of San Francisco, for appellant.

C. N. Vavuris and A. G. Simi, both of San Francisco, for respondents.

SHENK, Justice.

The plaintiff, as assignee of J. Maxwell Peyser, an attorney, commenced this action to foreclose a lien asserted under the written agreement of the defendant Robert Schoemann to pay for legal services. The attorney was discharged by his client on the same day the agreement was signed. The court decreed the enforcement of the lien to the extent of the reasonable value of the services performed to the time of discharge. On appeal by the plaintiff it is contended that the attorney was entitled to the enforcement of the lien to the full amount of the contract.

With one exception the correctness of the trial court's findings on material issues is not in dispute. The record shows that Max Schoemann died testate on June 2, 1937, a resident of the city and county of San Francisco, leaving no wife or issue. His next of kin were two brothers, the defendant, Robert Schoemann, who resided in New York; Otto Schoemann, who resided in Switzerland; and a sister Gertrude Horn, who resided in Germany. The will was holographic and was executed on December 13, 1934. It showed that as of that date the decedent was married, and in the will provision was made for a bequest to the wife. By its terms the residue was to be distributed, 10 percent to the brother Otto; 20 percent to the brother Robert; 10 percent to the sister Gertrude; 30 percent to children of Otto; ten percent and fifteen percent respectively to James and Eugene Schoemann, children of Robert Schoemann. Sam M. Schoemann, a cousin, who lived in California, was designated as executor and was left 5 percent of the estate for his services. The will offered for probate disclosed certain interlineations and alterations in pencil. The declaration of the marital status was stricken. The bequest to the wife was marked out with the notation, "Jennie died July 7, 1935." The words and figures "(20%) Twenty percent" in the bequest to Robert Schoemann were drawn through, without the insertion of any substituted figures. The bequest to the sister was apparently raised by alteration to 30 percent of the residue. The testator did not initial or sign the alterations.

The trial court in the present action found that on June 8, 1937, defendant Sam M. Schoemann filed a petition for probate of the will and for the issuance to him of letters testamentary; that on or about June 16, the defendant Robert Schoemann retained J. Maxwell Peyser as his attorney and by contract in writing dated June 21, 1937, agreed to pay him 33⅓ percent of his share of the estate in the event of settlement or 40 percent in the event of trial. A contest of the will was filed by Peyser in the name of Robert Schoemann on June 21, 1937. On that day Robert Schoemann by written notice to Peyser, rescinded the retainer agreement and substituted another attorney in the probate proceedings. The hearing on the petition for probate was noticed for June 22, 1937, and on that day Robert Schoemann filed his consent to the probate of the will reserving the right to apply to the court for "a construction of the erasures, alterations and interlineations" in the will. On July 2, 1937, the will was admitted to probate and letters testamentary issued to Sam M. Schoemann. On July 14, 1937, the executor filed a petition for instructions as to the correct construction of the will for the purpose of computing inheritance taxes and the proper administration of the estate. On January 19, 1938, an agreement was filed that Gertrude Horn should receive 16 percent of the estate, and that Otto and Robert Schoemann should each receive 12 percent of the estate. An order on the petition for instructions was based on this agreement. On February 23, 1938, the plaintiff, assignee of Peyser, commenced the present action to foreclose the lien on 33⅓ percent of Robert Schoemann's interest and obtained an order restraining the distribution of that interest. On February 28, 1938, a decree was entered ordering distribution to Robert Schoemann subject to the action herein and the restraining order. The 12 percent interest of Robert Schoemann amounts to approximately $15,000.

In addition to the foregoing the court found that there were no "false, negligent or fraudulent representations or statements to defendant Robert Schoemann as to the law or facts involved in said defendant's claim to receive a share of the estate of Max Schoemann, deceased, for the purpose of inducing said defendant to retain said J. Maxwell Peyser as his attorney or for any other purpose or at all." The court declared a lien on the funds held by the defendant Sam M. Schoemann for distribution to Robert Schoemann, to the extent of $300 which the court found to be the reasonable value of the services of Peyser to the time of his discharge. The percentage provided by the contract of employment amounts to $5,000.

It is the plaintiff's contention that the foregoing quoted finding is entirely in the attorney's favor and that the only conclusion that can be drawn therefrom is that there was no justification for the rescission of the contract of employment; consequently that he was discharged without cause and was entitled to recover the full amount of the agreed fee (citing Baldwin v. Bennett, 4 Cal. 392; Webb v. Trescony, 76 Cal. 621, 18 P. 796; Bartlett v. Odd Fellows Savings

Bank, 79 Cal. 218, 21 P. 743, 12 Am.St.Rep. 139; Kirk v. Culley, 202 Cal. 501, 261 P. 994; Elconin v. Yalen, 208 Cal. 546, 549, 282 P. 791; Zurich General Accident & Liability Ins. Co., Ltd., v. Kinsler, 12 Cal.2d 98, 81 P.2d 913; Echlin v. Superior Court, 13 Cal.2d 368, at page 375, 90 P.2d 63, 124 A.L.R. 719. The defendants contend that the quoted finding is not supported by the evidence; that the record discloses ample justification for the attorney's discharge, in which event the only question is the reasonable value of his services to the time of discharge.

[1] There seems to be no divergence of authority to the effect that if an attorney is discharged for sufficient cause he is entitled to no more than the reasonable value of his services rendered prior to his discharge. The important and controlling question on the appeal is whether the quoted finding is supported by the evidence. When considered as a finding absolving the attorney of any fraudulent purpose or intent in inducing the contract, it is supported by the evidence; but if it be deemed a finding that his conduct would not justify his discharge it is unsupported.

[2-5] Peyser testified that when Robert Schoemann consulted him and submitted the will to him he advised that the proper procedure would be to file a contest of the will; that if the contest was successful Schoemann would be entitled to one-third of the estate, but that if the contest was unsuccessful and the court determined that the alterations should stand as in accordance with the intention of the testator to cancel the bequests stricken out, 40 percent of the estate would go into the residue and he would still have 13 percent of the estate. He testified that he also advised Robert Schoemann that if the contest was successful his sons' bequests would not be affected. It appeared that before Robert signed the agreement he informed Peyser that he would "rather be killed" than see his boys lose the money left to them by the will. Peyser also testified that his intention was to file the contest as a preliminary step and later to ask for an interpretation of the will. However the agreement signed by Robert Schoemann contained the following: "Second party [Peyser] agrees to institute and prosecute to final judgment all actions and proceedings necessary to declare invalid and to defeat the will of Max Schoemann, deceased, and to recover for First Party all of the estate of Max Schoemann to which he is legally entitled."

It appears beyond dispute that when Peyser became acquainted with the facts and with his client's purpose to do nothing which would prevent his two sons from receiving their legacies, he prepared a contract in which he agreed to prosecute to final judgment all proceedings necessary "to declare invalid and to defeat the will of Max Schoemann, deceased." Peyser knew or should have known that if the will were declared invalid the sons would receive nothing thereunder. Peyser also advised Robert Schoemann that he would have him appointed administrator of the estate, when he knew that Robert was not a resident of the State of California. Peyser also prepared and filed the contest on behalf of Robert Schoemann in which the grounds of contest were alleged to be unsoundness of mind, infirmity of mind and body, lack of due execution, and "that said document by striking a line through the words and figures: '(20%) Twenty percent' in violation of law and not witnessed by the said testator; that said alteration purporting to be a bequest to the petitioner, Robert Schoemann was not the legal act of the said deceased, but was the result of undue influence of certain persons whose names are unknown to this contestant."

On the day the employment agreement was signed and the contract filed, Robert Schoemann showed the document to his sons. They told him that he had been misinformed by Peyser; that if the will were defeated they would receive nothing, and that he could not be appointed administrator because he resided in New York. That same day Robert Schoemann consulted another lawyer to verify these statements and was advised that Peyser had misinformed and misguided him. He immediately gave the notice of rescission.

It is true that the procedure to be pursued in protecting his client's interest is generally for the attorney to decide. Zurich General Accident & Liability Ins. Co., Ltd., v. Kinsler, supra. But this does not mean that the client has no control over the objectives to be attained by the procedure to be adopted. As applied to the present case Robert Schoemann could properly and did in effect direct the attorney to do nothing which would jeopardize the legacies of his sons under the will. Notwithstanding this declared purpose on the part of the client, Peyser charted a course whereby he bound himself and his client to a procedure which if carried to a successful conclusion would defeat that purpose. The contract obligated the attorney to take the steps necessary to have the will invalidated. In this respect he had misinformed and misdirected his client concerning the legal effect of the facts and of the procedure which he had adopted. At the trial Peyser testified that in prescribing the procedure and in filing the contest his intention was merely "to make an appearance in court" or "to force a settlement." But this intention would not excuse the obvious appearances to the contrary resulting from the advice and course of conduct of the attorney. The fact that a different course may have been decided upon at a later date if Peyser's employment had continued would not affect the right of the client to rescind at once. He had the right to act immediately and did so act upon being properly advised that if the will were declared invalid, as contemplated by the contract of employment and the contest just filed, his rights and the rights of his sons would be jeopardized. If an attorney misstates the legal effect of facts or of procedure to his client either through ignorance, carelessness or by mistake, and by his advice indicates and then pursues a course of action which would lead unquestionably to results contrary to the client's declared and proper objectives, the client is not bound to continue the attorney's employment. Indeed, the client may discharge his attorney at any time unless the attorney's power is coupled with an interest. No such interest appears here. § 284, Code Civ. Proc.; Gage v. Atwater, 136 Cal. 170, 68 P. 581; Todd v. Superior Court, 181 Cal. 406, 184 P. 684, 7 A.L.R. 938. But if, as here, he has entered into a contract to compensate the attorney on a contingency basis and discharges him before the services have been completed, he takes the chance that the attorney may claim and establish that he was discharged without sufficient cause. On the other hand if, as here, it develops that the discharge was justified, the attorney has no cause to complain and is fully protected by payment of the reasonable value of his services rendered prior to his discharge.

[6, 7] The finding in question when taken as a finding which would lead to the conclusion that the discharge of the attorney was without sufficient cause is incompatible with the facts as established without conflict in the evidence. Those facts support only a finding that there was sufficient cause for the discharge. Our conclusion in this respect may properly serve as a finding contrary to the finding of the trial court. Const. Art. VI, § 4¾; § 956a, Code Civ.Proc. The trial court, however, correctly concluded that the plaintiff was entitled to enforce the lien to the extent of the reasonable value of the services performed by the attorney to the date of his discharge.

The judgment is affirmed.

CURTIS, EDMONDS, and CARTER, JJ., concurred.

GIBSON, Chief Justice (concurring).

The judgment of the trial court should be affirmed on the ground that the compensation of an attorney employed under a contingent fee contract and discharged without cause should be measured by the reasonable value of the services performed, not by the fee fixed in the contract. The cases in this state allowing recovery of the full contract fee under such circumstances should be overruled. Webb v. Trescony, 76 Cal. 621, 18 P. 796; Zurich General Accident & Liability Ins. Co., Ltd., v. Kinsler, 12 Cal.2d 98, 102, 81 P.2d 913. It is true that a majority of jurisdictions permit such recovery. See cases collected in 136 A.L.R. 242. But a strong and growing minority hold that under a contingent fee contract an attorney may recover only the reasonable value of services rendered by him prior to discharge. Cole v. Myers, 128 Conn. 223, 21 A.2d 396, 136 A.L.R. 226; Hubbard v. Goffinett, 253 Ky. 779, 70 S.W.2d 671; Pye v. Diebold, 204 Minn. 319, 283 N.W. 487; Krippner v. Matz, 205 Minn. 497, 287 N.W. 19; Martin v. Camp, 219 N.Y. 170, 114 N.E. 46, L.R.A. 1917F, 402; Wright v. Johanson, 132 Wash. 682, 233 P. 46; Id., 135 Wash. 696, 236 P. 807; Cavers v. Old Nat. Bank & Union Trust Co., 166 Wash. 449, 7 P.2d 23, and other cases cited 136 A.L.R. 254. Sound reasons of policy and justice support the minority rule and it should be followed by this court. It is recognized as a part of the ethical rules governing the legal profession that an attorney will not sue a client for a fee except to prevent injustice, imposition or fraud. See American Bar Association, Canons of Professional Ethics, Canon 14.

The relation of attorney and client is one of special confidence and trust and the dignity and integrity of the legal profession demand that the interests of the client be fully protected. Tomblin v. Hill, 206 Cal. 689, 693, 275 P. 941; 1 Thornton, Attorneys at Law, 238. Without public confidence in the members of the legal profession which is dependent upon absolute fairness in the dealings between attorney and client, courts cannot function in the proper administration of justice. And inherent in the relationship between attorney and client is the fact that the client must rely almost entirely upon the good faith of the attorney who alone can make an informed estimate of the value of the client's legal right and of the expense and effort necessary to enforce it. These considerations have given rise to the generally accepted rule that a client may discharge his attorney at any time with or without cause. See Gage v. Atwater, 136 Cal. 170, 68 P. 581; Estate of Cazaurang, 1 Cal.2d 712, 36 P.2d 1069; 7 C.J.S., Attorney and Client, § 109, p. 941. But that is not enough. The right to discharge is of little value if the client must risk paying the full contract price for services not rendered upon a determination by a court that the discharge was without legal cause. The client may frequently be forced to choose between continuing the employment of an attorney in whom he has lost faith, or risking the payment of double contingent fees equal to the greater portion of any amount eventually recovered. See Estate of Cazaurang, supra. The uncertain position of the client in such circumstances is illustrated by the record in the present case where the trial court found the discharge was without cause and this court has made a contrary finding and concluded the discharge was justified. Unless a rule is adopted allowing an attorney as full compensation the reasonable value of services rendered to the time of discharge, clients will often feel required to continue in their service attorneys in whose integrity, judgment or capacity they have lost confidence.

The principles involved are well stated in the recent case of Cole v. Myers, 128 Conn. 223, 21 A.2d 396, 399, 136 A.L.R. 226: "An attorney at law is an officer of the court; a minister of justice. He is entitled to fair compensation for his services, but since, because of the highly confidential relationship, the client may discharge him even without just cause, he should receive reasonable compensation for the work he has done up to that point, and not the agreed fee he probably would have earned had he been allowed to continue in his employment. This rule is not unfair to the attorney. He will receive fair compensation for what he has done; his position as an officer of the court does not entitle him to receive payment for services he has not rendered." These considerations are compelling in their application to the case at bar where under the rule of the Zurich case, upon the finding of the trial court that the discharge was without cause, the attorney would recover $5,000 for a few hours' work found to be of the reasonable value of only $300.

TRAYNOR, J., concurred.

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20 Cal.2d 101

NATURAL MILK PRODUCERS ASS'N et al. v. CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 16105.

Supreme Court of California.

April 2, 1942.

As Modified April 21, 1942.

Rehearing Denied April 30, 1942.

1. Municipal corporations 🔑592(1)

Generally, local police regulation in conflict with general police regulation is invalid if passed after general regulation, and is superseded if followed by general regulation, except in case of local law of chartered city dealing with purely municipal affairs. Const. art. 11, §§ 6, 11.

2. Municipal corporations 🔑592(1)

Generally, as respects conflict between general and local law, where Legislature has regulated course of conduct by prohibitory enactments, municipality with subordinate power to act, can make such additional regulations as are appropriate to necessities of locality and are not unreasonable.

3. Municipal corporations 🔑592(1)

Generally, where state law so covers entire field that there is no room for municipal regulation, municipal regulations are necessarily in conflict with state law.

4. Municipal corporations 🔑592(1)

The San Francisco ordinance requiring pasteurization of all except "certified" or "raw" milk is not violative of Agricultural Code permitting both raw and pasteurized Grade A and certified guaranteed milk, since ordinance merely imposes additional restrictions and higher standards. St.1933, pp. 136–139, 149, 150, §§ 484, 487, 488, 490, 585, 587.

See Words and Phrases, Permanent Edition, for all other definitions of "Certified Milk" and "Raw Milk".

5. Municipal corporations 🔑592(1)

A provision in Agricultural Code regulating milk, authorizing municipality to provide nonconflicting additional regulations imposing higher standards will not validate conflicting ordinance, but indicates legislative intent not to occupy the field to exclusion of municipalities. St.1933, p. 130, § 451.

6. Constitutional law 🔑48

A wide discretion is vested in legislative body with respect to whether classification is reasonable and proper, and every presumption is in favor of validity of such a statute.

7. Constitutional law 🔑208(1)

The San Francisco Milk Ordinance is not invalid as making arbitrary and unreasonable distinction between certified milk and guaranteed or Grade A raw milk. St. 1933, p. 136, § 484; Const.Cal. art. 1, § 21; U.S.C.A.Const. Amend. 14.

8. Food 🔑1

The sale and distribution of milk is a lawful business protected by Constitution, but, being vital to public welfare and susceptible of being disease carrier, production and distribution and sale can be strictly regulated under police power.

9. Food 🔑1

The requirement that all milk for human consumption be pasteurized is a proper police regulation.

10. Constitutional law 🔑278(4)

The San Francisco Ordinance requiring pasteurization of all except "certified milk", which is milk in which especial precautions are taken to insure absence of disease and contamination and supervision is by especially qualified experts, is not violative of "due process of law". U.S.C.A.Const. Amend. 14, § 1; Cal.Const. art. 1, § 13.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

11. Constitutional law 🔑45

Legislation with respect to preservation of public health will not be set aside unless legislative discretion is palpably wrong.

12. Food 🔑3

The Milk Commission of San Francisco County Medical Society, which was required to certify raw milk under San Francisco Milk Ordinance, was not "administrative agency" of San Francisco or the state.

See Words and Phrases, Permanent Edition, for all other definitions of "Administrative Agency".

13. Constitutional law 🔑48

A statute should be interpreted in a manner that will avoid its being declared unconstitutional.

14. Constitutional law 🔑60

The San Francisco Milk Ordinance defining certified milk as milk conforming to standards of American Association of Medical Milk Commissioners and bearing certificate of Milk Commission of San Francisco County Medical Society, did not unconstitutionally "delegate legislative powers".

See Words and Phrases, Permanent Edition, for all other definitions of "Delegation of Legislative Power".

15. Food 🔑3

Under San Francisco Milk Ordinance defining certified milk as milk conforming to standards of American Association of Medical Milk Commissioners, standards promulgated by association are presumably established by medical experts.

16. Municipal corporations 🔑121

The authority of Milk Commission of San Francisco County Medical Society to demand and collect inspection fees in connection with certification of milk would not be determined in suit to enjoin enforcement of San Francisco Milk Ordinance, instituted by persons who had not applied for permit to sell certified milk.

In Bank.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by the Natural Milk Producers Association of California and others against the City and County of San Francisco and others to enjoin enforcement of ordinance regulating sale and distribution of milk. From a judgment for the defendants, the plaintiffs appeal.

Affirmed.

Prior opinion, 112 P.2d 930.

Rehearing denied; EDMONDS, J., dissenting.

Philip S. Ehrlich, Albert A. Axelrod, and Julien R. Bauer, all of San Francisco, for appellants.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco, for respondents.

Sullivan, Roche & Johnson, Eustace Cullinan, Jr., Bartley C. Crum, and Pillsbury, Madison & Sutro, all of San Francisco, as amici curiae, on behalf of respondents.

CARTER, Justice.

Plaintiffs appeal from a judgment for defendants in an action to have enjoined the enforcement of an ordinance of the City and County of San Francisco regulating the sale and distribution of milk in that city and county.

Plaintiff's attack on the ordinance is based upon their claim that it is arbitrary and unreasonable, in contravention of their constitutional rights and is in conflict with the state law on the subject covered thereby.

The ordinance contains comprehensive regulations for the sale and distribution of milk for human consumption in the city and county of San Francisco and imposes a penalty for a violation of its provisions. In the prayer of their complaint, plaintiffs ask for an injunction restraining the enforcement of subdivisions 1, 2, 3, 4, 7 and 12 of section 3 of the ordinance, and from preventing them from selling and distributing "guaranteed raw milk." Section 1 of the ordinance authorizes one of the defendants, the Director of Public Health of the City and County of San Francisco, to enforce the ordinance. Section 2 defines the various terms used in the ordinance. Market milk is defined as milk or cream in their natural fluid state as prepared for human consumption. Adulterated, impure, unhealthy and unwholesome milk is defined in part as milk from cows which have not passed the tuberculin test. Section 3 provides in part:

"Market milk for sale and distribution for human consumption in the City and County of San Francisco shall consist of the following grades of milk: (a) certified milk, (b) guaranteed pasteurized milk, (c) Grade A pasteurized milk, and (d) Grade B pasteurized milk, and no other milk shall be sold, offered or exposed for sale, exchanged or delivered for human consumption within the City and County of San Francisco. Provided, that Grade B pasteurized milk shall be sold, offered or exposed for sale, delivered or exchanged only for cooking and baking purposes. Provided further, that nothing herein contained shall prevent the delivery and sale of Raw Guaranteed Milk, Raw Grade A Milk or Raw Grade B Milk to wholesalers or to pasteurization plants for the purpose of pasteurizing the same.

"Subdivision 2. Certified Milk: Certified milk is market milk which conforms to the rules, regulations, methods and standards for the production and distribution of certified milk adopted by the American Association of Medical Milk Commissions and must bear the certification of the Milk Commission of the San Francisco Medical Society. Certified milk must be the produce of a dairy herd that shall consist solely of cows which have passed the tuberculin test in the manner prescribed by said Milk Commission. It must not contain more than 10,000 non-pathogenic bacteria per milliliter of milk, which standard must be attained solely by measures directed towards cleanliness, proper cooling and prompt delivery. Certified milk must contain not less than three and five-tenths (3.5) per cent of milk fat and a minimum of solids not fat of eight and five-tenths (8.5) per cent. Certified milk must be handled and delivered in sealed containers and on ice within thirty hours after its production and in the manner directed by said Milk Commission. The dairy farm milk room, milkers and dairy utensils, etc., must all conform to the requirements of the said Milk Commission.

"Subdivision 3. Guaranteed Milk Pasteurized: Guaranteed pasteurized milk shall conform to the following requirements as a minimum. The health of the cows shall be determined by physical examination at least once each month by an official representative of an approved milk inspection service and by a tuberculin test. It shall be produced on dairies which score not less than ninety per cent on the dairy farm score card adopted by the Department of Agriculture of the State of California. It must be delivered in containers having the pouring lip completely protected from contamination and shall be cooled immediately after being drawn from the cow to fifty degrees Fahrenheit or less, and so maintained until delivered for pasteurization, when it shall contain not more than fifteen thousand non-pathogenic bacteria per milliliter, and not less than three and one-half per cent of milk fat. It must be sold to the consumer within thirty hours after production and shall be labeled to indicate the date of sale to the consumer. All persons who come in contact with the raw guaranteed milk must exercise scrupulous cleanliness and must not be afflicted with any communicable disease or in a condition to disseminate the germs of typhoid fever, tuberculosis, diphtheria or other communicable disease liable to be conveyed by the milk. The absence of such germs in all such persons shall be determined by bacteriological and physical examination under the direction of the Department of Public Health of the City and County of San Francisco, conducted at the time of employment and every six months thereafter in a manner approved by the Department of Agriculture and the Director of Public Health. When pasteurized it shall contain not more than three thousand non-pathogenic bacteria per milliliter at the time of delivery to the consumer.

"Guaranteed milk when raw shall be delivered in sterile containers to pasteurizing plants located in the City and County of San Francisco, to be there pasteurized and thereafter distributed in the manner provided by the regulation of the Director of Health of the City and County of San Francisco.

"Subdivision 4. Grade 'A' Pasteurized Milk: Grade 'A' Pasteurized Milk shall conform to the following requirements. It shall be the produce of healthy cows as determined by physical examination at least once in two months by a veterinarian under the supervision of the Director of Public Health of the City and County of San Francisco and by the tuberculin test by such veterinarian, or by a veterinarian approved by the State Department of Agriculture, and from dairy farms scoring not less than 75 per cent on the score card approved by the Director of Public Health of the City and County of San Francisco. The tuberculin test must be repeated annually if no reacting animals are found in the herd. If reacting animals are found, they must be removed from the herd immediately and the tuberculin test repeated in six months, provided that in the first test the percentage of reacting animals found is less than 10 per cent of the herd. If the percentage of reactors found is greater than 10 per cent, the tuberculin test must be repeated in ninety days.

"All cows are to be fed, watered, housed, and milked under conditions approved by the Director of Public Health.

"All persons who come in contact with the milk must exercise scrupulous cleanliness and must not harbor the germs of typhoid fever, tuberculosis, diptheria or other communicable diseases transmissible in milk. Absence of such diseases shall be determined by bacteriologic and physical examination to the satisfaction of the Director of Public Health.

"Grade 'A' Raw Milk from the dairy farm shall be delivered in sterile containers to the pasteurizing plants located in the City and County of San Francisco, and is to be kept at a temperature of fifty degrees Fahrenheit, or below, until it reaches the pasteurizing plant when it must not contain more than fifty thousand (50,000) non-pathogenic bacteria per milliliter and rapidly cooled after pasteurization to a temperature of fifty (50) degrees Fahrenheit or below, and so maintained to the time of delivery to the ultimate consumer.

"Grade 'A' Pasteurized Milk must not contain more than fifteen thousand (15,000) non-pathogenic bacteria per milliliter at the time of delivery to the ultimate consumer. * * *

"Subdivision 7. Method of Pasteurization: Pasteurizing milk consists of the heating of every portion of the milk to not less than one hundred and forty (140) degrees Fahrenheit nor more than one hundred and forty five (145) degrees Fahrenheit and maintaining same at that temperature for thirty (30) minutes, and immediately cooling thereafter to a temperature of fifty (50) degrees Fahrenheit.

"All milk except certified milk intended for human consumption in San Francisco shall be pasteurized in San Francisco in accordance with the method set forth herein.

"Each pasteurizing plant shall be equipped with a sufficient number of self-registering devices to accurately record the temperature to which and the length of time for which the pasteurized product has been heated. Such record shall be kept for two months and be available for inspection by the Director of the State Department of Agriculture or any of his agents, and also by the Director of Public Health or his representative. * * *

"Subdivision 12. Methods of Serving Milk: When served in any hotel, boarding house, lunch counter, restaurant or other place of public entertainment, market milk shall be served in the original bottle in sizes ½ pints, pints, ⅙ quarts and quarts only, the cap of which shall not be removed except in the presence of the customer or patron; provided, however, that this provision shall not apply to cream so served.

"The bottling of all milk except certified milk is prohibited except in regularly approved and authorized pasteurizing plants.

"It shall be unlawful for any person, firm or corporation to sell, exchange, offer or expose for sale or exchange, or have on hand for sale or exchange or serve in any hotel, boarding house, restaurant, saloon, lunch counter or other place of public entertainment any milk or cream to which any gelatin or other substance, except as provided in the general dairy law of California, has been added to increase the consistency of such milk or cream so as to make it appear richer or of better quality; provided, however, that nothing in this ordinance shall be construed as prohibiting the standardization of milk and cream as provided in this ordinance."

Plaintiff Natural Milk Producers Association of California is a nonprofit cooperative corporation. It is not now engaged in and does not intend to engage in the production or sale of milk, though its members are engaged in that pursuit in California. Plaintiff C. B. Clowes is producing and selling milk in San Joaquin County. Plaintiff R. W. Krobitzsch, now deceased, his legal representatives having been substituted herein in his place, was formerly engaged in selling and distributing guaranteed raw milk in San Francisco, but has sold his business. Clowes, and the successors of Krobitzsch, state that they are desirous of selling and distributing guaranteed raw milk in San Francisco. The latter are fostering a dairy herd for that purpose.

Plaintiff's first contention is that the ordinance conflicts with the state law as embodied in the Agricultural Code and is therefore invalid. That Code contains a comprehensive plan for the regulation of the production, sale and distribution of milk and other dairy products in the state of California. (Agricultural Code, secs. 451–734, St. 1933, pp. 130–167, as amended.)

[1] It is conceded that the city and county of San Francisco possesses power to make and enforce within its limits all such local police, sanitary, and other regulations as are not in conflict with the general laws. (Cal.Const., Art. XI, sec. 11.)

It is true, as a general rule, that when there is a conflict between the local police regulations and the general police regulations of the state, the former is invalid if passed after the general law or is superseded if followed by the latter. In either case the result is the same, the local law has no effective force. There is of course the qualification with respect to chartered cities in regard to local laws dealing with purely municipal affairs, with which we are not here concerned; then the local law prevails. (18 Cal.Jur. 831 et seq.; Cal. Const., Art. XI, secs. 6 and 11.)

Turning to the specific claims of conflict made by plaintiffs, they assert that the Agricultural Code permits the sale and distribution of five *grades* of market milk, namely, certified, guaranteed raw, guaranteed pasteurized, grade A raw, and grade A pasteurized (Agricultural Code, secs. 484, 487, 488); that the ordinance while permitting the sale and distribution of some of those grades *prohibits* the sale and distribution of two grades, that is, guaranteed raw milk and grade A raw milk; that therefore there is a conflict in that under the state law all of the grades may be sold, but on the contrary the ordinance forbids the sale of some of those grades; and that section 451 of the Agricultural Code does not negative such a conflict by permitting municipal regulations to impose higher standards only for the individual grades because it does not authorize the absolute prohibition of the sale of any of the grades.

[2] Independent of section 451 of the Agricultural Code, which we will hereinafter discuss, it has long been the established general rule, in determining whether a conflict exists between a general and local law, that where the legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipal corporation with subordinate power to act in the matter may make such additional regulations in aid and furtherance of the purpose of the general law as may seem appropriate to the necessities of the particular locality and which are not in themselves unreasonable. In re Hoffman, 155 Cal. 114, 99 P. 517, 132 Am.St.Rep. 75; Mann v. Scott, 180 Cal. 550, 182 P. 281;

In re Iverson, 199 Cal. 582, 250 P. 681; Borum v. Graham, 4 Cal.App.2d 331, 40 P.2d 866; Witt v. Klimm, 97 Cal.App. 131, 274 P. 1039.

In the instant case the requirement of the ordinance is, in effect, that no milk for human consumption may be sold in the area, unless it is pasteurized with the single exception of certified milk; certified milk is raw milk. That requirement is clearly an additional regulation relating to the sale and distribution of milk inasmuch as the Agricultural Code provides for the sale of guaranteed raw milk and grade A raw milk. (Agricultural Code, secs. 484, 487, 488.)

[3] Plaintiffs contend, however, that the Agricultural Code so completely occupies the field of regulation relating to the production, sale and distribution of milk for human consumption, that there is no room for the operation of an ordinance of a municipality on the subject. It is the general rule that where the state law so covers the entire field that there is no room for municipal regulation, the latter regulations are necessarily in conflict with the state law. See Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172; Atlas Mixed Mortar Co. v. City of Burbank, 202 Cal. 660, 262 P. 334; Ganley v. Claeys, 2 Cal.2d 266, 40 P.2d 817; Ex parte Grey, 11 Cal.App. 125, 104 P. 476; In re Murphy, 190 Cal. 286, 212 P. 30; In re Mingo, 190 Cal. 769, 214 P. 850, and In re Iverson, supra. The case most closely allied to the instant case is In re Iverson, supra, in which the state prohibition act, containing comprehensive regulation with regard to the sale of intoxicating beverages, provided that prescriptions for the sale of liquor may be filled in quantities not exceeding sixteen ounces of alcoholic liquor. The municipal ordinance in question limited the quantities per prescription to eight ounces. This court held there was no conflict and that the state did not intend to completely occupy the entire field. At page 586 of 199 Cal., at page 682 of 250 P., it stated the rule to be: "The only way the Legislature can inhibit local legislative bodies from enacting rules and police regulations is by the state itself occupying the same legislative field so completely that legislation on the subject by local legislative bodies will necessarily be inconsistent with the state act. It does not follow that because the Legislature has seen fit to make certain general rules applicable in all the cities and elsewhere in the state it has thereby impliedly prohibited the enactment of additional local regulations by municipalities in keeping with the purpose of the general law. So long as the requirements of the municipal ordinance are not in themselves pernicious as being unreasonable or discriminatory, both may stand. There may be different regulations without a conflict. [Cases cited.] Where the Legislature has assumed to regulate a given course of conduct by prohibitory enactments, a municipality with subordinate power to act in the matter may make such new and additional regulations in aid and furtherance of the purposes of the general law as may seem fit and appropriate to the necessities of the particular locality and which are not in themselves unreasonable. * * * Whether the Legislature has undertaken to occupy exclusively a given field of legislation is to be determined in every case upon an analysis of the statute and of the facts and circumstances upon which it was intended to operate."

[4] In the instant case the requirement in the ordinance that only pasteurized (certified excepted) milk may be sold is nothing more than a different and additional regulation. The Agricultural Code permits certified guaranteed milk, both raw and pasteurized, and grade A, both raw and pasteurized. The ordinance merely imposes the additional restriction that the milk, whether it be guaranteed or grade A, must be pasteurized.

[5] Furthermore, that the legislature did not intend to so completely occupy the field that no room was left for municipal regulation is evidenced by section 451 of the Agricultural Code. It provides in part: "No provision of this division, except subdivision (b) of section 458.1, or any rule and regulation of the director is a limitation on the power of a municipality or county to provide for reasonable additional regulations not in conflict therewith requiring standards higher than the minimum requirements for the grades of market milk established in this division." While such a provision will not validate an ordinance if it in fact conflicts with the state law, it is available as an indication that the legislature did not intend to completely occupy the field to the exclusion of municipalities. In re Iverson, supra. Plaintiffs assert, however, that the sole field of operation left by that provision to municipalities is to

impose stricter requirements upon the various grades of milk as established by the Agricultural Code, but does not permit the complete prohibition of the sale of any one of the grades; that the ordinance prohibits the sale of two of the grades of milk set forth in the Agricultural Code, namely guaranteed raw milk and grade A raw milk, which creates a conflict with the provisions of that Code. That argument is very tenuous. We do not believe that that section may be given such a narrow interpretation. It is doubtful that there are more than three grades of milk for human consumption specified in the Agricultural Code, namely, certified, guaranteed and grade A. The latter two grades might be said to be divided into two kinds, raw and pasteurized, the main distinction between grade A raw and grade A pasteurized, for illustration, being the pasteurization. It is true that there is some difference in the requirements between the raw and the pasteurized milk other than pasteurization, but those differences appear to concern matters which have a direct relation to the results accomplished by pasteurization, such as the more frequent examination of the cows in case of raw milk when there is no process by which any bacteria are destroyed. Essentially, the requirement in the ordinance of pasteurization for both the guaranteed and grade A milk is merely a higher standard for the grades which is not in conflict with the state law. That interpretation finds support in sections 490, 585, 587 of the Agricultural Code, which refer to the various grades of milk established. Section 490 provides: "It is unlawful to sell any milk as, or under the representation of, *guaranteed or grade A milk,* except under the supervision of a milk inspection service approved by the director or established and conducted by the director." (Emphasis added.) No mention is made of pasteurized grade A and pasteurized guaranteed milk as being grades of milk. Section 585 dealing with the labeling of milk containers reads: "The *class or grade of all* market milk sold, except in bulk to distributors, the word 'raw' or 'pasteurized,' as the case may be, and the name and address of the producer or original bottler shall at all times appear plainly and in a conspicuous place on, or be securely attached to, every cap, bottle, can or other container." (Emphasis added.) The intimation is clear that pasteurization is an additional requirement within a grade, rather than a designation for an independent grade. Section 587 provides: "Where an approved milk inspection service is maintained as provided in this code, *market milk shall be graded* and designated as follows: 'certified milk,' 'guaranteed milk,' 'grade A milk.'" (Emphasis added.) Note there is no provision that pasteurized and raw guaranteed or grade A milk are separate grades.

Plaintiffs rely upon LaFranchi v. City of Santa Rosa, 8 Cal.2d 331, 65 P.2d 1301, 110 A.L.R. 639. In that case this court gave consideration to an ordinance prohibiting the sale of milk in Santa Rosa unless it was pasteurized in that city. There was a milk inspection service established (with the approval of the state) which embraced within its jurisdiction, that city, also the milk producer's facilities. The producer pasteurized his milk in his own approved plant. It was contended that there was a conflict between the ordinance and the state law, and the court so held but it was primarily concerned with the traffic barrier erected by the restriction on the place of pasteurization and it pointed out that the requirement that the pasteurization be done within the city, was not a higher standard for milk, conceding at page 336 of 8 Cal.2d, at page 1303 of 65 P.2d, 110 A.L.R. 639, however, that: "In considering this phase of the case, however, we may first assume that the municipality may adopt reasonable requirements with regard to the standards of the products which are not inconsistent with the Agricultural Code; that is to say, that the municipality may provide for standards higher than those fixed by the Agricultural Code, although it may not provide for standards below those fixed by the Agricultural Code. In re Hoffman, 155 Cal. 114, 99 P. 517, 132 Am.St.Rep. 75, and In re Iverson, 199 Cal. 582, 250 P. 681. It must also be taken for granted that the municipality may adopt zoning ordinances. Under the allegations of the complaint in the instant cause it appears that the *ordinance here in question does not purport to increase the standards of the product nor relate to a particular portion of the city in which pasteurization plants may be located.*" (Emphasis added.) Such cases as In re Sic, 73 Cal. 142, 14 P. 405, In re Mingo, supra, and Ex parte Daniels, supra, were distinguished by this court in Re Iverson, supra.

[6, 7] Plaintiffs contend that the ordinance is void on the ground that it discriminates in its operation without any reasonable basis for such discrimination contrary

to the constitutional inhibitions (U.S. Const., 14th Amend.; Cal.Const., Art. I, sec. 21.) Their attack is specifically aimed at that part of the ordinance which prohibits the sale of any milk for human consumption in San Francisco other than pasteurized milk with the single exception of certified milk, and imposes penalties for the violation thereof. Certified milk is raw milk and it may be sold under the ordinance. Plaintiffs assert that there is no substantial difference between guaranteed raw milk as defined in the Agricultural Code and certified milk as defined in the ordinance and therefore there is no reasonable basis for forbidding the sale of one and not the other. They concede, however, that if there is a difference then their contention must fail. A comparison of the two standards reveals without doubt that there is a substantial and reasonable difference which is directly related to the public health. To qualify as guaranteed raw milk, the health of the cows must be determined once a month, the milk must be produced on dairies having a score of 90%, it must be bottled on the premises, it must be cooled immediately after being drawn to 50 degrees Fahrenheit or less and so maintained until delivered to the consumer at which time it shall have not more than a 10,000 bacteria count per milliliter, and must be sold within 30 hours and the handlers thereof must be free from disease. The standards for certified milk are quite similar but in addition it is required in the ordinance that it conform "to the rules, regulations, methods and standards for the production * * * of certified milk adopted by the American Association of Medical Milk Commissions and must bear the certificate of the Milk Commission of the San Francisco County Medical Society." It would seem that, whatever may be the rules and regulations of the association, certified milk may be said to be subjected to a more rigid inspection than guaranteed raw milk by persons exceptionally well qualified therefor, that is, physicians and surgeons. Furthermore, the Agricultural Code recognizes certified milk as being in a class by itself. (Agricultural Code, sec. 484.) It must be remembered that a wide discretion is vested in the legislative body with respect to whether a classification is reasonable and proper and every presumption is in favor of the validity of such a statute. 5 Cal.Jur. 832 et seq. We cannot say that the ordinance here is invalid as making an arbitrary and unreasonable distinction between certified milk and guaranteed or grade A raw milk.

[8-11] Plaintiffs invoke the due process clause in their attack upon the ordinance (U.S.Const., 14th Amend., sec. 1; Cal. Const., Art. I, sec. 13.) It is true that the sale and distribution of milk is a lawful business which is protected by the Constitution, both federal and state. But it cannot be doubted that as milk is vital to the welfare of the nation and is susceptible of being a carrier of disease, the production, distribution and sale thereof may be strictly regulated under the police power to safeguard the public health. In re Hoffman, supra; Witt v. Klimm, supra. It has been held repeatedly that it is within the scope of the police power to require, for the protection of the public health, that all milk for human consumption must be pasteurized. Witt v. Klimm, supra; Koy v. Chicago, 263 Ill. 122, 104 N.E. 1104, Ann.Cas. 1915C, 67; City of Phœnix v. Breuninger, 50 Ariz. 372, 72 P.2d 580; Pfeffer v. Milwaukee, 171 Wis. 514, 177 N.W. 850, 10 A. L.R. 128; People v. McGowan, 118 Misc. 828, 195 N.Y.S. 286, 289; Lang's Creamery v. City of Niagara Falls, 224 App.Div. 483, 231 N.Y.S. 368; State v. Edwards, 187 N. C. 259, 121 S.E. 444; Moll v. City of Lockport, 118 Misc. 573, 194 N.Y.S. 250; 18 A. L.R. 246; 42 A.L.R. 558. It cannot be doubted therefore that the requirement that all milk for human consumption be pasteurized is a proper police regulation. The fact that here an exception is made with reference to certified milk does not alter the situation. Certified milk has long been established as milk in which especial precautions are taken to insure absence of disease and contamination, and the supervision is by especially qualified experts. Legislation with respect to preservation of the public health will not be set aside unless the legislative discretion is palpably wrong; this court said in Jardine v. City of Pasadena, 199 Cal. 64, 72, 248 P. 225, 227, 48 A.L.R. 509: " 'Every intendment is to be indulged in, and all doubts resolved in favor of the validity of its action.' The legislative determination of the facts which warrant the action of the legislative body will not be set aside or disregarded by the court unless the legislative discretion is clearly and palpably wrong and such appears to be and is found to be the fact from the evidence educed before the trial court. In re Miller, 162 Cal. 687, 124 P. 427; Stockton, etc., Co. v. [Common Council of City of] Stock-

ton, 41 Cal. 147; Ex parte Tuttle, 91 Cal. 589, 27 P. 933; In re Spencer, 149 Cal. 396, 86 P. 896, 117 Am.St.Rep. 137, 9 Ann.Cas. 1105. Ex parte King, 157 Cal. 161, 106 P. 578." It cannot be said that the city and county of San Francisco had no reasonable grounds for requiring all milk sold therein to be either pasteurized or certified. That other less stringent or different regulations might have sufficed is not our concern; that is a matter lying within the discretion of the legislative body. The ordinance does not prohibit the sale of milk for human consumption in San Francisco, it merely sets forth standards or requirements as to quality that must be met by the milk producers before it may be sold.

[12-15] Plaintiffs urge that there is an unconstitutional delegation of legislative power in that portion of the ordinance dealing with certified milk. Subdivision 2 of section 3 hereinabove set forth is the particular provision which plaintiffs attack. Specifically they assert that the provision "certified milk is market milk which conforms to the rules, regulations, methods and standards * * * adopted by the American Association of Medical Milk Commissions and must bear the certificate of the Milk Commission of the San Francisco County Medical Society" is vulnerable. The American Association of Medical Milk Commissions is a corporation with its principal place of business in New York whose members are the various local milk commissions throughout the nation. The Milk Commission of San Francisco County consists of five members appointed by the County Medical Society, the latter being composed of physicians and surgeons licensed to practice medicine in this state. A fee is charged to those desiring to produce and sell certified milk to cover the costs of inspection, and to purchase the caps from the American Association of Medical Milk Commissions with the trade marked word "certified" thereon to be used on the containers. The Commission legally is not an administrative agency of San Francisco or the state. In conformity with the rule that when it may reasonably be done, a statute should be interpreted in a manner that will avoid its being declared unconstitutional, we believe that the requirement in the ordinance may be said to merely require that certified milk must meet standards established by a private corporation or group who are experts in the field, and that the legislative body was aware of those regulations and standards and by the ordinance merely made them a part thereof. Under that view there is no unlawful delegation of legislative power. The ordinance is not essentially different from the statute requiring that to obtain a license to practice medicine the applicant must produce a diploma from a medical school whose requirements are in no particular less than those prescribed by the Association of American Medical Colleges, a private organization, which was declared to be not an unlawful delegation of power in Ex parte Gerino, 143 Cal. 412, 77 P. 166, 66 L.R.A. 249, and Arwine v. Board of Medical Examiners, 151 Cal. 499, 91 P. 319. It comes within the rule announced in Ex parte Gerino, supra, 143 Cal. at page 418, 77 P. at page 168, 66 L.R.A. 249, as follows: "It being proper for the Legislature to demand some standard of efficiency, as we have seen, we think it is equally within its powers to declare that it shall be the same as that prescribed from time to time by an association composed of colleges devoted to the work of preparing persons for the profession. Evidently the standard of proficiency in scholarship as a preparation, and the particular studies necessary to secure a fair preparation, must change as the discoveries in natural science open new fields of investigation, and suggest or reveal new curative agencies. The Legislature cannot successfully prescribe in advance a standard to meet these new and changing conditions. The method adopted appears to be sufficiently definite to enable all colleges to reach the required standard, when in good faith they desire to do so. The law is as fixed, definite, and certain in this respect as the nature of the subject and the object to be attained will permit; and we do not think it should be held void because it adopts the standard fixed from time to time by those who, it will be presumed, are the most eminent in the profession which it attempts to regulate, and who should be the most interested in maintaining the highest degree of professional proficiency, skill, and training." The standards promulgated by the American Association of Medical Milk Commissions are presumably established by medical experts. See, also, St. Louis, Iron Mountain & S. Ry. Co. v. Taylor, 210 U.S. 281, 28 S.Ct. 616, 52 L.Ed. 1061. The cases of Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947, and Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79

L.Ed. 446, are not in point inasmuch as no standard whatsover was there given by the statute for guidance of those to whom authority was delegated. The regulations and standards provided here for certified milk must be aimed at the procurement of milk free from contamination or other conditions detrimental to health.

[16] It appears from the evidence that in order for a producer to obtain a permit from the Milk Commission of the San Francisco County Medical Society authorizing the sale of certified milk in said city and county, he must permit said Commission to make an inspection of his facilities and the milk produced therefrom and pay certain inspection fees which said Commission has fixed to cover the cost of such inspection. It is contended by plaintiffs that such procedure constitutes a violation of the charter of the City and County of San Francisco, in that section 24 thereof specifically defines the manner of collection of inspection fees and the issuance of permits, and that the Milk Commission of the San Francisco County Medical Society being a nongovernmental body has no authority to collect such fees or issue permits authorizing the sale of certified milk. However, it must be noted that the ordinance here in question contains no provision requiring the payment of fees or other charges to said Milk Commission or any other nongovernmental body. While it does appear from the evidence that fees have been demanded by and paid to said Milk Commission, plaintiffs have not been required to pay any such fees as they have not made application for a permit to sell certified milk in San Francisco. The authority of the Milk Commission to demand and collect inspection fees in connection with the certification of milk is not necessarily involved in this case, as plaintiffs did not apply for a permit or certificate authorizing them to sell certified milk, but by their action they seek to enjoin the enforcement of an ordinance which prevents them from selling and distributing "guaranteed raw milk" in the City and County of San Francisco.

In view of what we have said in the foregoing opinion, it necessarily follows that the ordinance in question is a valid exercise of the police power of the respondent City and County, and the judgment is therefore affirmed.

SHENK, CURTIS, HOUSER, and TRAYNOR, JJ., concurred.

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20 Cal.2d 83

MILLER v. McKINNON et al.

S. F. 16023.

Supreme Court of California.

April 2, 1942.

As Corrected April 20, 1942.

1. Counties 🔑116

Ordinarily, compliance with terms of statute requiring public agency, such as a county, to let certain contracts by competitive bidding, is "mandatory" as to contracts within such terms, and contract made without compliance therewith is void and unenforceable as in excess of agency's power. Pol.Code, § 4041.18.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

2. Counties 🔑125
Municipal corporations 🔑249

Though a person to whom public agency, such as municipal corporation or county, illegally lets contract without competitive bidding, has supplied labor and materials in performance of contract and such agency has received benefits thereof, he has no right of action to recover reasonable value thereof in quantum meruit. Pol.Code, § 4041.18.

3. Counties 🔑116
Evidence 🔑65

Persons dealing with public agency, such as county, are presumed to know law requiring competitive bidding before letting of certain contracts by such agency, and act at their peril in making such contracts without such bidding. Pol.Code, § 4041.18.

4. Counties 🔑196(4)

A county taxpayer has right of action to recover moneys paid to contractor for work and materials furnished county in contravention of statute requiring competitive bidding before letting of contract therefor. Pol.Code, § 4041.18.

5. Estoppel 🔑62(3)

"Estoppel" is not available against a county to defeat recovery from contractor of moneys paid for work and materials furnished county in contravention of statute requiring competitive bidding before letting certain contracts. Pol.Code, § 4041.18.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel"

6. Counties 🔑196(7)

In taxpayer's action to recover money paid by county for repairs and alterations of quarry buildings, allegations of amended complaint that plans and specifications designated such work as one project, including "repairing bunkers, moving and repairing hoists, extending power line", etc., were sufficient to bring work within statute requiring that construction and repair of designated public buildings "or other public buildings" be done under contract let by competitive bidding, as term "public buildings" is not limited to places where public assembles. Pol.Code, § 4041.18.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Building".

7. Statutes 🔑225

The statute providing for letting of contracts by county boards of supervisors for construction and repair of public buildings by competitive bidding, and statute authorizing counties to acquire and operate quarries, must be construed together in determining whether contract for repairs and alterations of county quarry buildings must be so let, and competitive bidding statute is limitation on such other statute. Pol.Code, §§ 4041.18, 4041e.

8. Counties 🔑116

The words "other public buildings" in statute requiring that contracts for construction of wharves, chutes, hospitals, courthouses, jails, etc., "or other public buildings", be let by competitive bidding, if cost thereof exceeds $500, do not refer only to structures of character of those in preceding list. Pol.Code, § 4041.18.

9. Counties 🔑196(7)

In taxpayer's action to recover money paid by county for repair and alteration of quarry buildings and appliances, complaint alleging that plans and specifications designated work as one project stated case within statute requiring that contracts for construction or repair of public buildings be let by competitive bidding, if cost exceeds $500, though it alleged that work was done over period of years, during which numerous items of labor and material were furnished. Pol.Code, § 4041.18.

10. Counties 🔑116

The salutary public policy, declared by statute requiring that construction and repair of county buildings be done by contracts let by competitive bidding when cost exceeds $500, may not be thwarted by splitting a job into many items, each of which calls for expenditure below such amount. Pol.Code, § 4041.18.

11. Counties 🔑196(6)

An action to recover money, paid to partnership by county for repairing bunkers, hoists, etc., in county quarry, on ground of noncompliance with statute requiring that contracts for such work be let by competitive bidding, was properly brought by resident citizen and taxpayer of county on county's behalf against partnership, county, and officers thereof after district attorney's refusal to bring such action, and it was not necessary to prosecute action in county's name. Pol.Code, §§ 4005b, 4041.18.

12. Counties 🔑196(4)

Where a statute makes it imperative duty of specified officer to maintain actions to recover money illegally expended by county officers, refusal or inability of such officer to bring action must be shown before taxpayer's suit for recovery of such money is proper.

13. Pleading 🔑18

In taxpayer's action to recover money illegally paid by county to partnership for repairs and alterations of county rock quarry buildings without letting of contract therefor by competitive bidding, complaint alleging that repairs and alterations constituted one job, cost of which exceeded $500, showed on its face that competitive bidding was necessary and was sufficiently certain. Pol.Code, § 4041.18.

14. Parties 🔑50

In taxpayer's action to recover money illegally expended by county, plaintiff, naming four of five county supervisors as defendants in fourth amended complaint, and alleging therein that named supervisors voted for issuance of county warrants referred to in third amended complaint, substantially complied with condition, imposed by court on plaintiff's right to amend third amended complaint in sustaining demurrers thereto, that plaintiff join as defendants all supervisors who voted for any motion to issue any of such warrants, though third amended complaint alleged that all supervisors voted therefor.

15. Counties 🔑196(6)

All members of county board of supervisors are not "necessary parties defendant" in taxpayer's action to recover county funds illegally expended, as for repairs and alterations of county quarry buildings without letting of contract therefor by competitive bidding. Pol.Code, § 4041.18.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Parties Defendant".

16. Pleading ⚿18

In taxpayer's action to recover money illegally expended by county for repairs and alterations of county quarry buildings, count of complaint, alleging that contractor's bills were padded and included charges for labor and material never performed or furnished, as defendant's contractor and county officers knew, and that claims, on which warrants specifically set forth were based, were not itemized, was not uncertain as not showing which charges were claimed to be exorbitant.

17. Pleading ⚿193(6)

In taxpayer's action to recover money illegally expended by county for repair and alteration of county quarry buildings without letting of contract therefor by competitive bidding, complaint, alleging that all warrants for such expenditures and resolutions authorizing them were part of one transaction, was not demurrable as improperly uniting several causes of action not separately stated, though warrants were issued on 13 different dates. Pol.Code, § 4041.18.

18. Counties ⚿196(7)

In taxpayer's action to recover money illegally expended by county, complaint was not demurrable because demand for repayment of amount expended was not first submitted to Attorney General, with request that he act thereon, as no express imperative duty is imposed on such officer to recover funds illegally expended by county, but such duty is placed on district attorney of county. Pol.Code, §§ 470, 4005b; Const. art. 5, § 21.

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In Bank.

Appeal from Superior Court, Santa Clara County; Warren V. Tryon, Judge Assigned.

Action by J. Lester Miller, as a citizen resident and taxpayer of Santa Clara County, against J. M. McKinnon, a member of the Board of Supervisors of such county, and others, to recover county funds alleged to have been illegally expended. From a judgment of dismissal after sustaining of demurrers to plaintiff's fourth amended complaint without leave to amend, he appeals.

Reversed, with directions.

For prior opinion, see, Cal.App., 115 P. 2d 842.

George F. Sharp, of Oakland, for appellant.

Louis Oneal, Maurice J. Rankin, Duncan Oneal, Bohnett, Hill, Cottrell & Boccardo, Peckham & Peckham, and C. C. Coolidge, all of San Jose, for respondents.

CARTER, Justice.

Plaintiff, as a citizen resident and taxpayer of Santa Clara County, commenced in his name on behalf of the county, an action against a partnership doing business under the name of Nash Englehardt Silva Mfg. Co., and the members thereof, and certain county officers to recover money claimed by him to have been illegally expended by the county and received by the partnership. He also named the county as a defendant. He appeals from a judgment of dismissal entered after demurrers to his fourth amended complaint were sustained without leave to amend.

Plaintiff's fourth amended complaint contains two counts. In the first count, which was directed against the partnership defendant, he alleged that he is a citizen resident and taxpayer of the county; that the county owned real property upon which was situated "certain buildings or structures and a rock quarry"; that as a part of the buildings and attached thereto were "bunkers, hoists, motors, conveyors, crushers, screens, electrical appliances and a steel tower"; that in June, 1934, the board of supervisors of Santa Clara County authorized one of their members, J. M. McKinnon, to obtain assistance from the State Emergency Relief Administration for a project of repair and alteration of said quarry; that plans and specifications were approved by the board for that project of "repairing bunkers, moving and repairing hoists, extending power line, repairing motor, making tunnel and foundation, constructing 140′ x 32″ conveyor and erecting new steel tower," the estimated cost of which was $15,119, the labor cost to be furnished by SERA constituting $8,130 thereof; that thereafter such work was commenced; that the board did not adopt a resolution authorizing the performance of the work, and no bids therefor were called for; that between January 28, 1935, and January 13, 1936, there were issued warrants to the partnership defendant for a part of said work in the sum of $42,151.90; and that the district attorney of Santa Clara County knew of all of these facts but refused to bring an action for the recovery of the money so expended. The prayer of said count is for judgment in the sum of $42,151.90 against the partnership defendant. Thus, in essence this cause of action is one by a taxpayer in his own name on behalf of the county to recover moneys illegally expended, the illegality consisting of the failure to advertise for bids on the work to be performed on behalf of the county.

The second count adopts the foregoing allegations, and further alleges that the county purchasing agent, and quarry superintendent, some of the supervisors, and the partnership defendant conspired to do said work without calling for bids; that the bills of the partnership defendant that were paid were padded and included charges for labor and material in the sum of $17,847.68 which were never performed or furnished, all of which was known by the purchasing agent, superintendent of the quarry, the partnership defendant and supervisor McKinnon but was not known to the other supervisors who relied upon McKinnon's assurance that the claims were proper and voted to issue the warrants; that the district attorney with knowledge of those facts refused to take action to recover the money illegally expended.

Separate special and general demurrers to the plaintiff's third amended complaint were filed by Allegrini, McKinnon, Flood, and the partnership defendant. In the order sustaining those demurrers, leave to amend was conditioned upon plaintiff's joining as defendants the supervisors of Santa Clara County who voted for the issuance of the warrants. Demurrers were likewise interposed to the fourth amended complaint, but it does not appear what ruling was made thereon except the recital in the judgment of dismissal that the demurrers were sustained on December 28, 1937. The judgment of dismissal is dated January 12, 1938.

[1, 2] Ordinarily, compliance with the terms of a statute requiring the letting of certain contracts by a public agency such as a municipal corporation or county by competitive bidding and the advertising for bids is mandatory with respect to those contracts coming within the terms of the statute; a contract made without compliance with the statute is void and unenforceable as being in excess of the agency's power. This court stated in Los Angeles Dredging Co. v. Long Beach, 210 Cal. 348, 353, 291 P. 839, 842, 71 A.L.R. 161, in considering a competitive bidding requirement: "Certain general principles have become well established with respect to municipal contracts, and a brief statement of these principles will serve to narrow the field of our inquiry here. The most important one is that contracts wholly beyond the powers of a municipality are void. They cannot be ratified; no estoppel to deny their validity can be invoked against the municipality; and ordinarily no recovery in quasi contract can be had for work performed under them. It is also settled that the mode of contracting as prescribed by the municipal charter, is the measure of the power to contract; and a contract made in disregard of the prescribed mode is unenforceable." See, also, Reams v. Cooley, 171 Cal. 150, 152 P. 293, Ann.Cas.1917A, 1260; Zottman v. San Francisco, 20 Cal. 96, 81 Am.Dec. 96; Murphy v. Napa County, 20 Cal. 497; Jones v. Southern Pacific Co., 34 Cal.App. 629, 168 P. 586; Matthews v. Town of Livermore, 156 Cal. 294, 104 P. 303; Foxen v. City of Santa Barbara, 166 Cal. 77, 134 P. 1142; Santa Cruz Rock Pavement Co. v. Broderick, 113 Cal. 628, 45 P. 863; City Improvement Co. v. Broderick, 125 Cal. 139, 57 P. 776; Gamewell Fire Alarm Tel. Co. v. Los Angeles, 45 Cal.App. 149, 187 P. 163; Strauch v. San Mateo Junior College Dist., 104 Cal.App. 462, 286 P. 173; Brown v. Bozeman, 138 Cal.App. 133, 32 P.2d 168; Henry Cowell Lime & Cement Co. v. Williams, 182 Cal. 691, 189 P. 838. And even though the person with whom the contract was made has supplied labor and materials in the performance of the contract and the public agency has received the benefits thereof, he has no right of action to recover in quantum meruit the reasonable value thereof. Reams v. Cooley, supra; Zottman v. San Francisco, supra; Gamewell Fire Alarm Tel. Co. v. Los Angeles, supra. The competitive bidding requirement is founded upon a salutary public policy declared by the legislature to protect the taxpayers from fraud, corruption, and carelessness on the part of public officials and the waste and dissipa-

tion of public funds. This court stated in Reams v. Cooley, supra, at page 157 of 171 Cal., at page 295 of 152 P., Ann.Cas. 1917A, 1260: "It is urged in this case, as it invariably is in all such cases, that the application of this rule works a great hardship if the school district may retain the benefit of the work of the contractor and be relieved of liability to compensate him therefor. But the provision of the law limiting the power of school boards to validly contract, except in a prescribed mode, proceeds from a consideration of public policy not peculiar to such boards, but adopted as the policy of the state with reference to inferior boards and public bodies, and it would be difficult to perceive what practical public benefit or result could accrue by legislative limitation or prohibition on the power of such bodies to contract if courts were to allow a recovery where the limitation or prohibition is disregarded; in fact, the plea of hardship urged here was answered in the Zottman case by language as pertinent now as it was then, where the court said: 'It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him; but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with. If he neglect this, or choose to take the hazard, he is a mere volunteer, and suffers only what he ought to have anticipated. If the statute forbids the contract which he has made, he knows it, or ought to know it, before he places his money or services at hazard.'"

[3] Persons dealing with the public agency are presumed to know the law with respect to the requirement of competitive bidding and act at their peril. (See cases cited supra.)

[4] With the principles being as above stated, it inescapably follows that a right of action exists to recover moneys paid to a contractor for work and materials furnished the public agency where they were furnished in contravention of a statute requiring competitive bidding. If, as we have seen, the contract is absolutely void as being in excess of the agency's power, the contractor acts at his peril, and he cannot recover payment for the work performed, it necessarily follows that any payments made to him for the work are illegally made and may be recovered. If that were not true the competitive bidding requirement would be completely nullified because the agency could have the work done, pay the charges therefor, and the taxpayers would be helpless to compel observance of the law. The only event preventing that result in any case would be whether some taxpayer acted soon enough to forestall the payment by injunction proceedings. The effective operation and enforcement of the public policy declared in the statute cannot be dependent upon such an uncertainty. The temptation on the part of officials and the persons contracting with the agency desiring to evade the law would be to act quickly and secretly in order that the taxpayers would be caught off guard. Such a condition is manifestly undesirable.

It has been held that recovery may be had of payments made to a public official who was interested in the transaction for the furnishing of supplies for which the payments were made. County of Shasta v. Moody, 90 Cal.App. 519, 265 P. 1032.

[5] The case of Sacramento County v. Southern Pacific Co., 127 Cal. 217, 59 P. 568, 825, denies the right of recovery from the contractor, but as pointed out in the dissenting opinion in that case and under the foregoing principles, such a rule cannot stand; it ignores those principles and must be overruled. It is founded wholly on estoppel which it assumes to be available against a municipality. That assumption is incorrect where compliance has not been had with the statute, which is the measure of the power. See Hall v. City of Los Angeles, 19 Cal.2d 198, 120 P.2d 13; Kline v. San Francisco Unified School Dist., 40 Cal.App.2d 174, 104 P.2d 661, 105 P.2d 362; cases cited supra. For the same reasons the apparent holding contrary to the views herein expressed in Higgins v. San Diego Water Co., 118 Cal. 524, 45 P. 824, 50 P. 670; Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 P. 189; Warren Bros. Co. v. Boyle, 42 Cal.App. 246, 183 P. 706, must not prevail. Furthermore, the language in the Contra Costa Water Company case appears to be dictum. See dissenting opinion, Beatty, C. J. The same is true of Miller v. Boyle, 43 Cal.App. 39, 184 P. 421. The case of McCormick Lumber Co. v. Highland School Dist., 26 Cal. App. 641, 147 P. 1183, involved a situation where there was a compliance with the statutory requirements but they were mere-

ly insufficient. Under the complaint here involved no advertisement for bids was made in proper form, defective form, or any form. A similar comment is applicable to Clark v. Conley School District, 86 Cal.App. 527, 261 P. 723. Some of those cases were strictly limited by Reams v. Cooley, supra, in which a contractor was not permitted to recover in quantum meruit for labor and materials furnished to a school district because the contract was not let on competitive bids, where the court said at page 153 of 171 Cal., at page 294 of 152 P., Ann.Cas.1917A, 1260: "Undoubtedly a school board, like a municipal corporation, may, under some circumstances, be held liable upon an implied contract for benefits received by it, but this rule of implied liability is applied only in those cases where the board or municipality is given the general power to contract with reference to a subject-matter, and the express contract which it has assumed to enter into in pursuance of this general power is rendered invalid for some mere irregularity or some invalidity in the execution thereof, and where the form or manner of entering into a contract is not violative of any statutory restriction upon the general power of the governing body to contract nor violative of public policy. In the absence of such restriction on the mode or manner of contracting, the same general rule applies to such inferior political bodies as to individuals, and the former will be held responsible on an implied contract for the payment of benefits it receives under an illegal express contract not prohibited by law. This is the effect of the cases cited by appellant and relied on by him, notably Higgins v. San Diego Water Co., 118 Cal. 524, 45 P. 824, 50 P. 670; Sacramento [County] v. Southern Pacific Co., 127 Cal. 217, 59 P. 568, 825; and Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 P. 189. But, while the doctrine of implied liability applies where general power to contract on a subject exists and the form or manner of doing so is not expressly provided by charter or statute, the decided weight of authority is to the effect that, when by statute the power of the board or municipality to make a contract is limited to a certain prescribed method of doing so, and any other method of doing it is expressly or impliedly prohibited, no implied liability can arise for benefits received under a contract made in violation of the particularly prescribed statutory mode. Under such circumstances the express contract attempted to be made is not invalid merely by reason of some irregularity or some invalidity in the exercise of a general power to contract, but the contract is void because the statute prescribes the only method in which a valid contract can be made, and the adoption of the prescribed mode is a jurisdictional prerequisite to the exercise of the power to contract at all, and can be exercised in no other manner so as to incur any liability on the part of the municipality. Where the statute prescribes the only mode by which the power to contract shall be exercised, the mode is the measure of the power. A contract made otherwise than as so prescribed is not binding or obligatory as a contract, and the doctrine of implied liability has no application in such cases."

The statute with respect to competitive bids here involved is section 4041.18 of the Political Code. It provides in part:

"Under such limitations and restrictions as are prescribed by law, and in addition to jurisdiction and powers otherwise conferred, the board of supervisors, in their respective counties, shall have the jurisdiction and powers to construct or lease, build or rebuild, furnish or refurnish or repair hospital and almshouse, courthouse, jail, historical museum, aquarium, county free library building, branch library building, art gallery, art institute, exposition building or buildings for exhibiting and advertising farming, mining, manufacturing, live stock raising, and other resources of the county, stadium and such other public buildings as may be necessary to carry out the work of the county government, and to provide all necessary officers, employees, attendants, and supplies for the proper maintenance of the same. * * *

"Whenever the cost of construction of any wharf, chute, or other shipping facilities, or of any hospital, almshouse, courthouse, jail, historical museum, aquarium, county free library building, branch library building, art gallery, art institute, exposition building or buildings, stadium or other public buildings, or the cost of any repairs thereto or furnishing thereof shall exceed the sum of five hundred dollars, such work shall be done by contract, and any contract therefor shall be void unless the same shall be let as hereinafter provided.

"The board of supervisors shall adopt plans and specifications, strain sheets and working details therefor, and must advertise for bids for the performance of the said work in a newspaper of general circulation published in the county. * * *

"Provided, however, that in counties employing a purchasing agent, furnishings, materials and supplies used in the work mentioned in this subdivision costing not more than two thousand dollars, may be purchased by said purchasing agent in accordance with the provisions of section 4041.13 of this code without the formality of obtaining bids, letting contracts, preparing specifications and doing the other things required by this section for purchases costing more than five hundred dollars."

[6] From the allegations in the fourth amended complaint with regard to the work performed, it appears that the county of Santa Clara owns a parcel of real property and that there is situated thereon and "attached thereto, as part of said real property, certain buildings or structures and a rock quarry; that as a part of said buildings or structures and attached thereto there were bunkers, hoists, motors, conveyors, crushers, screens, electrical appliances and a steel tower; that said buildings or structures at all times herein mentioned were used to operate said quarry and extract rock therefrom"; that it was determined by the board of supervisors that the repairs and alterations to said quarry were necessary and plans and specifications therefor were filed and "that said plans and specifications designated said repairs and alterations as one project or one job, including 'repairing bunkers, moving and repairing hoists, extending power line, repairing motor, making tunnel and foundation, constructing 140' x 32" conveyor and erecting new steel tower'. That said plans and specifications of said County Surveyor included an estimate of the total cost of said job or project at Fifteen Thousand One Hundred Nineteen Dollars ($15,119.00), Eight Thousand One Hundred Thirty Dollars ($8,130.00) thereof estimated as labor to be furnished by SERA and the balance covering materials to be furnished by the County of Santa Clara". We believe those allegations are sufficient to bring the work performed within the terms of section 4041.18 of the Political Code; the only item that might possibly be excluded would be the "repairing motor". The terms "other public buildings, or the cost of any repairs thereto or furnishing thereof" appearing in section 4041.18 are sufficiently comprehensive to include the bunkers, tunnel, hoists, power line, conveyor and tower.

Plaintiff alleged that the various items were attached to and a part of the structures and buildings at the rock quarry. The term "public buildings" is obviously not limited to places where the public assembles. A jail would clearly be a public building; yet it is not ordinarily a place of public assemblies. See Swasey v. County of Shasta, 141 Cal. 392, 74 P. 1031. For illustration it has been held that the term building includes a sandhopper, Wilbur v. City of Newton, 307 Mass. 191, 29 N.E.2d 689; a spur track, Saulsberry v. North American Refractories Co., 278 Ky. 808, 129 S.W.2d 525; and that the terms "structures" and "public buildings" are synonymous, Saulsberry v. North American Refactories Co., supra. There is no policy of law which requires that a restricted or narrow meaning be given to the term building as here used in the statute. The manifest policy of the law is to require competitive bidding when the county engages in the construction or repair of improvements costing more than the named amount.

[7, 8] The fact that a county's authority for acquiring and operating a quarry is particularly set forth in a separate code section (Political Code, sec. 4041e) is of little significance in determining the scope of section 4041.18. Section 4041e does not purport to touch upon the subject of the manner of construction of quarry facilities, and it may be said of some of the other structures specifically mentioned by name in section 4041.18, that they find specific authorization in other sections or statutes. Sections 4041.18 and 4041e must be construed together and the former is a limitation on the latter. See Matthews v. Town of Livermore, supra. Nor may it be successfully urged that by reason of the listing of various public buildings, the words "other public buildings" refer only to structures of the character in the preceding list, because that list includes a wide variety of works with no common characteristic such as a "chute and wharf" as compared with a library.

[9, 10] Defendants assert that there were numerous items furnished over a period of a year and that one furnishing various items of labor or material cannot be expected to ascertain each time whether the

items are a part of one project and thus requiring bids. It is true that it is alleged that the work was done over a period of a year, but it is also alleged: "That said plans and specifications designated said repairs and alterations as *one* project or *one* job." (Emphasis added.) The allegations hereinbefore quoted are sufficient to state a case coming within the terms of section 4041.18 of the Political Code. Defendants are not foreclosed from furnishing proof that the labor and materials furnished by them did not in fact come within the purview of that section. It must be true that the salutary public policy declared by that section may not be thwarted by the device of splitting a job into many items, each calling for an expenditure below the prescribed amount in excess of which competitive bidding is required.

[11, 12] As we have seen, the demurrer to the first count in the complaint was general and also claimed lack of legal capacity on plaintiff's part to maintain the action. It is defendants' position that plaintiff's first cause of action, that is, the action to recover the money paid to the partnership on the ground that the payment was illegal as there was no compliance with the competitive bidding requirement, is founded upon a liability created by section 4005b of the Political Code, and the action thereunder must be prosecuted in the name of the county. Plaintiff alleged that he is a resident citizen and taxpayer of Santa Clara County; that the action is brought on behalf of the county, and that the district attorney of the county has refused to bring it. He named the county as a party defendant. Such procedure is proper. See Osburn v. Stone, 170 Cal. 480, 482, 150 P. 367. Section 4005b provides: "Whenever any board of supervisors shall, without authority of law, order any money paid as salary, fees, or for any other purposes, and such money shall have been actually paid; or whenever any county officer has drawn any warrant or warrants in his own favor, or in favor of any other person, without being authorized by the board of supervisors, or by the law, and the same shall have been paid, the district attorney of such county is hereby empowered, and it is hereby made his imperative duty, to institute suit, in the name of the county, against such person or persons, to recover the money so paid, and twenty per cent damages for the use thereof; and no order of the board of supervisors therefor shall be necessary to maintain such suit. When the money has not been paid on such order or warrants, it is hereby made the imperative duty of the district attorney of such county, upon receiving notice thereof, to commence suit, in the name of the county, to restrain the payment of the same; and no order of the board of supervisors shall be necessary in order to maintain such suit." Section 526a of the Code of Civil Procedure authorizes a citizen resident to bring an action against a county officer to restrain the illegal expenditure of money. It has been intimated either directly or indirectly that section 4005b in effect creates a cause of action for money illegally expended against the person to whom paid. Calaveras County v. Poe, 167 Cal. 519, 140 P. 23; County of Santa Barbara v. Janssens, 177 Cal. 114, 169 P. 1025, L.R.A.1918C, 558; County of Santa Barbara v. Rucker, 35 Cal.App. 676, 170 P. 860; Burr v. Board of Supervisors, 96 Cal. 210, 31 P. 38; Hansen v. Carr, 73 Cal.App. 511, 238 P. 1048; County of Shasta v. Moody, supra; County of Marin v. Messner, 44 Cal.App.2d 577, 112 P.2d 731; Contra dictum, Miller v. City of Martinez, 28 Cal. App.2d 364, 82 P.2d 519. It cannot be doubted that unless some substantive right is established by section 4005b then there is no basis for the recovery of the 20 per cent penalty in addition to the money illegally received, provision for which is made in that section. We believe that it must be conceded that that section at least recognizes the existence of such a cause of action. As heretofore pointed out, however, a cause of action exists to recover from the person receiving the money illegally paid, independent of any statute, and it is also clear that the action may be prosecuted by a taxpayer in his name on behalf of the public agency. See Mock v. City of Santa Rosa, 126 Cal. 330, 58 P. 826; Osburn v. Stone, supra; Hansen v. Carr, supra; Newton v. Brodie, 107 Cal.App. 512, 290 P. 1058; Briare v. Matthews, 202 Cal. 1, 258 P. 939. Where a statute makes it the imperative duty of a specified officer to maintain actions to recover money illegally expended by county officers, there must be a showing that such officer refuses to or for some reason cannot act before a taxpayer's suit is proper. Hansen v. Carr, supra. There is a statute here imposing such duty on the district attorney, Pol.Code, sec. 4005b. The plaintiff alleged that the district attorney refused to act. While it is true that plaintiff states in his brief that his action is based upon section 4005b, nevertheless, it follows from the foregoing that plaintiff has adequately stated a cause of action in his first count against the partnership for the recovery of the sums illegally expended which arose independent of statute. It was not therefore necessary that such action be prosecuted in the name of the county because it is not affected by the statute.

However, if plaintiff is to recover the penalty of 20 per cent in addition to the money received by defendant partnership, he must necessarily rely upon section 4005b, assuming a substantive right of action is created by that section. Even so, the demurrer, both general and for defect of parties plaintiff was improperly sustained. We see no valid reason why the action must be brought in the name of the county. Section 4005b merely requires the district attorney to bring the action in the name of the county when he prosecutes it. Naturally, he would bring the action in the county's name as attorney for the county. When he is not prosecuting the action because of his refusal to do so, the requirement that it be in the name of the county is no longer of any consequence. The action then is on behalf of the county by a taxpayer who in reality is representing the taxpayers generally. He in fact has no authority to sue in the name of the county. The case of Gray v. White, 5 Cal.App.2d 463, 43 P.2d 318, is not contrary to this view. There the action was by a taxpayer in his name against the supervisors and other officers of a county to recover money illegally expended. The court held a demurrer to the complaint properly sustained because plaintiff *failed to allege the refusal on the part of the district attorney to bring the action.* The statements there made with reference to the necessity of the action being in the name of the county and that the county was improperly joined as defendant are dictum.

[13] Defendants claim that the complaint is uncertain because it cannot be ascertained that the work and labor furnished by defendant partnership was a part of one job. We have heretofore quoted the allegation to the effect that the repairs and alteration to the rock quarry buildings was one job. It therefore appears on the face of the complaint that competitive bidding was necessary. The complaint is sufficiently certain to meet the requirement of a pleading of this character.

[14] In regard to the second cause of action, it is plaintiff's position that the gravamen thereof is the same as the first cause of action, that is, the failure to call for bids, and that the other allegations with respect to padding of bids, failure to supply the materials claimed, and knowingly causing the illegal payments to be made, were made to establish the participation of the defendants supervisor J. M. McKinnon, purchasing agent Emma Allegrini, and E. P. Flood, the superintendent of the county quarry, in a conspiracy to make the illegal expenditures. However, it should be mentioned that plaintiff prays for only $17,847.68 against the above defendants, the amount of claimed excessive payment for the material. The court ruled with regard to the demurrer to the third amended complaint as follows:

"It is hereby ordered That said demurrers, and each of them, be sustained and plaintiff granted fifteen (15) days from date hereof to file an amended complaint, on condition that in said amended complaint he join as defendants all members of the Board of Supervisors of Santa Clara County who voted in favor of any motion to issue any of the County Warrants referred to in plaintiff's amended complaint.

"In the event that plaintiff shall fail to join as defendants herein *all Supervisors of Santa Clara County who voted for any of said warrants* by filing a further amended complaint within said period of fifteen (15) days,

"It is ordered that said demurrers, and each of them, be sustained without leave to amend." (Emphasis added.)

Thereafter, plaintiff filed his fourth amended complaint in which he named as defendants, Hecker, Ayer and Cooley, they being three supervisors in addition to supervisor McKinnon theretofore named as defendant; the fifth supervisor was not named. Plaintiff alleged in his fourth amended complaint "that all of the members of the Board of Supervisors named herein as defendants voted for the issuance of each warrant"; the named defendants were the above-mentioned four supervisors; the warrants were for the sum of $42,151.90 paid to defendant partnership. One of the grounds of the demurrer to the fourth amended complaint was a defect of parties in that all of the members of the board of supervisors were not made defendants; the demurrer also specified all the grounds theretofore stated in the former demurrers to the third amended complaint. As far as appears from the record, the court made no order in regard to the demurrer to the fourth amended complaint. The only document with reference thereto is the judgment dismissing the action dated January 12, 1938, in which it is recited that defendants "having appeared and demurred to plaintiff's *fourth* amended complaint herein and the issue of law therefrom arising having been duly submitted to the court for its decision and the court being fully advised in the premises and having, by its order duly given and made on the 28th day of December, 1937, sustained the demurrer of said defendants to plaintiff's said *fourth* amended complaint without leave to amend the same." (Emphasis added.) Regardless of whether the requirement that plaintiff name all of the supervisors who voted for the issuance of the warrants, as defendants, set forth in the order sustaining the demurrers to the third amended complaint, was proper as a condition to plaintiff's right to amend, it seems that the plaintiff substantially complied with that condition. He alleged that the four supervisors named voted for the issuance of the warrants. The fact that he had alleged in the third amended complaint that all of the supervisors voted for the warrants does not mitigate against this allegation inasmuch as we must look at the final allegation in the last amended complaint. Therefore defendants cannot successfully assert that plaintiff failed to comply with the condition imposed by the court on his right to amend.

[15] However, inasmuch as the demurrer to the fourth amended complaint, raised the issue of the necessity of all the supervisors being named as defendants, and the demurrer was apparently sustained on all grounds, it becomes necessary to consider whether all the members of the board were necessary parties. We have seen that the first cause of action was directed at defendant partnership, the party who received the payments from the county, to recover the money illegally paid to it. It has been held that a demurrer for defect of parties, that is, that parties have not been joined, should be sustained only if the parties are necessary parties as distinguished from proper parties. Tregear v. Etiwanda Water Co., 76 Cal. 537, 18 P. 658, 9 Am.St.Rep. 245; De Leonis v. Hammel, 1 Cal.App. 390, 82 P. 349. The court may, of course, order proper parties to be brought in if expedient for a complete determination of the controversy. Code Civ.Proc., sec. 389. It has been said that the proper procedure to follow when a demurrer for defect of necessary parties is meritorious, is to order the parties brought in rather than to sustain the demurrer. Hughson v. Crane, 115 Cal. 404, 47 P. 120. We have seen that plaintiff substantially complied with the order of the court to bring in the other supervisors who voted for the issuance of the warrants, if we treat the order sustaining the demurrer to the third amended complaint as embodying such order. No order other than that was made. In any event, all of the members of the board of supervisors are not necessary parties defendant in an action against such officers to recover funds illegally expended. An analogous situation exists in an action by stockholders to recover on behalf of a corporation from the directors thereof, corporate funds unlawfully diverted. In such a case all of the guilty members of the board of directors need not be named defendants, their liability being joint and several. Curtis v. Metcalf, D.C., 265 F. 293; Baker v. Baker, 122 Misc. 757, 204 N.Y.S. 11; Brennan v. Barnes, 133 Misc. 340, 232 N.Y.S. 112; Fletcher Cyclopedia Corporations (Perm. Ed.), vol. 3, sec. 1314; see, also, Reetz v. Kitch, 230 Wis. 1, 283 N.W. 348. Harvey v. Meigs, 17 Cal.App. 353, 119 P. 941, and Fornaseri v. Cosmosart Realty, etc., Corp., 96 Cal.App. 549, 274 P. 597, cited by defendants are not contrary to the views above expressed. The statement in the Harvey case that the directors of the corporation should have been made parties is dictum, and if anything, merely indicates that they would be proper parties. In the Fornaseri case the statement was made with reference to a creditor's suit against a corporation for fraud that the delinquent officers must be made parties.

[16] Defendants urge that the second cause of action is uncertain in that it cannot be ascertained therefrom "which of the charges for labor or materials it is claimed were exorbitant." We cannot agree. The particular materials and labor that were exorbitant or not furnished were peculiarly within the knowledge of the defendants. The plaintiff specifically sets forth the warrants that were issued, and alleges that the claims upon which they were based were not itemized. Under those circumstances the records of the county would not show

the precise materials and labor which were questioned. Therefore, the case of Hansen v. Carr, supra, cited by defendants, dealing with the necessity of pleading matters of record is not in point. Furthermore, it must be remembered that the gist of plaintiff's second cause of action may be said to be the violation of section 4041.18 of the Political Code, rather than the payment of claims for materials which were not furnished.

[17] Defendants argue that several causes of action were improperly united and not separately stated; that is, that each warrant, or at least each resolution of the board for the issuance of the several warrants, is a separate and illegal expenditure giving rise to a separate cause of action. Warrants were issued on thirteen different dates. This contention is untenable. According to the allegations of the complaint, all of the warrants and the resolutions authorizing them were a part of one transaction; that is, for the one job of repairing and altering the buildings at the county quarry, and against the same defendants. There was one wrong manifested by several incidents, and therefore one cause of action accrued. See Covey v. England & McCaffrey, 233 App.Div. 332, 253 N.Y.S. 340; Broderick v. Marcus, 146 Misc. 240, 261 N.Y.S. 625.

[18] Finally, it is asserted by defendant Flood, that the demurrers were properly sustained because the demand for the repayment of the amounts illegally expended was not first submitted to the attorney general with the request to him to act thereon. This contention is clearly without merit as there is no express imperative duty imposed upon the attorney general to recover funds illegally expended by a county. Cal.Const., art. V, sec. 21; Pol.Code, sec. 470. That duty is placed upon the district attorney. Pol.Code, sec. 4005b. The policy that it is preferable to have such cases prosecuted by the district attorney, a representative of the county, is satisfied when there is a request that he act followed by his refusal to do so.

The judgment is reversed and the trial court directed to overrule the demurrers and permit defendants to answer if they be so advised.

GIBSON, C. J., and SHENK, CURTIS, and HOUSER, JJ., concurred.

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20 Cal.2d 165

PEOPLE v. GONZALES et al.

Cr. 4382.

Supreme Court of California.

April 2, 1942.

As Modified on Denial of Rehearing May 1, 1942.

1. Criminal law ⚿394

Under Fourth Amendment prohibiting unreasonable searches and seizures by federal officers, the federal courts forbid introduction of evidence obtained by an illegal search or seizure if a timely motion for its exclusion is made. U.S.C.A.Const. Amend. 4.

2. Criminal law ⚿394

Under provision of California Constitution prohibiting unreasonable searches and seizures, the introduction of improperly obtained evidence is permitted on ground that illegality of the search and seizure does not affect admissibility of the evidence. Const. art. 1, § 19.

3. Criminal law ⚿394

Under provision of California Constitution prohibiting unreasonable searches and seizures, a defendant may have civil and criminal remedies against officers for their illegal acts, but state is not precluded from using the evidence obtained thereby. Pen. Code, § 146; Const. art. 1, § 19.

4. Searches and seizures ⚿7(2)

The Fourth Amendment prohibiting unreasonable searches and seizures is not a limitation upon the states. U.S.C.A.Const. Amend. 4.

5. Constitutional law ⚿268

A criminal trial does not constitute a denial of "due process of law" so long as it is fair and impartial.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

6. Constitutional law ⚿266

In criminal prosecution, use of evidence obtained through an illegal search and seizure of apartment of one of defendants did not constitute a denial of "due process of law". Pen.Code, § 146; U.S.C.A.Const. Amends. 4, 14; Const.Cal. art. 1, § 19.

7. Criminal law ⚿394

The admissibility of evidence is not affected by illegality of means to which the party has been enabled to obtain the evidence.

8. Witnesses 🔑35

In criminal prosecution, trial court properly permitted officer to testify despite a temporary injunction obtained in a separate proceeding purporting to restrain the officer from testifying with regard to entry into apartment of one of defendants, since objections to testimony of a witness should be made to court before which witness was testifying.

9. Witnesses 🔑21

Provisions of statutes requiring any competent person who is properly subpœnaed and who is not privileged to appear in court and answer questions pertinent to matter in issue, and providing that if he refuses to testify he may be punished for contempt and that no one may lawfully prevent him from testifying, have for their objective the prevention of interference with testimony of witnesses. Code Civ.Proc. §§ 128, 177, 1985, 1986, 1990–1993; Pen.Code, §§ 136, 166, 1331.

10. Criminal law 🔑1170½(1)

In criminal prosecution, even if trial court erred in permitting officer to testify despite a temporary injunction obtained in a separate proceeding purporting to restrain officer from testifying with regard to his entry into apartment of defendant, error was not prejudicial to defendants, where such testimony could not be excluded on a new trial in view of Supreme Court holding that testimony was admissible.

11. Witnesses 🔑372(2)

In criminal prosecution, sustaining of objection to question asked witness by defendants' attorney on cross-examination as to whether witness had been enjoined from testifying concerning anything he had learned as result of his illegal search of apartment of one of defendants, was proper, as against defendants' contention that they had a right to ask the question for purpose of impeaching credibility of witness by showing bias.

12. Criminal law 🔑1172(2)

In prosecution of two defendants for conspiracy to commit grand theft, instructions telling jury that evidence admitted against one defendant could not be used against other defendant, although ambiguous in failing to indicate what evidence was admitted against each of defendants, were not prejudicial, in view of trial court's statements during trial indicating what evidence was admitted against each of defendants.

13. Conspiracy 🔑47

Participation in a conspiracy can be shown by circumstantial evidence.

14. Conspiracy 🔑47

Evidence supported conviction of both defendants for a conspiracy to steal money from a third party by use of a pretended money making machine.

15. Criminal law 🔑1171(1)

In prosecution of two defendants for conspiracy to steal money from a third party by use of pretended money making machine, argument to other bunco cases and bunco games, if misconduct, was not sufficiently prejudicial to justify reversal, particularly where trial court refused to grant a new trial on such ground.

CARTER and HOUSER, JJ., dissenting.

◆

In Bank.

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

John Gonzales and another were convicted of conspiracy to commit grand theft, and they appeal.

Affirmed.

Leo R. Friedman, of San Francisco, for appellants.

Earl Warren, Atty. Gen., J. Albert Hutchinson and David K. Lener, Deputies Atty. Gen., and Matthew Brady, Dist. Atty., and Joseph A. Garry, Asst. Dist. Atty., both of San Francisco, for respondent.

TRAYNOR, Justice.

On June 17, 1940, an indictment was filed charging defendants Gonzales and Chierotti with having conspired together on May 25, 1940, to commit grand theft by fraudulent representations to Secundo Valenzano regarding a machine that purportedly could reproduce United States currency, with the use of certain chemicals. The evidence showed that defendant Gonzales, after striking up an acquaintance with Secundo Valenzano, told Valenzano that a rich man had the machine, that real currency was necessary in making the reproductions, and that he would surreptitiously get possession of the machine and bring it to Valenzano's saloon. He brought the machine there, put some real bills into it, used the chemicals, and when the machine was opened, there were two bills for each one originally inserted. Thereupon Gonzales told Valenzano that if he could get several thousand dollars in new bills, equal to an amount to be furnished by Gonzales, each could double his money by using the machine. Valenzano put up no money but notified the police who arrested both Gonzales and Chierotti.

Valenzano was the only witness who testified to the foregoing events. Police Officer Iredale testified that on June 6, 1940, he and Police Officer Linss, without any warrant, authority, or permission, entered the apartment of defendant Chierotti in the latter's absence and took therefrom a black case containing not only bottles of liquid but a machine, subsequently identified by Valenzano as that used by Gonzales. Chierotti and Gonzales objected to any testimony by Officer Iredale regarding the entry and search of Chierotti's apartment and the seizure of the case and contents, as well as to the introduction and use of the latter as evidence, on the ground that the entry, search, seizure, and use of the property violated the rights guaranteed to Chierotti by the Fourteenth Amendment to the Constitution of the United States, and the search and seizure and due process clauses of the Constitution of California. Cal.Const. Art. I, secs. 19, 13.

Before the commencement of the trial Chierotti sought an injunction in an independent proceeding against the San Francisco Police Department and Officer Iredale to enjoin the use of the case and contents at the trial and to restrain Officer Iredale from testifying to anything he saw, did or heard while engaged in his search and seizure. The court denied the injunction and Chierotti appealed to this court. Pending determination of the appeal, the lower court granted a temporary injunction restraining Officer Iredale from testifying with regard to the entry into Chierotti's apartment. Many months before the trial Chierotti filed a written motion for an order directing the return to him of the case and contents, and the exclusion from evidence, not only of this property, but of any testimony of the officers regarding the search and seizure or based on information acquired as a result thereof. The motion was denied. At the trial the court refused to enforce the temporary injunction, allowing Officer Iredale to testify in direct defiance thereof. The defendants were found guilty by the jury. After judgment was pronounced each defendant appealed to this court from the order denying his motion for a new trial and from the judgment.

[1-3] The Fourth Amendment to the Constitution of the United States prohibits unreasonable searches and seizures by federal officers. Pursuant to this mandate the federal courts forbid the introduction in court of evidence obtained by an illegal search or seizure if a timely motion for its exclusion is made by the accused. Byars v. United States, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520; Go-Bart Importing Co. v. United States, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374; Gouled v. United States, 252 U.S. 298, 302, 41 S.Ct. 261, 65 L.Ed. 647; Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319; Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746; Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652; Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307; Ex parte Jackson, 96 U.S. 727, 733, 24 L.Ed. 877; Amos v. United States, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654; Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145. The California Constitution contains an identical provision (Cal.Const. Art. I, sec. 19), but the accepted rule in this state, as in many others, permits the introduction of improperly obtained evidence on the ground that the illegality of the search and seizure does not affect the admissibility of the evidence. People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383; In re Polizzotto, 188 Cal. 410, 205 P. 676; People v. Le Doux, 155 Cal. 535, 102 P. 517; Herrscher v. State Bar, 4 Cal.2d 399, 49 P.2d 832. See cases cited in 88 A.L.R. 348. The defendant may have civil and criminal remedies against the officers for their illegal acts (see Cal.Pen.Code, sec. 146; Silva v. MacAuley, 135 Cal.App. 249, 26 P.2d 887, 27 P.2d 791; Ryan v. Crist, 23 Cal.App. 744, 139 P. 436; 15 So.Cal.L.Rev. 139, 141 et seq.), but the state is not precluded from using the evidence obtained thereby.

[4-7] The Fourth Amendment to the Constitution of the United States is not a limitation upon the states (National Safety Deposit Co. v. Stead, 232 U.S. 58, 34 S.Ct. 209, 58 L.Ed. 504; State of Ohio v. Dollison, 194 U.S. 445, 24 S.Ct. 703, 48 L.Ed. 1062),

and California is free to interpret its own constitution. Defendants contend, however, that the prohibition in the Fourth Amendment of unreasonable searches and seizures is included in the provision of the Fourteenth Amendment that no state shall deprive any person of life, liberty, or property without due process of law, and therefore that under the interpretation given to the Fourth Amendment by the federal courts the introduction of evidence obtained by an illegal search and seizure constitutes a denial of due process of law. Not all of the first ten amendments to the federal constitution, however, fall within the concept of due process of law. Palko v. Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288; Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97; Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674, 90 A.L.R. 575. See 39 Harv.L.Rev. 431; 24 Harv.L.Rev. 366. In the determination of whether the prohibition against unreasonable searches and seizures is included within this concept, the unlawful search and seizure must be distinguished from the introduction in court of the evidence obtained as a result thereof. "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" may be so fundamental as to make any unreasonable search and seizure by a public officer a violation of due process of law. It does not necessarily follow, however, that the use in a court of law of evidence thus obtained is so contrary to fundamental principles of liberty and justice as to constitute a denial of due process of law. A criminal trial does not constitute a denial of due process of law so long as it is fair and impartial. See cases cited in 16 C.J.S., Constitutional Law, § 591, p. 1185 et seq. There is a failure to observe "that fundamental fairness essential to the very concept of justice" when a trial is but a pretense (Lisenba v. California, 62 S.Ct. 280, 290, 86 L.Ed. 166), as a trial dominated by a mob (Moore v. Dempsey, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543), or when the defendant is denied the right to counsel (Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461), or when his conviction results from testimony known by the prosecution to be perjured (Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406), or from an involuntary confession obtained through coercion or torture. Chambers v. Florida, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716; Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682. While the United States Supreme Court has held that the due process clause includes the guarantee of the Fifth Amendment against compulsory self-incrimination to the extent that the Amendment forbids the use of a confession obtained by coercion or torture (Chambers v. Florida, supra; Brown v. Mississippi, supra; Lisenba v. California, supra. See Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568), it has done so because a confession obtained by coercion or torture is so unreliable that its use violates all concepts of fairness and justice. Chambers v. Florida, supra; Brown v. Mississippi, supra; Lisenba v. California, supra; cf. Twining v. New Jersey, supra. The use of evidence obtained through an illegal search and seizure does not violate due process of law for it does not affect the fairness or impartiality of the trial. People v. Defore, 242 N.Y. 13, 150 N.E. 585; People v. Mayen, supra; Com. v. Donnelly, 246 Mass. 507, 141 N.E. 500; Johnson v. State, 152 Ga. 271, 109 S.E. 662, 19 A.L.R. 641. The fact that an officer acted improperly in obtaining evidence presented at the trial in no way precludes the court from rendering a fair and impartial judgment. It has long been an established rule of evidence that "the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence." 8 Wigmore, Evidence, 3d Ed., sec. 2183, p. 5, and cases there cited.

[8-10] Defendants contend that the trial court should not have permitted Officer Iredale to testify in view of the temporary injunction restraining him from testifying with regard to the entry into Chierotti's apartment. Objections to the testimony of a witness, however, should be made to the court before which he testifies and have no place in an injunction proceeding in another court. Any competent person who is properly subpoenaed, and who is not privileged, must appear in court and answer questions pertinent to the matter in issue. If he refuses to testify he may be punished for contempt of court, and no one may lawfully prevent or dissuade him from testifying. Code Civ.Proc. secs. 128, 177, 1985, 1986, 1990, 1991, 1992, 1993; Pen.Code secs. 136, 166, 1331. See cases cited in 8 Wigmore, Evidence, 3d Ed., secs. 2190-2195; 27 Cal.Jur. p. 9 et seq. Clear-

ly it is the objective of these provisions to prevent interference with the testimony of witnesses and the issuance of the temporary injunction was therefore improper. Even if it were error for the trial court to permit Officer Iredale to testify despite the temporary injunction it was in no way prejudicial to defendants, for such testimony could not be excluded on a new trial in view of the holding herein that the testimony was admissible and the affirmance of the order denying an injunction in Chierotti v. San Francisco Police Department, 20 Cal.2d 895, 124 P.2d 51, this day decided.

[11] On cross-examination defendants' attorney asked Officer Iredale if he had not been enjoined from testifying concerning anything he had learned as a result of his illegal search of Chierotti's apartment. Defendants contend that they had a right to ask this question for the purpose of impeaching the credibility of the witness by showing interest, bias, or prejudice and that the trial court therefore erred in sustaining an objection to it. It does not follow, however, that a witness would be inclined to testify falsely because he testified in the face of an injunction. On the contrary, in the words of the trial court, "the jury would be more inclined to believe the police officer who testified, if he testified despite the injunction and order. They would believe he was doing his duty." The question was immaterial and the objection to it was properly sustained.

Defendants have also objected to the refusal of the trial court to give certain instructions to the jury. Proposed instruction No. 30 stated: "* * * It is the law of this state, that in determining whether any such conspiracy existed of which the defendant Chierotti was a party, that testimony of the acts or declarations of the defendant Gonzales cannot be considered by you, and it your duty to disregard all evidence as to any acts or declarations of the defendant Gonzales, and to determine the existence or non-existence of such conspiracy so far as defendant Chierotti is concerned, from such other evidence as may be in the case against him. The fact that an unlawful conspiracy existed of which the defendant Chierotti was a member and the unlawful purpose of such conspiracy, must be established by evidence, to a moral certainty and beyond a reasonable doubt, separate and apart from and independent of any testimony as to any declarations that were made by the defendant Gonzales. In other words, in determining whether defendant Chierotti was a member of the conspiracy charged you cannot consider any declaration or act that the defendant Gonzales said or did." Proposed instruction No. 31 is the same as No. 30 except that it applies to defendant Gonzales instead of defendant Chierotti. Proposed instruction No. 32 stated: "You are instructed that a conspiracy cannot be proven merely by the acts or declarations of an alleged conspirator and that you may not consider such acts or declarations unless you are first convinced beyond a reasonable doubt by entirely independent evidence that a conspiracy existed."

[12] The trial court instructed the jury on the subject of these instructions as follows: "The first fundamental question that you should determine in this case is: Was there in fact a conspiracy formed as charged in the indictment. If you answer that question in the negative, you are at an end of the case and your verdict should be not guilty. If, on the other hand, you answer that question in the affirmative, you should then determine the question whether these defendants actively participated and entered into such conspiracy or scheme. In deciding the issues in this case you should take into consideration all the evidence admitted in the case, both for the State and for the defendant. * * * In considering the guilt or innocence of the defendant Chierotti you must consider only the evidence that has been admitted against him and cannot consider any evidence that has been admitted only as evidence against the defendant Gonzales. In considering the guilt or innocence of the defendant Gonzales you must consider only the evidence that has been admitted against him and cannot consider any evidence that has been admitted only as against the defendant Chierotti. You cannot return a verdict finding one of the defendants guilty solely on the ground that you find the evidence sufficient to establish the guilt of the other defendant."

These instructions told the jury that evidence admitted against Chierotti could not be used against Gonzales and that evidence admitted against Gonzales could not be used against Chierotti. They are ambiguous in failing to indicate to the jury what evidence was admitted against Gonzales and what evidence was admitted against Chierotti. The record, however, reveals that at the time evidence as to the acts and declarations of Gonzales was introduced, the court stated in the presence of the jury that the evidence was admitted against Gonzales and not against Chierotti, and that at the time evidence as to the acts and declarations of Chierotti was introduced the court stated that it was admitted against Chierotti and not against Gonzales. The instructions, therefore, read in conjunction with the statements of the court during the trial indicated to the jury that the acts and declarations of Gonzales could not be used to prove Chierotti a party to the conspiracy and that the acts and declarations of Chierotti could not be used to prove Gonzales a party thereto. Any error in the instructions because of their ambiguity was therefore not prejudicial to defendants.

[13, 14] Defendants contend the evidence is insufficient to establish that Chierotti participated in the conspiracy. Participation in a conspiracy, however, can be shown by circumstantial evidence. See cases cited in 5 Cal.Jur. 521. The evidence shows that a bag containing the money making machine and bottles of liquid were in Chierotti's apartment, that Chierotti had possession of the key to the lock on the bag, that Chierotti knew Gonzales, that Gonzales had been to Chierotti's apartment and was there on the Monday before the arrests were made, that Chierotti was seen leaving his apartment house with Gonzales carrying a bag, that Gonzales met with Chierotti shortly after leaving Valenzano's tavern, that Gonzales exhibited to Valenzano a large roll of bills but when Gonzales and Chierotti were arrested together shortly thereafter Chierotti had possession of a large roll of bills but Gonzales did not. This evidence is sufficient to justify the jury's conclusion that Chierotti participated with Gonzales in a conspiracy to steal money from Valenzano by use of the pretended money making machine.

[15] Any misconduct that may have existed on the prosecutor's part in referring to other bunco cases and bunco games during the course of his argument to the jury is not sufficiently prejudicial to justify reversal, particularly since the trial court refused to grant a new trial on this ground. See Imlay v. California Cab Co., 124 Cal. App. 68, 11 P.2d 1116; Alberts v. Lytle, 1 Cal.App.2d 682, 37 P.2d 705.

The judgment of conviction and orders denying a new trial are affirmed.

GIBSON, C. J., and SHENK, CURTIS, and EDMONDS, JJ., concurred.

CARTER, Justice.

I dissent.

The rule followed by the majority opinion seriously impairs the efficacy and sanctity of the constitutional guarantee against unlawful searches and seizures. Cal.Const. Art. I, sec. 19. The particular issue is the competency of evidence in a criminal proceeding which has been obtained from defendant in violation of that constitutional prohibition. Although it is my opinion that the same constitutional guarantee appearing in the Fourth Amendment to the Constitution of the United States is applicable to states as well as federal agencies because it is one of the fundamental liberties embraced in the Fourteenth Amendment to the Constitution of the United States, I will limit my discussion to the proposition that even if the right to be secure against unlawful searches and seizures is not protected by the federal Constitution with reference to state agencies, the provision in our state Constitution compels the rule that evidence obtained in contravention thereof shall not be competent or admissible.

It cannot be seriously questioned that to permit the use of evidence obtained in violation of the constitutional provision at least to some extent infringes upon the field of liberty secured by the inhibition against unlawful searches and seizures. But it goes beyond a mere partial invasion. It in effect practically destroys the right. That is true for the reason that the value of any right varies in direct proportion to the means afforded for the protection of the right; the realization of any benefit from the right is wholly dependent upon the existence of instruments for that purpose. If it may be violated and the fruits of the violation directed against the possessor of it, the fruits of it are lost, and it is no more than a bare abstraction.

I take it that a person in preserving the right here involved is justified in committing homicide. However, if he does not adopt that extreme measure, and in a well-ordered social system that should be discouraged, he is faced with possibility that evidence obtained may be used against him. Certainly he should be given credit and security rather than being penalized for failing to pursue such an extreme course.

Permitting such evidence to be used is an invitation and encouragement to law-enforcing officials to violate the Constitution. It gives them free reign to act upon mere suspicion and conjecture, to the harassment of the persons offended and to the end that the sanctity of his home or depository of his papers and effects is destroyed. It is of small comfort to say that he has an action against the officers. In most instances the amount of recovery would be negligible and the process costly.

In Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 343, 58 L.Ed. 652, it was stated with respect to this issue:

"Judge Cooley, in his Constitutional Limitations, pp. 425, 426, in treating of this feature of our Constitution said: 'The maxim that "every man's house is his castle" is made a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures, and has always been looked upon as of high value to the citizen.' 'Accordingly,' says Lieber in his work on Civil Liberty and Self-Government, 62, in speaking of the English law in this respect, 'no man's house can be forcibly opened, or he or his goods be carried away after it has thus been forced, except in cases of felony; and then the sheriff must be furnished with a warrant, and take great care lest he commit a trespass. This principle is jealously insisted upon.' In Ex parte Jackson, 96 U.S. 727, 733, 24 L.Ed. 877, 879, this court recognized the principle of protection as applicable to letters and sealed packages in the mail, and held that, consistently with this guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures, such matter could only be opened and examined upon warrants issued on oath or affirmation, particularly describing the thing to be seized, 'as is required when papers are subjected to search in one's own household.'

"In the Boyd case, supra, after citing Lord Camden's judgment in Entick v. Carrington, 19 How.St.Tr. 1029, Mr. Justice Bradley said ([at page 630 of 116 U.S., at page 532 of 6 S.Ct., 29 L.Ed. 746]):

"'The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment.'"

And again: "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

In addition to the federal courts, the following states have adopted the rule that evidence obtained in violation of the Constitution is not admissible. (Florida, Idaho, Illinois, Indiana, Kentucky, Michigan, Mississippi, Missouri, Montana, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin, Wyoming.) See State v. Wills, 91 W.Va. 659, 114 S.E. 261, 24 A.L.R. 1408; State v. Owens, 302 Mo. 348, 259 S.W. 100, 32 A.L.R. 408; Orick v. State, 140 Miss. 184, 105 So. 465, 41 A.L.R. 1145; State v. Arregui, 44 Idaho 43, 254 P. 788, 52 A.L.R. 477; State v. Dillon, 34 N.M. 366, 281 P. 474, 88 A.L.R. 348; McIntyre v. State, 190 Ga. 872, 11 S.E.2d 5, 134 A.L.R. 819.

Obviously, the purpose and object of the constitutional provision in question was to guarantee security to the individual against invasion of his premises by officers seeking evidence which might be used by them in a criminal prosecution without making oath or affirmation particularly describing the place to be searched or the person or thing to be seized. In other words, it was contemplated by the framers of the Constitution that before an officer should be permitted to secure evidence by means of a search and seizure, the facts supporting the claim of right to make the search should be submitted to a magistrate in the form of an affidavit, and if the magistrate determined such facts to be sufficient he would issue a warrant authorizing the search of premises particularly described in the warrant and the seizure of the person or thing particularly described therein. To say that to permit the use of evidence acquired in violation of this constitutional provision does not abrogate or destroy the constitutional right so guaranteed is to my mind counterfeit logic.

History reveals many abuses by public officers both in England and colonial times in this country when officers invaded the premises of persons suspected of crimes, many of which have long since been abolished, and the papers and effects of innocent victims seized and used for the persecution as well as prosecution of such victims. It was to prevent these abuses that the Fourth Amendment was added to the Constitution of the United States and section 19 of Article I was incorporated in the Constitution of California. In my opinion there is no such urgency or necessity enjoined upon prosecuting officers today to obtain evidence of law violation which requires them to violate a constitutional provision so specific in its prohibitions, and which has enshrined within its provisions such sacred concepts of liberty, security and justice as the constitutional provision here in question.

The more I read and hear about the tyranny of totalitarianism as it pervades a large part of the world today, the more appreciative I am of the constitutional form of government and the constitutional guarantees which we have in this country and in this state. And every time I see an effort being made to abrogate or nullify by interpretation any of the constitutional provisions designed to protect the life, liberty and property of the people, I shudder to contemplate what will happen if this disposition to abrogate and nullify these constitutional provisions continues. I, for one, shall never yield to the doctrine that a constitutional provision designed to protect the life, liberty and property of the people of this country should be abrogated or nullified by interpretation. If political, social or economic conditions require changes in our Constitution, such changes should be made by amending the Constitution in the manner prescribed by it, but it is not for the courts by their decisions to abrogate or nullify constitutional provisions by interpretation or read into those provisions that which was never intended to be included therein.

In my opinion it was prejudicial error requiring a reversal of the judgment for the trial court to admit the evidence obtained by the police officers as the result of the unlawful entry and search of the premises occupied by the defendants, and the judgment of conviction against them should therefore be reversed.

HOUSER, J., concurred.

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20 Cal.2d 895

John CHIEROTTI, Appellant, v. SAN FRANCISCO POLICE DEPARTMENT et al., Respondents.

S. F. 16646.

Supreme Court of California.

April 2, 1942.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Leo R. Friedman, of San Francisco, for appellant.

Earl Warren, Atty. Gen., J. Albert Hutchinson, Deputy Atty. Gen., and Matthew Brady, Dist. Atty., and Joseph A. Garry, Asst. Dist. Atty., both of San Francisco, for respondents.

TRAYNOR, Justice.

For the reasons set forth in the opinion in People v. Gonzales and Chierotti, Cal. Sup.Crim. 4382, 124 P.2d 44, this day decided, the order denying the preliminary injunction is affirmed.

GIBSON, C. J., and SHENK, CURTIS, and EDMONDS, JJ., concurred.

CARTER, Justice.

I dissent.

For the reasons stated in my dissenting opinion this day filed in the case of People v. Gonzales and Chierotti, Criminal No. 4382, supra, I am of the opinion that the order denying the preliminary injunction should be reversed.

HOUSER, J., concurred.

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20 Cal.2d 141

FENNESSEY v. PACIFIC GAS & ELECTRIC CO. et al.

S. F. 16676.

Supreme Court of California.

April 2, 1942.

Rehearing Denied April 30, 1942.

1. Statutes 🔑199

The word "emergency" as used in legislative enactments does not always have precisely the meaning ascribed to it by lexicographers.

See Words and Phrases, Permanent Edition, for all other definitions of "Emergency".

2. Municipal corporations ⚷120
Statutes ⚷179

Where the word "emergency" is defined by statute or ordinance, an interpretation thereof must be confined to and limited by such definition, and the subject-matter enacted.

3. Automobiles ⚷12

Under ordinance prohibiting the parking of automobiles between a safety zone and an adjacent curb but containing an exception in favor of public utilities while the driver of an automobile is engaged in necessary performance of emergency duties, the word "emergency" has reference to a method adopted as an expedient for meeting a situation which ordinarily calls for immediate action.

4. Automobiles ⚷246(55)

In pedestrian's action against electric company and its truck driver for injuries sustained by pedestrian when struck by bus driven to left of safety zone to avoid electric company's truck parked between curb and safety zone while driver was engaged in daily routine of cleaning and repairing street light fixtures, court properly refused to give instruction that if driver was engaged in maintenance of street lights, electric company and driver were not negligent, in view of ordinance prohibiting parking between safety zone and adjacent curb except where drivers of public utility park in case of emergency, since driver was not engaged in an "emergency". Vehicle Code, § 586, St. 1935, p. 191.

5. Automobiles ⚷173(4)

The fact that method employed by electric company in servicing street lights was the most practicable that could be used was immaterial in determining whether electric company and its truck driver were liable for injuries sustained by pedestrian when pedestrian was struck by bus driven to left of safety zone to avoid electric company's truck parked between curb and safety zone while driver was engaged in servicing street light fixtures. Vehicle Code, § 586, St.1935, p. 191.

6. Automobiles ⚷245(62)

In pedestrian's action against a gas and electric company, its truck driver, and operator of a bus for injuries sustained when pedestrian was struck by bus as it was driven to left of a safety zone to avoid truck which was parked between curb and safety zone while driver was servicing street light fixtures owned by city and county, whether parking of truck had anything to do with swerve or turn of bus onto street car tracks, as result of which accident occurred, or whether bus operator could have avoided accident, notwithstanding that he violated ordinance prohibiting driving to left of safety zone, were questions for jury. Vehicle Code, § 586, St.1935, p. 191.

7. Appeal and error ⚷1002

District Court of Appeal could not interfere with verdict based on conflicting evidence.

8. Negligence ⚷61(2)

Where the original negligence continues and exists up to time of injury, the concurrent negligent act of a third person causing injury will not be regarded as an "independent act of negligence", but the two concurring acts of negligence will be held to be the "proximate cause" of injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Act of Negligence" and "Proximate Cause".

EDMONDS and CURTIS, JJ., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Elmer E. Robinson, Judge.

Action by Irene Fennessey against the Pacific Gas and Electric Company and others, for personal injuries. From a judgment in favor of the plaintiff, the defendants appeal.

Judgment affirmed.

Prior opinion, 116 P.2d 479.

Rehearing denied; CURTIS and EDMONDS, JJ., dissenting.

Thos. J. Straub, John J. Briare, Frederick T. Searls, and W. H. Spaulding, all of San Francisco, for appellants.

John J. Taaffe, George B. Harris, and P. J. Murphy, all of San Francisco, for respondent.

PER CURIAM.

A hearing was granted in this cause by this court after decision by the District Court of Appeal, First District, Division One. After examining the record and contentions of counsel we are convinced that the decision of the District Court of Appeal is correct, and we therefore adopt the opinion prepared by Mr. Justice Ward when this case was pending in the District Court of Appeal and make it the decision of this court, as follows:

Appeal by defendants Pacific Gas and Electric Company, a corporation, and

Thomas Foley, one of its employees, from a judgment rendered following a jury's verdict in favor of plaintiff Irene Fennessey for damages for personal injuries. Mrs. Fennessey's husband died prior to the trial of the action. Defendant George L. Manecis, the driver of a jitney, as the result of a collision with which plaintiff's injuries were sustained, defaulted and judgment was taken against him.

The accident occurred on the south side of Market street just west of Tenth street in San Francisco, where Foley had parked a company truck between the south curb and a safety zone for the purpose of cleaning, servicing and doing repair work to street lighting fixtures owned by the city and county of San Francisco. The work as performed involved the use of a "tower" truck and it is admitted that in its position near the curb there was insufficient space for eastbound traffic to pass between it and the safety zone. Defendant Manecis, proceeding east on Market street, passed the truck by driving his automobile, which he was using as a jitney bus, to the left (north) of the safety zone, along the street car tracks. Mrs. Fennessey was standing in or very near the marked pedestrian lane which crosses Market street at Tenth street, when she was hit by the Manecis car.

The main contentions of appellants are that the evidence proves as a matter of law that at the time of the accident they were engaged in "emergency" work within the meaning of a municipal ordinance, but that, assuming negligence on their part, the evidence fails to show that such negligence was a proximate cause of the accident. In regard to the latter contention, it is their theory that the act of the jitney bus driver broke the chain of causation between any negligence in parking the truck and plaintiff's injuries.

Section 138 of the Motor Vehicle Act (now section 586 of the Vehicle Code of 1935, St. 1935, p. 191) and article V, section 35 (now section 76), San Francisco Traffic Ordinance, are substantially to the same effect, namely, the prohibition of parking between a safety zone and an adjacent curb. Appellants contend that section 8, article II of the traffic ordinance contains an exception in favor of public utilities "while the driver of any such vehicle is engaged in the necessary performance of emergency duties." Our attention has not been called to a definition of the word "emergency" in the traffic ordinance. In Fennessey v. Pacific Gas & Electric Co., 10 Cal.2d 538, 540, 76 P.2d 104, 105, on a former appeal in this case the court held that "The parking of the truck between the safety zone and the curb was a violation of state law and municipal ordinance * * * in force at the time of accident * * * unless it was 'engaged in the necessary performance of emergency duties'."

[1-3] The word "emergency" as used in legislative enactments does not always have precisely the meaning ascribed to it by lexicographers. Huff v. City of New York, 202 App.Div. 425, 195 N.Y.S. 257. It may be defined by the statute or ordinance. If so, an interpretation thereof must be confined to and limited by such definition and the subject matter enacted. The law governing this question indicates that "emergency" has reference to a method adopted as an expedient for meeting a situation which ordinarily calls for immediate action. Mason v. Crawford, 17 Cal.App.2d 529, 62 P.2d 420. The evidence shows that to keep the lights on both sides of Market street reasonably serviced and in repair requires more than a month's continuous work, going from pole to pole. Admittedly the work which Foley was doing, or was expected to do, upon the fixtures, was routine in nature and was not unforeseen, unexpected or the correction of a condition which had suddenly arisen.

[4] Appellants requested an instruction which first quoted a part of the ordinance and then proceeded as follows: "Therefore, if you believe from the evidence that, at or about the time of the accident in question, the said Thomas Foley was engaged in work involving the maintenance of the street lamps as an employee of the Pacific Gas and Electric Company, then I instruct you that in that event the defendants Thomas Foley and Pacific Gas and Electric Company were not guilty of any negligence and your verdict must be for those defendants and against the plaintiff." The instruction was refused with the notation "no evidence of the existence of any emergency." The refusal of this instruction must be approved. The repair vehicle was not used in responding to an emergency call, nor was it parked as the result of its arrival at the scene of an "emergency." It was simply engaged in its normal daily routine of cleaning and repairing street light fixtures.

[5] The fact that the method employed in servicing was the most practical that

could be used, or that appellant company had a contract with the city to perform the work, can play no part in the determination of the question. The record does not disclose any designated means or method to be used in performing the work. The contract could not justify the violation of a parking law except upon the theory that the servicing performed by appellants was an "emergency," which, as we have just said, was not the case. Until a legislative body in the exercise of its authority reframes an ordinance or statute excepting from the law prohibiting parking between a safety zone and an adjacent curb, vehicles engaged in the performance of routine work on behalf of a governmental agency, appellants are without remedy.

[6-8] Whether the parking of appellants' repair truck between the safety zone and the curb had anything to do with the swerve or turn of the jitney bus on to the first or second street car tracks, as the result of which the accident occurred, or whether the jitney driver could have averted such accident, notwithstanding that he violated the ordinance prohibiting driving to the left of a safety zone, were purely questions of fact to be determined by the jury. If the jury believed the evidence in support of respondents' theory that the parking of appellant company's car was a proximate cause of the accident, we are unable to interfere. Mecchi v. Lyon Van & Storage Co., 38 Cal.App.2d 674, 102 P.2d 422, 104 P.2d 26; McKay v. Hedger, 139 Cal.App. 266, 34 P.2d 221; Gett v. Pacific Gas & Electric Co., 192 Cal. 621, 221 P. 376; Winsky v. DeMandel, 204 Cal. 107, 266 P. 534; Wright v. Los Angeles Ry. Corp., 14 Cal.2d 168, 93 P.2d 135; Hurtel v. Albert Cohn, Inc., 5 Cal.2d 145, 52 P.2d 922. In Lacy v. Pacific Gas & Electric Co., 220 Cal. 97, 98, 29 P.2d 781, 782, the court said: "The authorities in this state hold that where the original negligence continues and exists up to the time of the injury, the concurrent negligent act of a third person causing the injury will not be regarded as an independent act of negligence, but the two concurring acts of negligence will be held to be the proximate cause of the injury." Rae v. California Equipment Co., 12 Cal.2d 563, 86 P.2d 352; Taylor v. Oakland Scavenger Co., 17 Cal.2d 594, 110 P.2d 1044.

The judgment is affirmed.

EDMONDS, Justice (dissenting).

Although I agree that the appellants were guilty of negligence as a matter of law, I fail to find any causal connection between their negligence and the injuries sustained by the respondent. Ordinarily, the question of proximate cause, like those of negligence and contributory negligence, is one of fact to be determined by the jury. But where only one conclusion may reasonably be drawn from the facts, the question becomes one of law. Schwartz v. California Gas & Elec. Corp., 163 Cal. 398, 125 P. 1044; Traylen v. Citraro, 112 Cal.App. 172, 297 P. 649; Gallichotte v. California, etc., Ass'n, 4 Cal.App.2d 503, 41 P.2d 349; Kostouros v. O'Connell, 39 Cal.App.2d 618, 103 P.2d 1028; Restatement of the Law of Torts [American Law Institute], § 434.

According to uncontroverted evidence, the truck was parked in such a manner as to prevent automobiles eastbound on Market Street from passing between the curb and the safety zone. This zone is 64 feet in length and is protected by raised buttons. The tracks of the Municipal Railway lie four feet north of and parallel with the safety zone, and about the same distance farther north are the tracks of the Market Street Railway Company.

Immediately prior to the accident, the respondent had alighted from a bus and had stepped into the east end of the safety zone near the pedestrian crosswalk. At the time Manecis had reached a point variously estimated as from 20 to 100 feet away from the west end of the safety zone, he observed the truck blocking the street between it and the curb. Following two or three other cars ahead of him, he swerved to his left and proceeded for several feet along the second track until he struck respondent, who was in the crosswalk, causing severe injuries. During all of this time, his automobile was traveling at a speed of about 10 to 15 miles per hour.

It is well settled that the violation of a statute or municipal ordinance constitutes negligence per se, provided the plaintiff is one of a class of persons whom the statute was intended to protect (Baillargeon v. Myers, 180 Cal. 504, 182 P. 37; Rabe v. Western Union Tel. Co., 198 Cal. 290, 244 P. 1077; Benjamin v. Noonan, 207 Cal. 279, 277 P. 1045; 19 Cal.Jur. 632; Prosser on Torts, p. 266), unless such violation was justifiable or excusable under the circumstances. Mora v. Favilla, 186 Cal. 199, 199 P. 17; Parker v. Auschwitz, 7 Cal.App.2d 693, 47 P.2d 341. Market Street is a thoroughfare with four street car tracks, and the traffic thereon is frequently congested. It was undoubtedly the design of the city ordinance to keep the traffic lane between the curb and the safety zone open and thereby prevent the hazard to pedestrians seeking to board, or leave street cars which would be caused by vehicles traveling on the street car tracks. At the time of the appellants' illegal parking, the respondent had stepped into the safety zone. She was therefore among those whom the statute was intended to protect.

But in order to be a legal cause of another's injury, it is not sufficient that the harm would not have occurred had the actor not been negligent. An original act of negligence is not a proximate cause of an injury when the damage directly results from the intervening act of a third person which was one not to be reasonably anticipated by the defendant as likely to result from his own act. If, with the effects of the former negligence consciously before him, the intervening actor is guilty of a new negligent act which may not be said to flow with logical sequence from the original negligent act, the chain of causation is broken and the original act of negligence is not the proximate cause of the accident. These are fundamental and accepted principles in the law of torts. Vizelich v. Southern Pacific Co., 126 Cal. 587, 59 P. 129; Trice v. Southern Pacific Co., 174 Cal. 89, 161 P. 1144; Schwartz v. California Gas & Elec. Co., supra; Katz v. Helbing, 205 Cal. 629, 271 P. 1062, 62 A.L.R. 825; Hauser v. Pacific Gas & Elec. Co., 133 Cal.App. 222, 23 P.2d 1068; McMillan v. Thompson, 140 Cal.App. 437, 35 P.2d 419; Camp v. Peel, 33 Cal.App.2d 612, 92 P.2d 428.

Applying these principles to the facts of the present case, as I read the record, it is clear that the sole legal cause of the respondent's injuries was the independent act of Manecis in operating his car in such a careless manner as to violate her rights as a pedestrian by running her down in the marked crosswalk. Admitting that the act of the appellants in obstructing the passage of traffic between the safety zone and the curb forced Manecis to take a path of travel made illegal by city ordinance, there is no evidence that the parked truck caused him to operate his automobile carelessly. On observing the truck, he made his first turn to the left at least 20 feet from the west end of the safety zone. He then proceeded along the municipal tracks for about 25 feet, at which point he swerved again to the left and drove along the tracks of the Market Street Railway Company to the point in the pedestrian lane where the respondent was struck. He traveled for a distance of at least 84 feet from the point of his original turn to the place of the accident, and during this course of travel his speed was not more than 10 to 15 miles per hour. The evidence clearly indicates that after he had turned left to avoid the parked truck, his subsequent movements were governed by his own free choice without any possible reference to the truck and unaffected by any act of the appellants. There is no claim that the truck caused Manecis to lose control over his automobile and the evidence is entirely to the contrary. After he turned to the left, there was nothing about the truck which could have affected his action in directing the course or speed of the vehicle he was driving.

Under these circumstances, the act of Manecis in striking respondent was a new act of negligence, wholly unrelated to the negligence of the appellants. There is no basis for holding that Foley should reasonably have anticipated that a car, forced to operate to the left of the safety zone but admittedly within the control of the driver, would be so negligently driven as to strike a pedestrian standing in the marked crosswalk some 86 feet away. The unlawful occupation of the street by the appellants' truck was, at most, a condition and not a contributing cause of the accident. McMillan v. Thompson, supra.

The present case cannot be likened to those wherein the facts show that the vehicle operated by the defendant came to a sudden stop, forcing other vehicles approaching from the rear to swerve out suddenly, and a pedestrian or automobile was struck by another automobile whose driver was avoiding, or attempting to avoid, the defendant's car. Gett v. Pacific Gas & Elec. Co., 192 Cal. 621, 221 P. 376; Mason v. Crawford, 17 Cal.App.2d 529, 62 P.2d 420. Manecis collided with the respondent, not in swerving to avoid hitting the appellants' truck, but only after he had proceeded some 86 feet farther in full control of the speed and direction of the vehicle he was operating.

The case is likewise distinguishable from decisions in which the negligent act of the defendant was a concurring factor and actively participated in the accident. For example, in Lacy v. Pacific Gas & Elec. Co., 220 Cal. 97, 29 P.2d 781, the defendant negligently left an electric light pole in a farm roadway. The plaintiff was about to enter an automobile parked in front of the pole. As the driver of the automobile was endeavoring to start the motor, the car pole in the air in such a manner as to strike the plaintiff on the leg. The defendant's act was held to have been the proximate cause of plaintiff's injuries. But in the present case, at the time the accident occurred the appellants' act had ceased to have any effect upon the movements of Manecis and it did not actively concur in producing the injuries sustained by the pedestrian.

The respondent relies upon McKay v. Hedger, 139 Cal.App. 266, 34 P.2d 221, and Mecchi v. Lyon Van & Storage Co., 38 Cal.App.2d 674, 102 P.2d 422, 104 P. 2d 26. In the McKay case, the defendants double parked their ice truck in such a manner as to obstruct the view of other drivers lawfully traveling on the street. The plaintiff, a minor child, ran from behind the truck into the path of an oncoming automobile and was injured. In the Mecchi case, the defendant illegally parked its moving van at an angle to the curb opposite two cars parked at the curb across the street, thus reducing the space for passing cars. In passing through this space, a car hit the plaintiff, a minor. In both cases, the question whether the defendant's illegal parking was a proximate cause of the accident was held to be a question for the jury. However, in each of them, the parked automobile obscured the vision of the oncoming drivers and the injured pedestrians, and the accident occurred while the passing cars were in the very act of proceeding around the standing vehicle. The facts of the present case are entirely different and compel a contrary result.

Concerning the holding that the former decision (Fennessey v. Pacific Gas & Elec. Co., 10 Cal.2d 538, 76 P.2d 104), has now become the law of the case, that appeal was taken, in part, from an order granting the respondent a new trial upon the ground that certain instructions given by the trial court upon the issue of proximate cause was erroneous. The propriety of the challenged instructions was the sole question decided by the court upon that appeal; whether or not the evidence was sufficient as a matter of law to establish the act of the appellants as a proximate cause of the accident was not decided by the court and, in my opinion, the doctrine of the law of the case does not apply to the issues now before the court.

For these reasons, I believe that the judgment should be reversed.

CURTIS, J., concurred.

MEDICO-DENTAL BLDG. CO. OF LOS ANGELES v. HORTON & CONVERSE.*

Civ. 12749.

District Court of Appeal, Second District, Division 3, California.

March 31, 1942.

Rehearing Denied April 29, 1942.

Hearing Granted May 28, 1942.

1. Landlord and tenant ⚷48

A lease to physician prohibiting physician from maintaining drug store, but impliedly permitting physician to dispense drugs in treating physician's own patients, was not violative of provision in drug company's lease prohibiting leasing of any part of building for drug store purposes.

2. Evidence ⚷20(1)

It is common knowledge that a physician who furnishes medicines to his own patients does not thereby conduct a "drug store".

See Words and Phrases, Permanent Edition, for all other definitions of "Drug Store".

3. Evidence ⚷507

In landlord's rent action against tenant asserting violation of lease prohibiting leasing of other parts of building to tenants selling drugs, whether physician in building was selling drugs was not subject of expert testimony, where all facts necessary to decision were before trial court.

4. Landlord and tenant ⚷48

A lease provision, prohibiting leasing of other parts of building to tenants selling drugs, must be interpreted to give effect to parties' main intention, so as to make provision reasonable, and with reference to circumstances under which it was made and matter to which it relates. Civ.Code, §§ 1636, 1643, 1647.

5. Landlord and tenant ⚷48

A provision, in drug company's lease, prohibiting leasing of other parts of building to tenants selling drugs, prohibited the carrying on of business of selling drugs, but did not prohibit physicians in building from exercising their right under Business and Professional Code to dispense medicines to their patients. St.1937, pp. 1300, 1301, §§ 4030, 4031, 4035, 4036.

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* Subsequent opinion 132 P.2d 457.

6. Druggists 🔑5

A physician having laboratory or office for compounding of drugs and dispensing of prescriptions to patients, and employing pharmacist, did not operate "pharmacy" within Business and Professional Code. St. 1937, p. 1301, § 4036.

See Words and Phrases, Permanent Edition, for all other definitions of "Pharmacy".

7. Landlord and tenant 🔑134(3)

A provision in lease permitting physician to compound and dispense drugs in connection with regular course of treatment of physician's patients did not give physician right to do anything which physicians could not legally do under Business and Professional Code, and did not give him permission to operate "pharmacy" or "drug store". St.1937, pp. 1300, 1301, §§ 4030, 4031, 4035, 4036.

8. Landlord and tenant 🔑48

A drug company was "estopped" from asserting that dispensing of medicines to patients by physician was violative of company's lease prohibiting leasing of other parts of building to other tenants selling drugs, where company's agents had knowledge of and acquiesced in physician's practices and sold drugs to physician for three months.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

9. Estoppel 🔑90(1), 95

Equity does not permit a party to take advantage of a situation which he has encouraged by his silence and acquiescence.

10. Estoppel 🔑55

"Estoppel" of corporation can arise from a waiver of a right implied from conduct of corporation's agents causing others to act in the belief that a waiver was intended.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

11. Landlord and tenant 🔑34(2)

Evidence that detriment to drug company's business, by reason of physician's alleged sale of drugs in violation of company's lease prohibiting leasing of other parts of building to other tenants selling drugs, was trivial, would not warrant company's rescission of lease.

12. Contracts 🔑261(2)

The breach of independent convenant or one which does not run to whole consideration for contract does not warrant "rescission" of contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Rescission".

13. Contracts 🔑261(2)

A breach of dependent covenant so trivial in amount that it does not materially affect or interfere with primary purposes of covenantee in entering into contract does not give covenantee the right to rescind.

14. Landlord and tenant 🔑48

A provision in lease prohibiting leasing of space in building to tenant's competitor would not be breached by landlord by reason of another tenant's alleged competitive use of space, unless landlord refused or persistently failed to make reasonable efforts to put an end to such violation.

15. Landlord and tenant 🔑48

A provision in lease prohibiting leasing of space in building to tenant's competitor merely imposed on landlord an implied obligation to see that other tenants did not become competitors by reasons of practices adopted without landlord's knowledge or consent.

16. Landlord and tenant 🔑62(2)

A tenant can enjoin competitor from practices constituting violation of tenant's lease prohibiting leasing of space in building to tenant's competitor.

17. Landlord and tenant 🔑34(2)

A tenant was not entitled to rescind lease for alleged violation of provision prohibiting leasing use of space in building to tenant's competitor, so long as landlord was diligently and in good faith endeavoring to remove cause of tenant's complaint.

18. Landlord and tenant 🔑44(1)

Covenants in lease should be construed to be dependent or independent according to intention of parties and good sense of case, and technical words should give way to such intention.

19. Landlord and tenant 🔑20

Leases of realty create rights depending on privity of estate, and rights depending on privity of contract.

20. Landlord and tenant 🔑37

Those features of lease which are strictly contractual should be construed in accordance with principle that intentions of parties should be given effect as far as possible.

21. Contracts 🔑173

Covenants which run to entire consideration of contract are "mutual and dependent".

See Words and Phrases, Permanent Edition, for all other definitions of "Mutual and Dependent Covenant".

22. Landlord and tenant 🔑44(1)

Where landlord's covenant is of such nature that breach thereof will defeat entire purpose of tenant in entering into lease, such as rendering his further occupancy of premises a source of continuing financial loss incapable of satisfactory measurement in damages, covenant goes to entire consideration for lease upon tenant's part.

PARKER WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action for rent by Medico-Dental Building Company of Los Angeles against Horton & Converse. From the judgment, the plaintiff appeals.

Reversed.

Louis M. Lissner and Laurence M. Weinberg, both of Los Angeles, for appellant.

J. Harper Shoop, of Los Angeles, for respondent.

SHINN, Justice.

Plaintiff sued for rent under a lease dated July 1, 1934, of space on the ground floor of an office building which was used by defendant in conducting a prescription drug business. Judgment was given for defendant on the ground that plaintiff itself had violated the lease in material respects, that because of such violations defendant had the right to rescind and did rescind its lease, and was therefore not liable for rent accruing after it vacated the premises immediately following the rescission.

In the lease between plaintiff and defendant there was a provision that the landlord would not lease any portion of the building "for the purpose of maintaining a drug store or selling drugs or ampoules or for the purpose of maintaining a cafe, restaurant or lunch counter therein during the term of its lease." On December 30, 1937, plaintiff leased the ninth floor to one Dr. Boonshaft, who headed a medical group composed of six or eight doctors. This lease contained the following provisions: "The premises demised hereby are to be used solely as offices for the practice of medicine and dentistry and lessee agrees that he will not maintain therein or thereon, nor permit to be maintained therein or thereon, a drug store or drug dispensary, nor will lessee compound or dispense, or permit to be compounded or dispensed, drugs or ampoules except in connection with the regular course of treatment of lessee's own patients. Lessee agrees not to display any sign or advertisement on the inside or outside of the demised premises or the building of which the demised premises are a part enbodying the words 'Pharmacy,' 'Drug Store,' 'Dispensary' or words of like import. Lessee understands that lessor has heretofore executed a lease to Horton & Converse granting to said Horton & Converse the exclusive privilege of conducting a drug store business on the ground floor of said Medico-Dental Building, and lessee agrees that he will not do, nor permit to be done, anything in connection with the premises demised hereby which would in any way conflict with, or constitute a breach by the lessor therein of said Horton & Converse lease."

The court found that on December 30, 1937, by executing said lease "plaintiff did lease a part or portion of the Medico-Dental Building to a tenant other than the defendant for the purpose of maintaining a drug store and selling drugs on the premises demised in said lease and said lessee so understood said provision, and in this respect the court finds that on December 30, 1937, plaintiff breached its lease with the defendant in a material respect and that such breach was not waived by the defendant; that the plaintiff by virtue of one of the provisions of said lease intended to and did give Louis D. Boonshaft, M. D., the right and privilege of maintaining a drug store, selling drugs and compounding prescriptions on said leased premises, and by so doing failed to protect the defendant against competition."

The court further found that during the month of May, 1938, a drug store in charge of a registered pharmacist was opened by Dr. Boonshaft, registered as a pharmacy with the State Board of Pharmacy with a state sales tax permit, and that goods were sold in said drug store and prescriptions were being compounded and filled and a charge was being made for said prescriptions in said drug store during said month of May, 1938, and that "plaintiff in not taking immediate action to abate said drug store by exercising the authority given it by the provision in its lease with Louis D. Boonshaft, M. D., whereby said Louis D. Boonshaft, M. D., agreed that he would not do, nor permit to be done, anything in connection with the premises demised to him by plaintiff, which would in any way conflict with or constitute a breach by plaintiff of defendant's lease, and, finally, on August 19, 1938, advising defendant that it, the plaintiff, could make no arrangements with Dr. Boonshaft and could not do anything with him regarding the selling of drugs and the maintaining of the drug store on his premises, violated and breached its lease with defendant in a material respect, and that such violation or breach was not waived by defendant."

It was further found that "plaintiff failed, refused and neglected to conform and comply with the restrictive covenant in the lease between plaintiff and defendant and that by reason of such failure, refusal and neglect plaintiff breached its lease with defendant in a material respect, in that it failed to protect the defendant against competition, and the court further finds that such breach was not waived by the defendant."

[1] We shall first take up the question whether the evidence was sufficient to prove any violation by plaintiff of defendant's lease. Preliminarily it is necessary to understand what was meant by the restrictive covenant in question. The trial court found that plaintiff leased space to Dr. Boonshaft "for the purpose of maintaining a drug store and selling drugs." This finding is not supported by the evidence. The space was not leased for the purpose of maintaining therein a drug store. Its use for that purpose was expressly prohibited in positive language. From the wording of the lease it seems clear that Dr. Boonshaft was given implied permission to compound and dispense drugs and ampoules in connection with the regular course of treatment of his own patients. Since this is all that he intended, or was given permission to do, it is apparent from the findings that no distinction was drawn by the trial court between the right so extended to him and the privilege of operating a drug store. This fact is emphasized by the additional finding that the parties to the lease understood that Dr. Boonshaft would have the right to operate a drug store. These findings illustrate the theory of the case which led to the conclusion that plaintiff violated its lease with defendant in leasing to Dr. Boonshaft. This conclusion, in our opinion, is not tenable.

[2] It is conspicuous in the record that throughout the trial it was assumed that a physician who furnishes medicines to his patients is thereby conducting a drug store. That this is not true, as a matter of fact, is of common knowledge. That it is not true as a matter of law is made perfectly clear by the language of provisions of the Business and Professional Code to which we shall refer. A decision based upon findings to the contrary would be novel, to say the least.

[3] A Mr. Walsh, vice president of defendant, and a member of the State Board of Pharmacy, was called as a witness for defendant. He testified as follows: "Now Mr. Walsh, when did it first come to your attention that what in your opinion was a pharmacy, was located on the ninth floor of the Medico-Dental Building?" He answered that he had been so advised by the manager of the store in the building in April or May. The court had previously ruled, over appellant's objection, that Mr. Walsh could testify by way of stating his opinion that a pharmacy was being operated by Dr. Boonshaft. This was not a subject matter for expert testimony. Whether Dr. Boonshaft was given a lease by plaintiff with knowledge that he intended to operate a drug store and whether he operated one were questions of fact for the court to decide. They went to the very essence of the case and were to be decided upon the evidence as to what was actually done in the premises. All of the facts necessary to a decision were before the court; there was no occasion to receive the opin-

ion of any witness as to whether the facts in evidence proved that Dr. Boonshaft was operating a pharmacy or drug store. People v. Overacker, 1911, 15 Cal.App. 620, 632, 115 P. 756; Coelho v. Judson Mfg. Co., 1916, 30 Cal.App. 39, 156 P. 1005; Wilkerson v. City of El Monte, 1936, 17 Cal.App. 2d 615, 622, 62 P.2d 790.

From comments made by the trial judge in connection with the receipt of this expert testimony it would appear that the opinion expressed by the witness was thought to have no little evidentiary value. That the testimony contributed to the erroneous conclusion of fact may fairly be inferred. Furthermore, as will later appear, the opinion, if it had been admissible, was rested so heavily upon the issuance of a pharmacy license to Dr. Boonshaft, rather than upon the manner in which the latter operated his business, as to detract greatly from any force it might otherwise have had.

[4, 5] Another finding was that in his lease Dr. Boonshaft was given permission to compound and sell drugs. This was true if the words "compound and dispense" mean "compound and sell." Let us assume that they do, and let us assume that in a purely technical sense "selling" means every disposition except giving away without charge, direct or indirect. We then come to the question whether compounding and dispensing medicines and ampoules by a physician to his own patients in the course of treatment would be the sale of drugs which was prohibited by the provision of defendant's lease. That provision must be so interpreted as to give effect to the mutual intention of the parties (Civil Code, section 1636), so as to make it reasonable (Civil Code, section 1643), and with reference to the circumstances under which it was made and the matter to which it relates (Civil Code, section 1647). As so construed we believe it to be clear that it must have been the intention to prohibit the carrying on of the business of selling drugs but not to prohibit those practices which as a matter of law under their professional licenses could be followed by physicians as such. The Medico-Dental Building was what its name implies—one primarily operated for the occupancy of physicians and dentists. That fact is emphasized by defendant and is pointed out as the reason for its maintaining its drug store in the building. There are several pertinent sections of the Business and Professional Code, St.1937, p. 1230 et seq. They are important because they state the law under which physicians dispense medicines and define terms as the parties no doubt understood them, but which were used loosely in the testimony and the findings.

Sec. 4030. "Except as otherwise provided in this chapter, it is unlawful for any person to manufacture, compound, sell or dispense any drug, poison, medicine or chemical, or to dispense or compound any prescription of a medical practitioner, unless he is a registered pharmacist or a registered assistant pharmacist under the provisions of this chapter."

Sec. 4031. "This chapter does not apply to or interfere with any one, who holds a physician's and surgeon's certificate and who is duly registered as such by the Board of Medical Examiners or the Board of Osteopathic Examiners of this State, with supplying his own patients with such remedies as he may desire if he acts as their physician and is employed by them as such and if he does not keep a pharmacy, open shop or drug store, advertised or otherwise, for the retailing of medicines or poisons."

Sec. 4035. "As used in this chapter, pharmacy means and includes every store or shop where drugs, medicines or chemicals are dispensed or sold at retail, or displayed for sale at retail, or where prescriptions are compounded, which has upon it or in it as a sign, the words 'pharmacist,' 'pharmaceutical chemist,' 'apothecary,' 'druggist,' 'pharmacy,' 'drug store,' 'drugs,' or any of these words."

Sec. 4036. "Every store, dispensary, pharmacy, laboratory or office for the sale, dispensing or compounding of drugs, medicines or chemicals, or for the dispensing of prescriptions of medical practitioners, shall be in charge of a registered pharmacist or a licentiate in pharmacy. No registered assistant shall conduct a pharmacy."

[6, 7] It seems that the parties must have had the foregoing statutory provisions in mind when the Boonshaft lease was drafted. Plaintiff was scrupulously careful to provide that Dr. Boonshaft's practices in the dispensing of drugs should be confined to those which are permitted by law to physicians to the exclusion of other prac-

tices which pertain to the pharmacy or drug business. It was lawful for Dr. Boonshaft to supply to his own patients, as their physician, such remedies as he might desire to prescribe for them (section 4031) if he did not also "keep a pharmacy, open shop or drug store, advertised or otherwise, for the retailing of medicines or poisons." He had the right to compound prescriptions if he did not also maintain a "store" or "shop" where medicines, etc., were dispensed or sold at retail having upon it as a sign the words "pharmacist," "pharmaceutical chemist," "apothecary," "druggist," "pharmacy," "drug store," or "drugs" (section 4035, Business and Professional Code). He agreed not to display any such sign and never did display one. No doubt he intended to employ a pharmacist, as he would have been required to do under section 4036, because he had a laboratory or office for the compounding of drugs and the dispensing of prescriptions. But this did not constitute having or operating a pharmacy as defined by section 4035. In other words, there was nothing in the lease which gave him the right to do anything which physicians could not legally do, nor was he given permission to operate a pharmacy or drug store. Nor is there any evidence that he intended in the beginning to do or that he did anything that other physicians in the building could not lawfully do. The reasonable construction of the Horton & Converse lease is that it was not thereby intended to deprive future tenants in the building of rights and privileges to dispense medicines to their patients which were enjoyed by the physicians and dentists who were already there and other practitioners who were purchasing drugs and medicines from respondent. The evidence clearly shows that the executives of Horton & Converse so understood their lease for several months after Dr. Boonshaft moved in. He took possession of the ninth floor of the building April 15, 1938. He then began purchasing drugs at retail from defendant's store in the building. He had to pay a sales tax on his purchases and complained of this to Mr. Walsh, the vice president of defendant. The latter told him that sales tax was charged on all retail purchases but not on wholesale purchases. Thereupon Mr. Walsh took the matter up with Mr. Binder, who was the manager of the Boonshaft group, with the result that he received full information as to the manner in which the group of doctors was operating, namely, that it was rendering services on a monthly payment basis, was treating a large number of people, and desired to buy drugs at wholesale to be supplied to the patients. In the latter part of April or early part of May Mr. Walsh saw the drug room and the medicines on the shelves in the Boonshaft suite. He testified that at about that time he had been advised by the manager of the store in the building that Dr. Boonshaft had received quite a quantity of pharmaceuticals, drugs and medicines; that he intended to operate his own pharmacy and had employed a pharmacist. He communicated these facts to the representative of appellant, who read to him pertinent provisions of the Boonshaft lease and explained how Dr. Boonshaft was operating. Mr. Walsh had previously discussed with Mr. Binder and Dr. Boonshaft the possibility of an arrangement under which Dr. Boonshaft would purchase his drugs at a discount from defendant and credit was established as of June 25, 1938, for purchases at wholesale. Defendant continued to sell drugs at retail to Dr. Boonshaft until the wholesale purchases were commenced after the 25th of June, and thereafter sold them at wholesale up to the time of trial. Mr. Walsh testified that Horton & Converse sold drugs, medicines, etc., to Dr. Boonshaft just as they sold them to other physicians. Of course defendant knew during all of this period that the Boonshaft group were supplying drugs to their patients. As a matter of fact Dr. Boonshaft on May 10, 1938, obtained a pharmacy license from the State Board of Pharmacy, of which Mr. Walsh was a member. Mr. Walsh's signature was attached to this license. Although Horton & Converse knew that drugs were being purchased at retail and were to be purchased from them at wholesale to be dispensed to patients, they made no objection to Dr. Boonshaft or his representatives nor did they, until early in August under circumstances to be related, make any objection to the representatives of plaintiff. They knew from having had the Boonshaft lease read to them in part that the group of doctors were not operating a pharmacy or drug store and were doing no more than supplying drugs or medicines to their patients. They were satisfied with this condition of things. Since Mr. Walsh was a member of the State Board of Pharmacy, and since defendant had been in the drug business for a great many years, it is to be presumed that they were well informed of the difference between the drug store or pharmacy business and the distinctly different vocation of the practice of medicine, which involves to some extent the dispensing of medicines. As we have seen, they were satisfied with the practices that were being followed by Dr. Boonshaft. We cannot find in this evidence any support for the finding that the making of the lease itself or the practices followed thereunder amounted to maintaining a drug store or selling drugs. If the dispensing of drugs to patients was competition with defendant, then all of the other physicians in the building who followed the common practices of medical men—and which are commonly known, as well—would likewise have been in competition with defendant. The executives of defendant changed their minds about their own rights in the premises under the following circumstances: on July 1, 1937, occupancy of the Medico-Dental Building had fallen to a level of 50% and for that reason defendant's rent was reduced from $600 to $500 a month for one year, with a proviso that for each 5% of increase over the level of July 1, 1937, the rent would be increased at the rate of $16.66 per month, not to exceed a fixed rental of $600 per month, although the lease also provided for rental equal to 7% of gross sales.

On July 1, 1938, defendant was billed for the July rent in the amount of $658.31, $100 being a restoration of the fixed rental and $58.31 being an amount previously accrued and including, apparently, an increase due to Dr. Boonshaft's occupancy of space. Mr. Horton, president of defendant, then called up plaintiff's representative to make complaint of the charge for rent, saying, "You are not only operating a pharmacy up there but you are raising our rent on the strength of it." Aside from Mr. Walsh's inquiry of plaintiff's representative as to whether Dr. Boonshaft was operating a pharmacy, Mr. Horton's complaint was the first one made to plaintiff as to the practices of the Boonshaft group and no complaint whatever had been made to Dr. Boonshaft. Defendant apparently was satisfied to have Dr. Boonshaft for a customer for the drugs which he was dispensing to his patients. The rent matter appears to have had an illuminating effect.

[8] Clearly the acts of defendant which we have stated were, in themselves, such as to estop it from claiming, as it later on proceeded to do, that the lease to Dr. Boonshaft, or his practices in the dispensing of medicines, constituted a breach of the covenant of defendant's lease. We should look at certain of the findings in this connection. They cover certain facts which were relied upon by plaintiff to establish an estoppel against defendant but they do not cover or purport to cover other matters relating to knowledge and acquiescence discussed herein which we think do support the claim of estoppel. There was testimony for plaintiff that the restrictive provision of the Boonshaft lease had been read to an executive of defendant and that the latter had approved it before the lease was executed. The court found this to be untrue. It had also been testified that Mr. Walsh advised Dr. Boonshaft that it would be necessary for him to obtain a pharmacy license and sales tax permit and that he outlined the procedure to be followed and promised to assist in the obtaining of said licenses. The court found that Mr. Walsh did not give such advice or make such promises and that it was not true that he or any person on behalf of defendant "did assist or encourage Mr. Binder or anyone to establish or maintain or acquiesce in the maintaining of a drug store or selling of drugs in any part or portion of the Medico-Dental Building other than the premises demised by plaintiff to defendant." The first portion of this finding, that relating to the statements of Mr. Walsh, finds support in the evidence because Mr. Walsh as a witness denied having made the statements. The remainder of the finding has technical support in the evidence, because of course it was not contended that defendant assisted or encouraged Dr. Boonshaft to maintain a drug store or sell drugs. But the pertinent facts with relation to defendant's knowledge of and acquiescence in Dr. Boonshaft's practices were established by the testimony of Mr. Walsh and other witnesses for defendant and stand uncontradicted. From the latter part of April or the early part of May until the rent controversy arose on the 1st of August, respondent knew the terms of the Boonshaft lease, had been informed of the employment of a pharmacist as early as April or May, not only knew of the dispensing of drugs to Dr. Boonshaft's patients but also sold him the drugs first at retail and later at wholesale, obtained such benefits as accrued from this business, and yet

uttered no word of complaint or remonstrance except to inquire whether a pharmacy, or in other words, a drug store or shop for the sale of drugs to the public, was being maintained. The court found that defendant during the last week of July, 1938, learned of the "activities with reference to the aforesaid drug store," but the facts with reference to defendant's knowledge that Dr. Boonshaft had a pharmacist in his employ and was supplying his patients with medicines purchased from defendant for several months before any complaint was made were established without conflict.

[9, 10] Mr. Walsh denied having had "definite" knowledge of the issuance of pharmacy and sales tax licenses until the last week of July, although he admitted having had knowledge of the employment of a pharmacist early in May. The denial is of an immaterial fact in view of his full knowledge of the manner in which drugs were being dispensed. There is no pretense that defendant's executives were so naive as to believe that the physicians during the several months in question were purchasing large quantities of medicines and giving them away to their patients. Nor does it appear that such is the common practice among physicians. It is true as found by the court that defendant did not encourage Dr. Boonshaft to maintain a drug store or sell drugs, but it unquestionably did, by its silence and its sales of drugs to him encourage him to continue to furnish medicines to his patients and to believe and to proceed in the belief that his methods of doing business did not conflict with defendant's rights under its lease. There was no finding to the contrary. Equally significant was defendant's silence with respect to registering a complaint with plaintiff until after a controversy arose over the amount of rent. The plainest principles of equity preclude defendant from taking advantage of a situation which by its silence and acquiescence it encouraged. The estoppel arose from a waiver of the right to assert that its lease had been broken. It was such a waiver as was to be implied from the conduct of its agents and did not need to be express or intentional as long as others acted in the belief that a waiver was intended. Jones v. Della Maria, 1920, 48 Cal.App. 171, 191 P. 943; Johnson v. Kaeser, 1925, 196 Cal. 686, at page 698, 239 P. 324. If Horton & Converse had proceeded against Dr. Boonshaft, the latter would have had a good defense upon the foregoing facts. How can Horton & Converse have greater rights against plaintiff, or how could plaintiff have had greater rights to compel Dr. Boonshaft to change his practices?

[11-13] There is another reason why we think the evidence was insufficient to support a conclusion that any breach of defendant's lease was of a substantial nature. The only evidence in the record as to the amount or value of drugs dispensed by Dr. Boonshaft to his patients was to the effect that they amounted to from $2 to $5 a day. This apparently was at some time prior to the purchases that were made at wholesale. However, there was no evidence that the sales were ever any greater than that, nor was there any evidence as to the nature of the medicines dispensed which would have enabled the court to know whether they differed from those ordinarily supplied by physicians to their patients, nor was there any evidence whatever as to what proportion of the medicines was supplied under the monthly charge and what medicines, if any, were charged for separately. In other words, while under its arrangement with Dr. Boonshaft defendant was profiting satisfactorily in the sale of drugs to him, its detriment, if any, through loss in the filling of prescriptions was not proved or attempted to be proved. Plaintiff was under no obligation to lease to a tenant who would trade with defendant, nor even to lease to a physician. Dr. Boonshaft's advent as a tenant was distinctly advantageous to defendant. It is to be presumed that defendant's sales to him were profitable. The contention is that Dr. Boonshaft should not have been allowed to supply medicines to his patients at all but should have issued prescriptions for such as were needed, which prescriptions, presumably, in part, at least, would have been filled in defendant's store. This was the excuse which defendant offered for the attempted rescission of its lease. This diaphanous screen cannot hide the nakedness of the claim of damage. Nothing of substance in the way of detriment was proved. It is just as reasonable to infer from the facts in evidence that defendant's profits from the sale of drugs and medicines exceeded its possible profits from filling prescriptions as to infer the contrary.

If it were possible to see in the situation some detriment to defendant's business based upon fact and not pure theory, it would be, upon the facts in evidence, insignificant and trivial and would not have warranted a rescission of the lease. Keating v. Preston, 1940, 42 Cal.App.2d 110, 117, 118, 108 P.2d 479. From the fact that a contract is breached by one party it does not necessarily follow that the other thereby becomes entitled to rescind. A breach of a contract in some trivial or minor respect may in some cases be regarded as if it were the breach of an independent covenant. See discussion by Justice Cardozo in Jacob & Youngs v. Kent, 1921, 230 N.Y. 239, 129 N.E. 889, 23 A.L.R. 1429. If the breach of an independent covenant or one which does not run to the whole consideration for the contract does not warrant a rescission of the contract, by like reasoning a breach of a dependent covenant so trivial in amount and consequence that it does not materially affect or interfere with the primary purposes of the covenantee in entering into the contract should not give the latter the right to rescind. In no proper sense can it be said that the sale of medicines by physicians or dentists in the Medico-Dental Building to their own patients constituted a practice which would bring them in competition with defendant's drug business, and no more can it be said that because Dr. Boonshaft employed a pharmacist to compound prescriptions, the insignificant amount of business done with his patients, assuming that it was all through the medium of prescriptions, constituted competition with defendant's business within the meaning of the covenant, in the absence of any showing whatever that the amount involved exceeded the amounts of medicines and drugs which other physicians and dentists in the building were accustomed to furnish and were furnishing to their patients without objection on defendant's part. This feature of the case seems to have been inadequately presented to the trial court, although it was an important one.

There is yet another finding which we think is unsupported by the evidence, and that is that plaintiff breached its lease by failing to take more vigorous action against Dr. Boonshaft to compel him to change his practices. On August 3, Mr. Horton addressed a letter to plaintiff reading as follows: "Some time ago, prior to the execution of your lease with the Louis D. Boonshaft Medical Group, the manager of your building, Mr. Naylor, called our Mr. Walsh and assured him that the Boonshaft Group would not be allowed to operate a drug store, or dispensary, in the building, and read a portion of the clause in the Boonshaft lease to him over the telephone that would protect us. However, it has come to our attention that Dr. Boonshaft has purchased a stock of drugs, taken out a pharmacy permit, employed a pharmacist, has a State Sales Tax permit, fills prescriptions and sells drugs, and charges for the same, which is in direct violation of our lease, and that this was being done with the full knowledge of your building manager. According to the terms of our lease, we must insist that you immediately put a stop to this practice." Plaintiff's representatives immediately contacted Dr. Boonshaft, with the result that on August 8 there was a meeting in the offices of defendant attended by its officers, Dr. Boonshaft, Mr. Binder, and representatives of plaintiff. Dr. Boonshaft denied that he was violating his own lease or that he was maintaining a drug store or selling drugs or ampoules in violation of defendant's lease. At the suggestion of Mr. Horton, negotiations were undertaken toward an arrangement for Dr. Boonshaft to have his prescriptions filled by defendant. From then on until August 19 plaintiff's representatives were diligent in trying to bring about such an arrangement. They were at all times in sympathy with the claims of defendant, although denying any responsibility for the causes of the complaints, and sincerely endeavored to satisfy the demands that defendant was making. One of the plans was to persuade Dr. Boonshaft to submit a list of the most commonly used prescriptions and drugs to defendant for the purpose of getting prices thereon. This was pursuant to a suggestion made by Mr. Horton. Plaintiff endeavored to obtain such a list but on August 19 its attorney advised Mr. Horton by telephone that he had been unable to do anything with Dr. Boonshaft, that "there could not be any arrangements made," and Mr. Horton then said he thought they would move out, to which the attorney said, "Use your own judgment about that." Upon the following day defendant closed its store, placed a sign on the door announcing its removal to one of its other stores, and piled the store full of packing boxes. On August 24 Mr. Horton wrote to plaintiff stating, "In our letter to you, dated August 3, 1938, we notified you that one of your tenants had purchased a stock of drugs, taken our a pharmacy permit, employed a pharmacist, has a State Sales Tax permit, fills prescriptions and sells drugs in direct violation of our lease. We now take the position that you have had a reasonable time to comply with the provisions of our lease but have failed to do so. We, therefore, advise that such failure compelled termination of performance on our part. You are hereby notified that we will vacate the premises located at 947 West Eighth Street before the first day of September, 1938." The premises were vacated before the end of the month of August.

Plaintiff took the position with Dr. Boonshaft that he was violating the lease, and in the ensuing controversy took the side of defendant. That only goes to establish plaintiff's good faith toward defendant. It does not prove that Dr. Boonshaft was violating his lease. Instead of taking extreme measures, plaintiff endeavored in apparent good faith and with commendable diligence to bring the parties to some sort of agreement. Defendant does not advise us just what plaintiff should have done that it did not do. It was simply assumed by defendant that plaintiff intended to do nothing more than had already been done to bring about a settlement of the dispute. That is not a fair inference from the facts disclosed by the evidence. Immediately upon being notified that Dr. Boonshaft's consent could not be obtained to the purchasing of his drugs on prescriptions from defendant, the latter abruptly closed its doors and abandoned all further effort to otherwise assert its rights under the lease.

[14, 15] A most important fact in this connection is that plaintiff had committed no wrong. As already noted, leasing to Dr. Boonshaft violated no right of defendant; the lease in terms respected and provided against violation of defendant's exclusive privilege. Plaintiff never had any more knowledge of Dr. Boonshaft's practices than defendant had, if indeed, as much, until the matter was discussed in conference in the month of August. Under the view most favorable to defendant, plaintiff's conduct could not have constituted a breach of its covenant unless such conduct amounted to a consent to a breach of defendant's exclusive privilege by Dr. Boonshaft, manifested by refusal or persistent failure to make reasonable efforts to put an end to such violation. In other words, Dr. Boonshaft's violation, assuming one for the moment, could not have become plaintiff's violation until plaintiff in effect adopted it as its own. Conceding that this could have been done through inaction (University Club v. Deakin, 1914, 265 Ill. 257, 106 N.E. 790, L.R.A.1915C, 854), the evidence was clearly insufficient to show that it was done or that plaintiff had abandoned its efforts to find a solution for the disagreement between the tenants. While plaintiff was under an express obligation not to lease space to a competitor of defendant, there was, at most, but an implied obligation to see that other tenants did not become such competitors by reason of practices adopted, without plaintiff's knowledge or consent. And if it be the law that a landlord has a duty in such situations, beyond those he has consciously assumed, a breach of that obligation should not be hastily declared against him without a showing that he has been guilty of bad faith or deliberate violation of his duty.

[16, 17] If defendant's understanding of its rights was correct, it could have enjoined Dr. Boonshaft from the practices which constituted a violation of defendant's lease. Pappadatos v. Market St. Bldg. Corp., 1933, 130 Cal.App. 62, 19 P.2d 517; Waldorf-Astoria Segar Co. v. Salomon et al., 1905, 109 App.Div. 65, 95 N.Y.S. 1053, at page 1056, affirmed in 184 N.Y. 584, 77 N.E. 1197; Standard Fashion Co. v. Siegel-Cooper Co., 1898, 157 N.Y. 60, 51 N.E. 408, 43 L.R.A. 854, 68 Am.St.Rep. 749. We do not say that it was obliged to do so, but it cannot be questioned that a greater measure of cooperation with plaintiff would have strengthened its claim that it acted in good faith. At any rate the precipitate and summary action which it did take was wholly unjustified under the circumstances. It must be remembered that up until the time that it closed its store, defendant had not given plaintiff any notice that it contemplated rescinding its lease nor had it made any complaint whatever that plaintiff was not proceeding diligently to remove the cause of the controversy. It was at Mr. Horton's suggestion that negotiations were taken up toward a settlement of the controversy. Plaintiff was not allowed a reasonable time, or any time at all, within which to take further action after Dr. Boonshaft had declined to enter into an agreement, before defendant closed its store. Defendant's contention in this respect does not compare favorably with the good faith shown by plaintiff throughout the controversy. Defendant had no right under the circumstances shown here to rescind its lease

as long as plaintiff was diligently and in good faith endeavoring to remove the cause of defendant's complaint. However, as already pointed out, plaintiff was under no obligation to bring the two tenants to an agreement, or to interfere with Dr. Boonshaft's methods, which did not interfere with the rights of defendant under its lease.

Appellant argues another point which should be decided, inasmuch as it may be pertinent upon a retrial of the case. It is contended that the covenant of the lessor not to lease any part of the building for the purpose of its use as a drug store or for the sale of drugs, and the lessee's covenant to pay rent are independent of each other and therefore that if the former was breached, such breach would not give the lessee the right to terminate or rescind the lease or relieve it from liability to pay rent during the remainder of the term. Two California cases are relied upon, neither of which is in point. They are Arnold v. Krigbaum, 1915, 169 Cal. 143, 146 P. 423, Ann.Cas.1916D, 370, and Exchange Securities Co. v. Rossini, 1919, 44 Cal.App. 583, 186 P. 828. In the first of these cases it was held that a counterclaim for damages for failure to make repairs could not be asserted in an action of unlawful detainer. In the other it was held that a covenant to pay rent was not dependent upon a covenant of the lessor to give the lessee an opportunity to purchase the property in case of sale and that a breach of the latter covenant did not relieve the lessee of his obligation to pay rent. It was also held that a breach of an independent covenant in a lease does not give the right to rescind or terminate the lease in the absence of an agreement between the parties granting such right.

[18-22] In Lunn v. Gage, 1865, 37 Ill. 19, 87 Am.Dec. 233, in construing a lease the court approved a statement to the effect that "covenants are to be construed to be dependent or independent, according to the intention of the parties, and the good sense of the case; and that technical words should give away to such intention." Other cases to the same effect are collected in 32 Am.Jur., section 134. It seems to us to be a wholly satisfactory rule. Leases of real property create distinct sets of rights and obligations, namely, those depending upon privity of estate and those depending upon privity of contract. Samuels v. Ottinger, 1915, 169 Cal. 209, 211, 146 P. 638, Ann.Cas.1916E, 830. Those features of the lease which are strictly contractual in their nature should be construed as other contracts are construed and in accordance with the fundamental principle that the intentions of the parties should be given effect as far as possible. It is an established rule that those covenants which run to the entire consideration of a contract are mutual and dependent. Ernst v. Cummings, 1880, 55 Cal. 179; Brennan v. Ford, 1873, 46 Cal. 7; Osborn v. Henry Cowell Lime, etc., Co., 1918, 37 Cal.App. 67, 70, 173 P. 492. Undoubtedly the covenant in defendant's lease was of such a nature. The exclusive right to conduct a drug store in the building was the thing contracted for. The business was derived largely from tenants in the building and when vacancies occurred defendant's income from the store suffered to such an extent that the rent was temporarily reduced. This fact, of course, is but corroborative of the contention that the business was not of a transient nature and that it was of prime importance that no competitor be rented quarters in the building. Where a covenant of a lessor is of such a nature that its breach will defeat the entire purpose of the lessee in entering into the lease, such as rendering his further occupancy of the premises a source of continuing financial loss incapable of satisfactory measurement in damages, it must be said that the covenant goes to the entire consideration for the lease upon the lessee's part. University Club v. Deakin, 1914, supra; Hiatt Investment Co. v. Buehler, 1929, 225 Mo.App. 151, 16 S.W.2d 219. See also cases cited supra.

The appeal presents no other questions. The judgment is reversed.

SCHAUER, P. J., concurred.

PARKER WOOD, Justice.

I dissent. For dissenting opinion see 125 P.2d 610.

DOMINGUEZ ESTATE CO. v. RUDDOCK.

Civ. 12808.

District Court of Appeal, Second District, Division 1, California.

April 2, 1942.

Rehearing Denied April 28, 1942.
Hearing Denied May 28, 1942.

Landlord and tenant ⚷208(1)

Where lease provided that, in event of assignment of lease before completion of building on leased premises, assigning lessee should remain personally responsible for performance of all obligations under lease until building was constructed and paid for, assignor of lease could not be held responsible for nonpayment by his assignee of rental which accrued long after completion of building. Civ.Code, § 1638.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by the Dominguez Estate Company against A. B. Ruddock to recover rent allegedly due under lease. From a judgment in favor of the defendant, the plaintiff appeals.

Judgment affirmed.

Earl D. Killion, of Los Angeles, for appellant.

Garnet C. Rainey, Edward D. Neuhoff, and Montgomery G. Rice, all of Los Angeles, for respondent.

YORK, Presiding Justice.

This action, tried upon a stipulated statement of facts, was brought to recover rent under a fifty-year lease dated June 1, 1912, between R. M. Baker, as lessor, and E. P. Bryan and L. T. Bradford, as lessees, covering certain real property located at 833 South Spring Street in the city of Los Angeles.

It was stipulated that on August 10, 1916, Edna Price became the owner in fee of said property, as devisee under the will of said R. M. Baker, the original lessor, and on August 21, 1918, L. D. Sale by mesne assignments succeeded to all the interest of Bryan and Bradford, the original lessees under said lease. On January 25, 1922, Edna Price and her husband, and the said L. D. Sale entered into an agreement modifying the terms of the original lease with respect to the construction on the premises of a $50,000 building. On December 14, 1923, said lessee, L. D. Sale, and his wife, Katherine M. Sale, transferred all their rights in the lease to A. B. Ruddock, the respondent herein. The last named parties on the same date executed an instrument in writing (which was attached to said assignment) whereby a modification of the building agreement of January 25, 1922, between Price and Sale was made.

On January 7, 1924, respondent Ruddock and his wife granted and assigned to the Southwestern Development Company "a certain Indenture of Lease, bearing date the 1st day of June, 1912." On that day respondent Ruddock surrendered actual possession of the leased premises to said Southwestern Development Company, and since that time has disclaimed any right, title or interest in or to said lease agreement of June 1, 1912. On March 31, 1924, the Southwestern Development Company entered into an agreement whereby it leased to the Los Angeles City Club (for a period of 20 years after the date of its completion), the building proposed to be erected upon the premises covered by the original lease. On November 17, 1924, the building contemplated by the lease and the modification agreements heretofore referred to was constructed, completed and fully paid for.

On October 25, 1926, Edna Price, a widow, as owner and lessor, deeded the property and assigned the lease of June 1, 1912, to City Bond & Finance Company, which corporation on October 26, 1926, deeded the property and assigned the lease to Maria De Los Reyes D. de Francis, who on February 23, 1929, conveyed the real property to Dominguez Estate Company, appellant herein, reserving to herself as grantor a life estate therein including rents, issues and profits arising therefrom during the term of her natural life.

Following January 7, 1924, Southwestern Development Company paid rental under the terms of the original lease of June 1, 1912, to the respective owners of the leasehold interest and from July 7, 1933, said corporation paid rental to appellant, Dominguez Estate Company, which corporation acquired a fee simple title to the property on June 4, 1933, the date of the death of Maria etc. de Francis, the life tenant.

In August of 1932, said Maria etc. de Francis granted the Southwestern Development Company a reduction in the rental from $1,000 to $750 per month, which amount was paid to and including December, 1932. On January 4, 1933, the rental was reduced to $600 per month which sum was paid to and including April, 1937. On April 19, 1937, appellant notified Southwestern Development Company that it would no longer accept rental at the rate of $600 per month but would require the payment of $1,000 per month, as provided by the terms of the lease. Said rental was paid up to and including September 30, 1938, the said Southwestern Development Company having abandoned possession of the premises on September 28, 1938.

It was further stipulated that when appellant acquired title to the real property it knew that Southwestern Development Company was in possession of the premises as lessee under an assignment from respondent Ruddock. Further, that respondent had paid none of the rental or taxes under the terms of the original lease since Janaury 7, 1924 (the date of the assignment by him to Southwestern Development Company), and that none of appellant's predecessors in interest at any time ever made demand upon respondent that he pay the rental, nor did they inform him that he was liable or obligated to perform the terms and provisions of the original lease.

On November 15, 1938, prior to the commencement of the instant action, appellant for the first time notified respondent that he would hold him personally responsible for payment of all rental, taxes, etc., as provided for in the original lease. The instant action was filed on January 12, 1939, to recover rental due for the months of October, November, December, 1938, and January, 1939, at the rate of $1,000 per month.

This appeal is prosecuted from the judgment of the trial court rendered in favor of respondent Ruddock, it being stated in appellant's opening brief as follows: "Apparently the trial court sustained the contention of the defendant and respondent and held that the said A. B. Ruddock was not liable for any rent or other charges under the lease after the building had been erected and completed in accordance with the terms of the lease agreement. It is the contention and claim of the appellant, however, that the said A. B. Ruddock was not released by the completion of the building and that he is still liable for the obligations of the lease until such time as he might make an assignment in the form of assignment as provided in the lease agreement, being the latter part of paragraph 8 * * * which provides that such assignment shall be evidenced in writing, fully executed and acknowledged by the assignee or assignees, as well as the assignors, and whereby the assignee or assignees shall expressly accept and assume all the terms and covenants of the lease to be kept and performed by the lessees and will agree to comply with and be bound by them. * * *"

Paragraph 8 of the lease of June 1, 1912, provides as follows:

"It is further covenanted and agreed that the Lessees may sell, assign or transfer this lease before they shall have constructed or paid for the building on said premises of the character and within the time hereinbefore specified, but in the event of such an assignment, sale or transfer before the final completion of said building, the Lessees herein shall remain and do hereby hold themselves personally responsible for the construction and completion of said building and for the rents due and to grow due and the performance of all other obligations of this lease until such time as said building is constructed and paid for.

"After said building * * * has been erected and completed in conformity with the requirements of this lease * * * the Lessees may sell, assign, and transfer this lease and their interest in said leasehold premises and the buildings thereon provided that all rents, taxes, assessments, insurance and other charges of every kind shall have been paid to the date of such assignment and all covenants and agreements herein contained on the part of said Lessees to be kept and performed shall have been fully complied with at the date of such assignment or conveyance; and further provided that in case of said sale or assignment of said lease the same shall be evidenced in writing, fully executed and acknowledged by the assignee or assignees, as well as the assignors, and duly recorded * * * wherein and whereby the assignee or assignees shall expressly accept and assume all the terms and covenants in this indenture contained, to be kept and performed by the Lessees, and will agree to comply with and be bound by them, and the said Lessees herein * * * agree that they will not make any assignment of this lease or any interest therein except in the manner and upon the conditions as above set forth, and it is agreed and notice is hereby given that any assignment of said lease, lease-hold interest or any interest therein, not in strict conformity with these provisions shall be null and void, provided, however, that in the event that said lease is assigned in good faith and in accordance with the terms and conditions of this paragraph hereinbefore set forth and duly recorded as herein provided and fully accepted in all its terms by the assignee or assignees, as herein contemplated, that then and in that event the Lessees so assigning and conveying said lease * * * shall thereafter and thereby be forever released and discharged from the obligations of this lease on their part to be kept or performed, provided they are not then in default in any of the obligations thereof, on their part to be kept and discharged. In the event of any assignment under the terms and conditions herein set forth, said assignee and all succeeding assignees shall be subject to the same terms and conditions as to future assignments."

The court interpreted the 8th paragraph of the lease as follows:

"III. The court finds, as to the provisions for assignment of said lease dated June 1, 1912, by the lessees, and as to the liability of such assigning lessees, that the language of the first sentence of the eighth paragraph of said lease provides and specifies and means that the original lessees, or any assignees of the original lessees, shall have the right to sell, assign or transfer the said lease before the building specified in the lease should be completely constructed and paid for, but that if said lessees or their assignees should so sell, assign or transfer before such completion and construction, they and each of them should nevertheless remain and continue to be personally responsible for the construction and completion of the said building and for the payment of the rents due or to grow due or accruing prior to said completion and for the performance of all other obligations of the lease by said lease required to be performed only until such time as said building was constructed and paid for, and that said language of paragraph eight also provides and specifies and means that from and after the completion of and payment of said building, no further liability or duty or performance of any sort should accrue or become due from any such original lessee or assignee who had himself sold, assigned or transferred all his interest prior to such completion and full payment.

"The court finds that the second and third sentences of said eighth paragraph of said lease provide and specify and set forth the conditions prerequisite to any assignment of the said lease by the lessee made subsequent to the completion of and payment for said building, and provides for and defines the liabilities and duties of the assignor and assignee of any assignment made after the completion of the said building, and the court finds that said second and third sentences do not affect or have any bearing upon the making of any assignment of the lease by the lessee prior to such building completion or the liability of any assignor, who assigned the lease prior to the construction, completion and payment for said building."

"The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Civ.Code, sec. 1638.

An examination of the eighth paragraph of the lease reveals that it is made up of two paragraphs, the first concerning assignments made before the completion of the contemplated building upon the premises, and providing in the event of an assignment before such completion, such assigning lessee shall remain personally responsible for the performance of all obligations under the lease until such time as said building shall have been constructed and paid for. The second paragraph of paragraph eight concerns assignments made after the completion of the building, and sets forth in detail the manner and form in which such an assignment shall be made at that time.

In view of the clear and explicit language of the said eighth paragraph of the lease, the interpretation placed upon it by the trial court must be sustained as a matter of law. Since respondent Ruddock assigned the lease to the Southwestern Development Company in January, 1924, at which time the contemplated building had not been erected on the property, he cannot be held responsible for nonpayment of rent by his assignee which rental accrued long after the completion of the building, to-wit: in October, November, December, 1938, and January, 1939.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concurred.

51 Cal.App.2d 122

ESCOBAR et al. v. McNIEL et al.

Civ. 6611.

District Court of Appeal, Third District, California.

April 3, 1942.

1. Automobiles 🔑218

Generally, fact that pedestrians are proceeding along shoulder of highway in same direction traffic is traveling, in opposition to Vehicle Code, establishes "negligence per se". Vehicle Code, § 564, St.1935, p. 188.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence Per Se".

2. Appeal and error 🔑842(7)

Generally, the issue of contributory negligence is one for trier of facts, and will not be disturbed on appeal unless it can be said that such negligence contributed directly to plaintiff's injury, in which event it became an "issue of law".

See Words and Phrases, Permanent Edition, for all other definitions of "Issue of Law".

3. Automobiles 🔑245(74)

Evidence presented question for jury as to whether two high school boys, who crossed highway and proceeded to run and walk along shoulder in direction traffic was traveling toward automobile which had stopped to give them a ride, were guilty of contributory negligence, so as to be precluded from recovering for injuries sustained when struck by automobile traveling in same direction. Vehicle Code, § 564, St.1935, p. 188.

4. Negligence 🔑136(9)

Contributory negligence becomes a "question of law" only when court is compelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to negligence of plaintiff contributing to his injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by Chris Escobar, Jr., a minor, etc., and another, against Mary McNiel and another, for injuries sustained by plaintiffs when struck by defendants' automobile. From a judgment for plaintiffs, the defendants appeal.

Affirmed.

Butler, Van Dyke & Harris, of Sacramento, for appellants.

Henry S. Lyon and Robert E. Roberts, both of Placerville, for respondents.

STEEL, Justice pro tem.

The defendants appeal from a judgment entered in favor of plaintiffs pursuant to the verdict of a jury. The sole error assigned in this appeal is whether or not the plaintiffs were guilty of contributory negligence as a matter of law. The essential facts are without dispute and may be summarized as follows:

The action is one for damages alleged to have been sustained by plaintiffs as a result of an accident which occurred on a Sunday afternoon in November, 1939, on U. S. Highway 50, approximately four and one-half miles west of Placerville, in El Dorado county.

The appellant Mary McNiel, accompanied by her husband George P. McNiel (since deceased) was riding in their Chrysler automobile, and at the time of the accident it was being driven by appellant Owen Daniel Brown, westerly along said highway.

The plaintiffs, respondents here, minor high school boys of the ages of 17 and 16 respectively, were pedestrians and on their way home at the time of the accident. As they approached the highway from a side road they observed some friends passing in a car traveling westerly which the boys signaled for a ride. Respondents were then approximately 250 feet from the highway, and the car, hereinafter referred to as the Smith car, did not stop at once but proceeded along the highway some 380 feet to a point about midway in a cut where it was brought to a stop partly on and partly off the paved portion of the highway. The respondents, upon reaching the highway from the side road, looked for oncoming traffic, and seeing none, proceeded directly across the highway to the northerly side and then walked and ran westerly along the north shoulder toward the Smith car. As they approached the car from the rear they went to the left side thereof and had just engaged in a conversation with some of the occupants when the defendant's car, traveling westerly also, approached and struck them, hurling them forward and to the ground in front of the parked Smith car, resulting in the injuries sustained.

Upon the trial, plaintiff's witness, a civil engineer, produced a profile map which was received in evidence showing the physical condition of the highway in the vicinity of the scene of the accident.

As already indicated the accident occurred about midway in a cut with sloping embankments, the length of which was some 600 feet or more. The width of the paved portion of the highway through the cut is 22.4 feet with a white center line, and has a shoulder on either side from five to six feet in width. As a car approaches from the east, that is the Placerville direction, the highway descends somewhat, and at a point some 2,000 feet east of the accident it would disappear from the view of one at the scene of the accident, and after reaching the bottom of the dip or grade it gradually ascends, and at a point some 1,050 feet east of the accident scene it would again come into view, from that point on the grade flattens out almost to level, giving one a clear and unobstructed view for the entire distance last mentioned.

It is the testimony of appellants that they did not see the two boys prior to the impact, and it was only after appellant Mrs. McNiel, who was sitting in the front seat suggested to Mr. Brown, the driver of the car, "I think you struck something" that they pulled to one side and stopped several feet beyond the Smith car. The evidence shows that the accident happened around four o'clock P. M. of the day in question that it was a clear day and the setting sun was shining very brightly as appellants drove toward it traveling westerly. Appellant Mrs. McNiel testified that she held her hand up to shade her eyes; that they were traveling between 40 and 45 miles per hour, and that she saw the Smith car which stopped partly on the highway and partly on the shoulder but that she did not see the boys until after the accident.

Defendants' Exhibit A is a photograph taken by a gentleman immediately after the accident and admittedly shows a good reproduction of the conditions at the scene of the accident immediately after its occurrence. The Smith car is shown parked as above indicated and appears to have been parked as nearly off the pavement and adjacent to the embankment as was practical. Appellant Brown testified in substance to the same effect as did Mrs. McNiel with reference to the speed of the car, the glaring sun, and seeing the Smith car but not seeing either of the boys until after the accident. Appellants further testified that another car was parked approximately opposite the Smith car facing easterly, and that as they approached the scene a car traveling at a high rate of speed coming toward them, passed as they were passing between the two parked cars. There is some conflict in the testimony as to the car being parked opposite the Smith car, some of its occupants testifying that it was parked up the highway a considerable distance. However, this becomes immaterial, as appellants at the outset, concede that there is evidence in the record sufficient to support the jury's implied finding of negligence upon the part of Brown, the driver of the defendant's car.

[1-3] Appellants contend that the fact respondents crossed the highway and then proceeded to run and walk along the shoulder on the north side and in the direction traffic was traveling, which is in direct opposition to the provisions of Section 564 of the Vehicle Code, St.1935, p. 188, constitutes negligence per se. While this is the general rule (19 Cal.Jur. 632 and cases there cited) it is also the general rule that the issue of contributory negligence is one for the jury or trier of the facts to determine, and will not be disturbed upon appeal unless it can be said that such negligence contributed directly to the plaintiff's injury, in which event it became an issue of law. Clearly it cannot here be said, as a matter of law, that the act of respondents, in traversing along the

northerly side of the highway was a proximate cause of the accident nor can it likewise be said as a matter of law, that the failure of the boys to look back along the highway as they passed to the left side of the Smith car constituted contributory negligence directly or proximately causing their injury. These were questions for the jury.

The undisputed evidence shows that they were standing close up and within a foot of the side of the Smith car, one of the boys with his foot on the running board, and had engaged in a short conversation with some of the occupants when they were struck.

Edward H. Smith who was seated in the rear seat of the Smith car testified as follows:

"Q. Now as you went down the highway where did you first see the Escobar boys? A. I saw them across, coming out of the golf road.

"Q. Now, explain to the jury just exactly what happened after that; what did your son do with his car? A. He drove along, we seen them and he said, 'Oh, I ain't going to stop.' He pulled up maybe four or five hundred feet or something like that and he dropped out his hand and stopped. He says, 'I will give them a ride.' And he pulled up right against the bank and stopped. The little boys crossed the road and came up behind the car.

"Q. How do you know they crossed the road? A. I was looking through the back window.

"Q. Did you watch them all the way down the road? A. Practically all the way down, yes, sir.

"Q. Where were they traveling? A. Traveling right up against the righthand side of the road coming up behind the car.

"Q. Were they on the paved portion or off on the shoulder? A. They were onto the shoulder, right against the cut, right against the bank.

"Q. And what happened as they reached the Smith car, the car which your son was driving and you were in? A. They stepped around the car.

"Q. Did you see them do that? A. Yes, sir, I seen them as they went to make the turn and then they appeared at the window.

"Q. The window at which side of the car? A. On the left side.

"Q. Now you were looking back through the back of the car, the back window? A. As they were coming up I was looking through the back window.

"Q. And you were looking that way when you saw them from the door? A. Yes, sir, and then I turned to the window.

"Q. As you saw the boys making that turn did you see any other car coming from down the highway? A. I did not."

It would appear, therefore, that the jury might well have drawn the inference that appellant's car had not come into vision from the so-called dip when the respondents turned to the left and came to the side of the Smith car. It will be recalled that appellants both testified that they did not see the boys at all prior to the accident.

[4] The jury having found by its verdict that respondents were not guilty of contributory negligence, it becomes a question of law only when the court "is impelled to say that from the facts reasonable men can draw but one inference, and that an inference pointing unerringly to the negligence of the plaintiff contributing to his injury. Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125, 128.

The judgment is affirmed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

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51 Cal.App.2d 120

In re LASKER.

Civ. 12911.

District Court of Appeal, Second District, Division 3, California.

April 2, 1942.

1. Descent and distribution 🔑71(7)

In proceeding to establish fact of petitioner's birth, where evidence is not brought up, on appeal from order denying petition, by bill of exceptions, reporter's transcript, or otherwise, District Court of Appeal must assume that evidence was insufficient to support allegations of petition or to justify order establishing fact of petitioner's birth.

St.1939, p. 752, § 10605; Rules of Supreme Court and District Courts of Appeal, rule 29.

2. Descent and distribution ⚷71(7)

On appeal from order denying petition to establish fact of petitioner's birth, trial judge's opinion, incorporated in brief of amicus curiæ, but not part of record, that applicable sections of Health and Safety Code are unconstitutional, presents no question for review. St.1939, pp. 751–753, §§ 10600 to 10607.

3. Appeal and error ⚷717

The trial judge's opinion cannot be accepted as establishing any fact in case on appeal, even when incorporated in transcript, and cannot take place of record of evidence adduced at hearing.

4. Appeal and error ⚷712

It is appellate courts' duty to decide cases on records before them.

5. Descent and distribution ⚷71(7)

On appeal from order denying petition to establish fact of petitioner's birth, trial judge's opinion, incorporated in brief of amicus curiæ, but not part of record, that applicable sections of Health and Safety Code are unconstitutional, does not warrant assumption by District Court of Appeal that trial judge would have granted petition had he deemed law valid. St.1939, pp. 751–753, §§ 10600 to 10607.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by John L. Lasker for establishment of the fact of his birth. From an order denying the petition, petitioner appeals.

Affirmed.

Albert G. Bergman, of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and Douglas DeCoster, Deputy Co. Counsel, both of Los Angeles, as amici curiae, on behalf of Los Angeles County.

SHINN, Justice.

This is an appeal by John L. Lasker from an order denying his petition filed under sections 10600 to 10607, inclusive, of the Health and Safety Code, St.1939, pp. 751–753, for the judicial establishment of the fact of his birth.

We have been furnished with a clerk's transcript which contains a petition for order establishing birth, notice of hearing of the petition, affidavits of publication and service, and two minute orders, one showing that the matter came on for hearing, that John L. Lasker was sworn and testified and that the matter was submitted, and the other entry showing that the petition was denied. There also appears in the clerk's transcript what purports to be a deposition of one Mary Lesko, taken in the state of Pennsylvania pursuant to a commission issued in said proceeding.

Section 10605 of the Health and Safety Code provides as follows: "If, upon the hearing, the allegations of the petition are established to the satisfaction of the court, the court may make an order determining that the birth, death, or marriage did in fact occur at the time and place shown by the proofs adduced at the hearing."

[1] The evidence given at the hearing has not been brought up by bill of exceptions, reporter's transcript or otherwise, as required by rule XXIX of the Supreme Court and District Courts of Appeal. Without the evidence before us we cannot know whether it was such that the court was or should have been satisfied as to the truth of the allegations of the petition and therefore must assume, under rules of law as controlling as they are familiar, that the evidence given in support of the petition was insufficient to support the allegations thereof or to justify an order establishing the fact of petitioner's birth. 2 Cal.Jur., sec. 262, sec. 499 et seq., and cases cited.

[2] Incorporated in the brief of amicus curiae we find an opinion of the trial judge, expressing the view that the applicable sections of the Health and Safety Code are unconstitutional, and we are asked to assume that the petition was denied for that reason alone. The opinion is not a part of the record (Ferguson v. Green, 1929, 99 Cal.App. 641, 645, 278 P. 1058; Estate of Ingram, 1929, 99 Cal.App. 660, 662, 279 P. 208; Rickards v. Noonan, 1940, 40 Cal.App.2d 266, 271, 104 P.2d 839) and does not present to us a question calling for decision. If we should find ourselves in agreement with the views expressed in the opinion, our affirmance would be supported upon two grounds instead of one, which is unnecessary, and if we should not be able to reach the same conclusion it would still be necessary to affirm the order and our opinion on the constitutional question would

therefore be but dictum, without effect as a rule of law. 21 C.J.S., Courts, § 190, p. 317.

[3-5] Although an opinion of the trial judge is sometimes found useful as illustrating the theory or basis of the decision (Union Sugar Co. v. Hollister Estate Co., 1935, 3 Cal.2d 740, 750, 47 P.2d 273), it cannot, even when incorporated in the transcript, be accepted as establishing any fact in the case. Goldner v. Spencer, 1912, 163 Cal. 317, 320, 125 P. 347; Estate of Felton, 1917, 176 Cal. 663, 667, 169 P. 392. The opinion in question is not even in the certified transcript and if it were it would be subject to a motion to strike it out (White v. Merrill, 1889, 82 Cal. 14, 15, 22 P. 1129; Estate of Ingram, supra, 1929, 99 Cal.App. 660, 662, 279 P. 208) and whether or not stricken could not take the place of a record of the evidence adduced at the hearing. Since it is the duty of appellate courts to decide cases upon the records before them, there is no justification for the adoption of loose practices which would make for uncertainty or inadequacy in records on appeal. Consequently we cannot assume, as appellant requests us to do, that the trial judge would have granted the petition had he deemed the law to be valid.

The order appealed from is affirmed.

SCHAUER, P. J., and PARKER WOOD, J., concurred.

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51 Cal.App.2d 775

PEOPLE v. MILANCHALK.

Cr. 472.

District Court of Appeal, Fourth District, California.

April 1, 1942.

Criminal law 🔑1182

Where clerk's and reporter's transcripts were filed in reviewing court on February 13, 1942, no briefs were filed, and the only appearance on behalf of appellant was in the form of a letter from his counsel stating that he was abandoning appeal, motion to affirm judgment made on March 31, 1942, was granted. Pen.Code, § 1253.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Proceeding by the People against John Milanchalk. From the judgment, defendant appeals and a motion is made to affirm the judgment.

Motion granted and judgment affirmed.

Edgar G. Langford, of San Diego, for appellant.

Earl Warren, Atty. Gen., for respondent.

PER CURIAM.

The clerk's and reporter's transcripts were filed in this court on February 13, 1942. No briefs have been filed and the only appearance on behalf of the appellant is in the form of a letter from his counsel to the effect that he was abandoning the appeal.

The cause was regularly placed on the calendar for March 31, 1942, at which time a motion to affirm the judgment under section 1253 of the Penal Code was made.

The motion is granted and the judgment is affirmed.

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51 Cal.App.2d 156

HEFFRON v. ROSENBERG et al.

Civ. 11995.

District Court of Appeal, First District, Division 2, California.

April 7, 1942.

1. Bankruptcy 🔑390

After adjudication in bankruptcy and appointment and qualification of a trustee, bankrupt is without right to institute or prosecute an action, cross-action, or proceeding except on cause of action not passing to trustee. Bankr.Act § 70, sub. a, 11 U.S.C.A. § 110, sub. a.

2. Bankruptcy 🔑281

Where bankrupt has an interest in partnership which passes to trustee under Bankruptcy Act, it becomes right of trustee to protect bankrupt's interest by suit against the other partner, if suit is necessary. Bankr.Act § 70, sub. a, 11 U.S.C.A. § 110, sub. a.

3. Bankruptcy 🔑281

Where bankruptcy trustee instituted suit against bankrupt's alleged partner to protect bankrupt's interest in partnership, the trustee had complete control over the action subject to the approval of bankruptcy court. Bankr.Act § 70, sub. a, 11 U.S.C.A. § 110, sub. a.

4. Bankruptcy 🔑302

Where bankruptcy trustee instituted suit to recover assets of bankrupt on theory that bankrupt was undisclosed partner of defendant, cross-complaint of bankrupt against defendant alleging existence of partnership between bankrupt and defendant was demurrable, since the cause of action had passed to the trustee. Bankr.Act § 70, sub. a, 11 U.S.C.A. § 110, sub. a.

5. Bankruptcy 🔑301

In suit by bankruptcy trustee to recover bankrupt's assets on theory that bankrupt was undisclosed partner of defendant, wherein bankrupt filed cross-complaint based on same theory, appointment of receiver was unauthorized where evidence disclosed that the claim upon which the complaint and cross-complaints were founded had been fully settled and compromised by defendant and bankruptcy trustee. Bankr.Act §§ 27, 38, 11 U.S.C.A. §§ 50, 66.

6. Bankruptcy 🔑252

Where record did not disclose that appeal had been taken from or direct attack made upon order of bankruptcy court affirming bankruptcy trustee's compromise of claim based on theory that bankrupt was defendant's undisclosed partner, the order was a "final adjudication" of the bankrupt's interest in the property and was not subject to "collateral attack" in suit in state court to recover bankrupt's assets. Bankr.Act §§ 27, 38, 11 U.S.C.A. §§ 50, 66.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack" and "Final Adjudication".

7. Equity 🔑65(1)

A party must come into a court of equity with clean hands.

8. Equity 🔑65(2)

Where, on face of bankrupt's cross-complaint based on theory that bankrupt was undisclosed partner of defendant and that defendant held assets of bankrupt, the bankrupt conceded that she defrauded bankruptcy court and her creditors, appointment of receiver was breach of judicial discretion, under "clean hands doctrine". Bankr.Act §§ 27, 38, 11 U.S.C.A. §§ 50, 66.

See Words and Phrases, Permanent Edition, for all other definitions of "Clean Hands Doctrine".

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by William I. Heffron, as trustee in bankruptcy of the estate of Jennie Rosenberg, against Jennie Rosenberg and Lloyd Vaughn, to recover assets of the bankrupt, wherein Jennie Rosenberg filed a cross-complaint. From an order appointing a receiver, Lloyd Vaughn appeals.

Reversed.

George T. Goggin and Halverson & Halverson, all of Los Angeles, for appellant.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for respondents.

NOURSE, Presiding Justice.

Plaintiff, as trustee in bankruptcy of the Estate of Jennie Rosenberg, commenced this action against Vaughn and Mrs. Rosenberg on the theory that the bankrupt was an undisclosed partner of Vaughn and that the latter held valuable assets in his own name, half of which should go to the trustee as assets of the bankrupt. The bankrupt filed an answer admitting all the allegations of the complaint, and then filed a cross-complaint pleading substantially the same matters alleged in the trustee's complaint. On the same day that the cross-complaint was filed the trial court, on application of the cross-complainant, issued an order to show cause why a receiver should not be appointed to take possession of all the property held by Vaughn. In response to this order Vaughn filed a demurrer to the cross-complaint, and an affidavit denying the partnership and disclosing a compromise and settlement of the entire controversy between the trustee and himself, duly approved by the referee in bankruptcy. Following a hearing upon the order to show cause the trial court appointed a receiver fixing his bond at $5,000 and granting Vaughn a stay on appeal if he filed a bond in the sum of $50,000.

The appeal is taken from the order appointing the receiver.

It is not possible to sustain the order upon any legal ground, but, in the interest of brevity, we will confine our discussion to two issues—that the court was without jurisdiction to make the order, and that it is not supported by judicial discretion.

Mrs. Rosenberg filed a voluntary petition in bankruptcy in March, 1939, and was duly discharged in November, 1939. In December, 1940, the proceedings were reopened upon the affidavit of Mrs. Rosenberg stating that she believed that she had a partnership interest in the property standing in the name of Vaughn amounting to over $150,000, but that, through mistake, misapprehension, and misunderstanding, she had failed to include it in her inventory. In her cross-complaint she alleged that in 1923 she entered into an agreement of partnership with Vaughn under which they acquired numerous pieces of real estate, including an apartment house located on West Eighth Street in the city of Los Angeles; that the partnership also acquired valuable stocks and securities; that she filed the original petition in bankruptcy because of a deficiency judgment for $4,200 and that there are other creditors in the sum of $1,500; that Vaughn has repudiated and denied the existence of the partnership, but that he had made an offer to the trustee to settle the controversy by the payment of a fixed sum.

The trustee, as plaintiff and cross-defendant, filed an affidavit showing that a proposal of compromise was made by Vaughn, that the creditors duly accepted the proposal, and that the referee, after a hearing at which the bankrupt was present and made her objections, made his order confirming the proposal and directing the trustee to dismiss this proceeding.

In the affidavit of Vaughn filed in response to the order to show cause he denied the partnership relation; alleged that he was the sole owner of the apartment house located on West Eighth Street, that Mrs. Rosenberg had been employed by him at a fixed salary as manager of the apartment house. Attached to the affidavit was the "statement of affairs" verified by the bankrupt and filed in the bankruptcy proceedings, and also a transcript of her testimony taken in those proceedings. In both instances she took oath that she had been employed by Vaughn at a salary of $600 a year, and that she was not engaged in any business or partnership. She testified that five years preceding she had owned an apartment house which she traded for a worthless ranch, and that one of the claims against her was based on a deficiency judgment arising out of that transaction. She further testified that Vaughn owned the apartment house on West Eighth Street where she was employed, that she never owned that property, and that she had never had any business dealings, trades, or transfers with Vaughn. The order of compromise expressly found that the offer was "fair, reasonable and equitable," that the bankrupt had no assets other than the possibility of recovery in this action which "is extremely doubtful," but that she be permitted to continue the action if she filed a bond indemnifying the estate against loss in the sum of $7,500 if she failed to recover an amount equal to the compromise accepted—$6,000. She failed to comply with this order, but insists upon continuing the litigation, notwithstanding the compromise, and the order of the bankruptcy court.

[1-4] The demurrer to the cross-complaint was overruled. It should have been sustained because the trial court was without jurisdiction to entertain the proceedings based upon the cross-complaint. "After adjudication of bankruptcy and the appointment and qualification of a trustee, the bankrupt is without right to institute or prosecute an action, cross action, or proceeding except on a cause of action not passing to the trustee." 8 C.J.S., Bankruptcy, § 489, p. 1362; 6 Am.Jur. p. 732. Section 70, sub. a, of the Bankruptcy Act (Title 11, U.S.C.A. § 110, sub. a), provides that the trustee shall be vested with the title of the bankrupt in all property which prior to the filing of the petition he could have transferred, including "rights of action arising upon contracts." When the bankrupt has an interest in a partnership, which passes to the trustee under this section of the act it becomes the right of the trustee to protect the bankrupt's interest by suit against the other partner, if suit is necessary. Here the trustee exercised that right by commencing this action. As trustee he had complete control over the action, subject to the approval of the bankruptcy court. Williams v. Lane, 158 Cal. 39, 42, 109 P. 873; Greene v. Moore, 43 Cal.App. 91, 93, 184 P. 506; Electric Utilities Co. v. Smallpage, 137 Cal.App. 640, 642, 31 P.2d 412; Dean v. Shingle, 198 Cal.

652, 659, 246 P. 1049, 46 A.L.R. 1156; In re Kranich, D.C., 174 F. 908, 911.

Respondents cite passages from 8 C.J.S., Bankruptcy, § 489, p. 1362, 1363, giving the bankrupt authority to sue in his own name "where the trustee renounces the claim or fails or declines to take it up and proceed with it, or the court of bankruptcy will not permit him to commence or prosecute the action." This is not the situation presented here. The trustee did not renounce the claim or fail to prosecute the action, and the bankruptcy court did not prevent the prosecution of it. To the contrary, the action was commenced by the trustee and was alive and pending at the time the bankrupt sought to inject herself as a party.

[5, 6] However, since the demurrer was overruled and the application for a receiver was heard on the merits, the entire uncontroverted evidence required the denial of the application for the appointment of a receiver. It was shown that the whole claim upon which both the original complaint and the cross-complaint were founded was fully settled and compromised. The power of the trustee to effect the compromise is found in section 50, title 11, U.S.C.A., Bankruptcy Act. The power of the referee to approve the compromise and direct a dismissal of the suit in the state court is found in section 66 of the Bankruptcy Act. The order of the bankruptcy court affirming the compromise and terminating the litigation was entered on May 15, 1941. There is nothing in the record disclosing that an appeal was taken or that any other direct attack was made upon it. There is no contention here that such attack was made, and we must assume that it has become final. That order having the effect of a judgment of a judicial tribunal must now be deemed a final adjudication of the bankrupt's interests in the property involved in this litigation. Donald v. Bankers Life Co., 5 Cir., 107 F.2d 810, 812; In re Tinkoff, 7 Cir., 85 F.2d 305, 307; In re Florsheim, D.C., 24 F.Supp. 991, 992; Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 219, 61 S.Ct. 904, 85 L.Ed. 1293.

This order of the bankruptcy court was based upon the express finding that the offer of compromise was "fair, reasonable and equitable" and that the possibility of recovery in the litigation by the bankrupt estate was "extremely doubtful," and that it was "for the best interest of the estate and all persons interested therein that said offer of compromise be accepted and approved."

[7, 8] The remedy of the bankrupt was by appeal or other direct attack to review the order, and the remedy lies in the bankruptcy court. The order was not subject to this collateral attack in the state court. Hence, the order of the trial court appointing a receiver to take possession of appellant's property was erroneous. Assuming that the bankrupt should be able to amend her cross-complaint to state a cause of action she could not prevail therein except by admitting her wilful perjury in the bankruptcy proceedings, or by matching further perjury with that which has gone before. This proceeding being one in equity she is confronted with the settled rule that a party must come into a court of equity with clean hands. But here, upon the face of her cross-complaint, she concedes that she defrauded the bankruptcy court and her creditors, and prays that a court of equity will aid her in keeping the fruits of such fraud. The appointment of a receiver under such circumstances was a breach of judicial discretion.

The order is reversed.

STURTEVANT and SPENCE, JJ., concurred.

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51 Cal.App.2d 24

PEOPLE v. LAMARR et al.

Cr. 3539.

District Court of Appeal, Second District, Division 3, California.

March 31, 1942.

1. Burglary ⚷41(1)

Evidence *held* sufficient to justify convictions of second-degree burglary.

2. Burglary ⚷41(4)

In burglary trial, evidence that screen of back porch door of dwelling house alleged to have been entered was cut and door unhooked, that washing machine on porch was unbolted from floor and moved about eight feet, and that defendants made inconsistent statements as to why they were at house, including statement that they were there to get washing machine, was sufficient to show entry.

3. Burglary ⚿41(4)

In burglary trial, real estate broker's testimony that he told defendant's sister that she could see inside of dwelling house, alleged to have been entered, when owner was there in evening, was insufficient to show that defendant's entry of back porch of unlighted house in nighttime was permissive.

4. Burglary ⚿7

Where dwelling house, alleged to have been entered by persons charged with burglary, was described in information as located at certain house number on named street in certain county, defendants were not misled as to house referred to and, not being owners or in possession thereof, were not entitled to make issue as to whether victim of burglary was owner or entitled to possession of house.

◆

Appeal from Superior Court, Los Angeles County; A. A. Scott, Judge.

Raymond LaMarr and another were convicted of burglary in the second degree, and they appeal.

Affirmed.

Albert Flaxman, Gladys Towles Root, and Eugene V. McPherson, all of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Lewis Drucker, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendants were charged with the crime of burglary. Each pleaded not guilty and admitted the allegations that he had been convicted twice previously of having committed a felony and that he had served terms in the state prison. Trial by jury was waived. They were adjudged guilty of burglary of the second degree. Defendants appeal from the judgments and the order denying their motions for a new trial.

Appellants claim that the evidence was insufficient to justify the judgments, in that (1) there was no proof of entry, (2) assuming there was entry, it was permissive, and (3) there was no showing that the victim of the alleged burglary was the owner or entitled to possession of the house. This contention is not sustained in any particular.

[1] It is undisputed that the defendants went in a coupe automobile to a single family unlighted dwelling in Los Angeles on August 15, 1941, after dark, about 7:45 p. m., and parked the automobile in the driveway and got out of the automobile; that a three-inch cut was in the screen of the back door parallel with the door hook; that rope and canvas were in the automobile; that a "For Sale" sign was in the front yard; that nothing was found on the persons of the defendants or in their homes.

Other evidence was in substance as follows: Mrs. McDonnell, the complaining witness, had resided in the dwelling until August 3, 1941, but did not remove her furniture until August 28, 1941. Mr. McDonnell had not been at the house since July 5, 1941. Between August 3d, the time when she left the house, and the date of the burglary she returned to the house on three occasions and found that it had been entered and things taken therefrom. On each of such occasions she locked and nailed the doors and windows. On August 14th she observed that her Bendix washing machine was in its usual place on the back porch where it was fastened to a cement slab by bolts, and that some small boys were playing on the porch. On August 16th she observed that the washing machine had been detached from the slab and was in the center of the back porch, having been moved about eight feet.

A neighbor asked the two men who were in the driveway what they were looking for, and they said they were looking for Mr. McDonnell and that they had an appointment to meet him there, and that they were after the washing machine since the instalments were in arrears. The neighbor testified that the automobile was parked at the end of the house facing the rear of the lot.

The neighbor's wife testified on direct examination that she saw one of the defendants come out of the back porch with a flashlight in his hand and that he said he was inspecting the gas and light, and on cross-examination she testified that the man who came out of the back porch with a flashlight "could have been" an officer and that she could not say who that man was. She further testified that one of the men said that the reason that they were so late was that they had come from San Bernardino.

An officer testified that he saw LaMarr in the parkway with a flashlight and that he asked him what he was doing and he said he was looking for the meter, and that he was an employee of the Edison Company; and that soon thereafter, LaMarr said that he was there to see about renting the house for his sister; and that thereafter when Esparza came to the parkway where the officer and LaMarr were, LaMarr said they came there about the washing machine.

Another officer testified that he talked with LaMarr that evening and LaMarr told him that a man by the name of Salcido had sent them out there to pick up the washing machine, and that if the officer would go with him to a certain cafe they might find Salcido; that after searching for Salcido, LaMarr said that, he himself, was the Salcido they had been looking for. The officer testified further that Esparza said LaMarr asked him to help LaMarr get the washing machine and that he went there for that purpose.

A real estate broker, called as a witness by defendants, said he had had a "For Sale" sign up at the premises for a period of about six weeks preceding August 15th; that a woman (the one referred to by LaMarr as his sister) came to his office and wanted to see the inside of the house, and that he told her that she could see the inside only when the owner was there and that the owner was there in the evening occasionally.

The woman referred to as LaMarr's sister testified that LaMarr was her brother; that she had been to the premises on several occasions in the afternoon and evening and knocked at the door and no one answered; that she works at night and she sent the defendants there to see Mr. McDonnell and to make arrangements for her to look the place over.

LaMarr testified that they went there because his sister told them to rent the house or see if the owner would sell it; that they parked the car in the driveway about the middle of the house; that they knocked on the front door, went around to the back, saw the back door open, and were just going to leave when a man (referring to the neighbor) came from the back of the lot and talked to them; that he told the neighbor and the officers that he went there to see about renting or buying the place for his sister; that he did not say that he was from the Edison Company, or that he was looking for the meter, or that he was there to pick up the machine, or that Salcido had sent him; that he did not touch the machine.

Esparza testified in substance the same as LaMarr did, and that he told the officers that he was with Salcido (referring to LaMarr).

The evidence was sufficient to justify the judgments of conviction. The above references to the evidence are adequate to show that it will serve no useful purpose to restate, in the form of an analysis or argument, the various items of evidence which are the basis for this conclusion.

[2] As to appellants' contention that there was no entry, there was testimony that, between the time when the owner of the machine was at the house on August 14th and the time when the defendants were apprehended at the house on August 15th, the screen of the back porch door had been cut, the door unhooked, and the washing machine on the porch had been unbolted from the floor and moved about eight feet. Both defendants participated in making inconsistent statements concerning the reason they were at the house, including a statement that they were there to get the washing machine. Regardless of the view taken relative to the testimony that one of the defendants came out of the porch with a flashlight, the evidence was sufficient to show entry.

[3] The claim of appellants that entry, if any, was permissive is based apparently upon the theory that inasmuch as the real estate broker had told the sister that she could see the inside of the house when the owner was there in the evening, that such a statement was permission to enter the back porch of a stranger's unlighted house in the nighttime and knock upon the kitchen door, and that the sister could delegate such right of entry to defendants. This claim has no merit.

[4] Defendants assert that there was no showing that the victim of the alleged burglary was the owner or entitled to the possession of the house. The house was described in the information as being located at a certain house number on a certain named street in the county of Los Angeles. The defendants were not misled concerning the house to which reference was made. The house was not owned or possessed by defendants or either of them, and they were not entitled to make an issue as to the ownership or possession. People v. Price, 1904, 143 Cal. 351, 352, 77 P. 73;

People v. Redman, 1919, 39 Cal.App. 566, 568, 179 P. 725.

The judgments as to both defendants, and the order denying the motions for a new trial, are affirmed.

SCHAUER, P. J., and SHINN, J., concurred.

51 Cal.App.2d 117

ADAMS v. HILDEBRAND.

Civ. 13460.

District Court of Appeal, Second District, Division 2, California.

April 2, 1942.

1. New trial 🔑9

Where a case involves more than one issue of fact, and the issues are severable, the trial court has power to order a new trial on one issue only. Code Civ.Proc. § 657.

2. Appeal and error 🔑977(2)

Ordinarily, the question whether the issues are severable or so inseparably pleaded that a new trial must be granted on all issues is within the trial court's discretion, and that court's determination will not be disturbed on appeal in absence of showing of abuse of discretion. Code Civ.Proc. § 657.

3. New trial 🔑9

Where general damages awarded in a negligence action are small but to a certain extent compensatory, no conclusion can be drawn that the verdict was a compromise, and it is within trial court's discretion to grant a new trial on issue of damages alone on ground of insufficiency of evidence to sustain the verdict. Code Civ.Proc. § 657.

4. New trial 🔑9

Where trial judge determined that issues of negligence and damages were severable in action for death of plaintiff's two year old son, and jury returned verdict for plaintiff for $250, judge had power to grant plaintiff's motion for a new trial on issue of damages alone. Code Civ.Proc. § 657.

5. Appeal and error 🔑977(2)

Where evidence was sharply in conflict on issue of negligence in action for death of plaintiff's two year old son, and there was no showing of abuse of discretion, trial judge's determination that issues of negligence and damages were severable would not be disturbed by reviewing court on appeal from order granting plaintiff's motion for new trial on issue of damages alone. Code Civ.Proc. § 657.

6. Damages 🔑9

On question whether trial court had power to grant plaintiff's motion for new trial on issue of damages alone in action for death of plaintiff's two year old son, where it was stipulated that special damages amounted to $198.68, award of $51.32 as general damages for death was inadequate. Code Civ.Proc. § 657.

7. Jury 🔑31(7½)

In action for death of plaintiff's two year old son, the granting of plaintiff's motion for new trial on issue of damages alone did not deprive defendant of her constitutional right to a "trial by jury". Code Civ. Proc. § 657.

See Words and Phrases, Permanent Edition, for all other definitions of "Trial by Jury".

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action for wrongful death by Byron O. Adams against Rebecca B. Hildebrand. There was a verdict for plaintiff, and from an order granting a new trial on the issue of damages alone, defendant appeals.

Affirmed.

C. F. Jorz, of Los Angeles, for appellant.

Chase, Barnes & Chase and Milford Fish, all of Los Angeles, for respondent.

McCOMB, Justice.

From an order granting a new trial on the issue of damages alone after trial before a jury in an action to recover damages for wrongful death defendant appeals.

The essential facts are:

The jury returned a verdict in favor of plaintiff in an action to recover damages for wrongful death of a child of the age of two years in the sum of $250. Thereafter on motion for a new trial the trial judge made the following order:

"It is hereby ordered that the motion of the plaintiff Byron Q. Adams for a new trial in the above entitled action be and the same hereby is granted as to the issue of damages only, upon the ground of insufficiency of the evidence to justify or sustain the verdict heretofore rendered in the above entitled action."

This is the sole question necessary for us to determine:

Did the trial court commit prejudicial error in granting plaintiff's motion for a new trial on the issue of damages only?

This question must be answered in the negative and is governed by the following pertinent rules of law:

[1] (1) It is within the power of the trial court where there is more than one issue of fact in a case and such issues are distinct and severable to order a new trial on one issue only. (In re Estate of Everts, 163 Cal. 449, 452, 125 P. 1058; sec. 657, Code Civ.Proc.)

[2] (2) Ordinarily the question of whether the issues are severable or so "inseparably pleaded" as to require that a new trial be granted as to all the issues is a question within the discretion of the trial court, whose determination thereof will not be disturbed on appeal in the absence of a showing of abuse of discretion. (Amore v. Di Resta, 125 Cal.App. 410, 414, 13 P.2d 986.)

[3] (3) Where general damages awarded are small but to a certain extent compensatory, no conclusion can be drawn therefrom that the verdict was a compromise, and it is within the discretion of the trial court to grant a new trial as to the issue of damages only upon the ground of insufficiency of the evidence to sustain the verdict. (Sassano v. Roullard, 27 Cal. App.2d 372, 376, 377, 81 P.2d 213; see, also, Gates v. Wendling Nathan Co., 27 Cal.App.2d 307, 316, 81 P.2d 173.)

[4-6] Applying the foregoing rules to the facts of the instant case, we find it was within the power of the trial court to grant a motion for a new trial on the issue of damages only, and it was also the duty of the trial judge to determine whether the issues of negligence and damages were severable. The determination of the trial judge that these issues were severable will not be disturbed by us, since there was no showing of abuse of discretion, it being conceded that the evidence was sharply in conflict upon the issue of negligence. It was stipulated that the special damages amounted to $198.68. It is therefore obvious that the sum of $51.32 as general damages for the wrongful death of plaintiff's minor son was inadequate.

[7] There is no merit in defendant's contention that the verdict was a result of an obvious compromise by the jury, in view of the third rule above stated. Neither is there any merit in defendant's proposition that, if the order granting the motion for a new trial stands, he is being deprived of his constitutional right to a trial by jury. (See Ingraham v. Weidler, 139 Cal. 588, 589, 73 P. 415.)

The cases of Wallace v. Miller, 26 Cal. App.2d 55, 78 P.2d 745, and Bencich v. Market St. Ry. Co., 20 Cal.App.2d 518, 67 P.2d 398, are factually distinguishable from the facts in the present case. This distinction is clearly pointed out in Sassano v. Roullard, supra, 27 Cal.App.2d page 376 et seq., 81 P.2d 213.

For the foregoing reasons, the order is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

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50 Cal.App.2d 856

GALVAN et al. v. BARNETT et al.

Civ. 13520.

District Court of Appeal, Second District, Division 2, California.

March 25, 1942.

Appeal and error ⚷801(1)

An appeal would be dismissed on respondents' motion, where all grounds stated in motion were supported by certificate of clerk of superior court setting forth the facts, and by the authorities cited. District Court of Appeal Rules, rule 6.

◆

Appeal from Superior Court, Los Angeles County.

Action by Beniot Macios Galvan and others against Edwin W. Barnett and others. From the judgment, the plaintiffs appeal.

Appeal dismissed.

Samuel Mirman and Samuel Rubenstein, both of Los Angeles, for appellants.

Frank Karr, E. E. Morris, C. W. Cornell, O. O. Collins, and Randolph Karr, all of Los Angeles, for respondents.

PER CURIAM.

The respondents having filed their motion to dismiss the appeal in the above-entitled matter, supported by a certificate of the clerk of the Superior Court setting forth the facts required by Rule VI of this Court, and it appearing that all of the grounds stated in the motion are supported by said certificate and by the authorities cited.

It is hereby ordered that this appeal be, and it is, hereby dismissed.

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51 Cal.App.2d 141

EHLEN et al. v. BURROWS.

Civ. 13122.

District Court of Appeal, Second District, Division 2, California.

April 6, 1942.

Hearing Denied June 1, 1942.

1. Pleading 🔑207

Where complaint showed that plaintiffs were relying upon four distinct causes of action, and all causes were set forth in one count, complaint was vulnerable to special demurrer on ground that the several causes of action were not separately stated.

2. Appeal and error 🔑672

The propriety of trial court's action in not permitting an amendment to complaint after demurrer thereto was sustained was properly before appellate court, where it appeared on face of record that objection to complaint could be cured by amendment. Code Civ.Proc. § 472c.

3. Limitation of actions 🔑31

Generally, an action by a patient against a physician for injury sustained by patient by reason of negligent treatment by physician is an "action sounding in tort" and not upon a "contract", and such an action is barred by statute one year after date of injury. Code Civ.Proc. § 340, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Action Sounding in Tort" and "Action Upon Contract".

4. Limitation of actions 🔑55(3)

If a physician performs an operation in a negligent manner and continues thereafter to treat patient, the one-year statute of limitations on an action for malpractice does not commence to run during continuance of relationship of physician and patient, unless patient has discovered injury or through use of reasonable diligence should have discovered it. Code Civ.Proc. § 340, subd. 3.

5. Limitation of actions 🔑95(1)

The one-year statute of limitations on a patient's action against a physician for malpractice does not run against patient's rights during the time that patient is in ignorance of cause of her disability and cannot with reasonable diligence ascertain such cause. Code Civ. Proc. § 340, subd. 3.

6. Limitation of actions 🔑55(3)

In patient's action against physician for negligent diagnosis and treatment and for unnecessarily removing patient's teeth, the one-year statute of limitations commenced to run when patient ceased to be a patient of physician. Code Civ.Proc. § 340, subd. 3.

7. Assault and battery 🔑2

The unnecessary removal of a patient's teeth by a physician without patient's consent constitutes an "assault".

See Words and Phrases, Permanent Edition, for all other definitions of "Assault".

8. Limitation of actions 🔑55(3)

A patient's cause of action against a physician for unnecessarily removing patient's teeth without patient's consent was barred by one-year statute of limitations where teeth were removed before August 2, 1939, and patient did not consult physician after that date, and complaint was not filed until January 18, 1941. Code Civ. Proc. § 340, subd. 3.

9. Limitation of actions 🔑95(1)

Where it did not appear on face of patient's complaint against physician for malpractice that patient discovered, or by reasonable diligence should have discovered,

presence of broken roots of teeth in patient's mouth at a date more than one year prior to filing of complaint, a cause of action against physician for negligently leaving pieces of roots in mouth after removing teeth was not barred by one-year statute of limitations. Code Civ.Proc. § 340, subd. 3.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by John H. Ehlen and another against Montrose T. Burrows for damages for malpractice. From an adverse judgment, plaintiffs appeal.

Affirmed in part and reversed in part and case remanded with instructions.

Waldo & Waldo, of Pasadena, for appellants.

Crawford & Browne, of Pasadena, for respondent.

STEPHENS, Justice pro tem.

Plaintiff and her husband brought this action against defendant, a physician and surgeon, seeking damages for alleged malpractice. Defendant filed both a general and special demurrer, and as one of the causes of demurrer interposed the plea of the statute of limitations, Code Civ. Proc. § 340, subd. 3. The trial court sustained the demurrer without leave to amend, and from the judgment subsequently entered plaintiffs' appeal. The minute order does not indicate the ground upon which the demurrer was sustained, but it appears from the briefs that it was based upon the plea of the statute of limitations.

According to the allegations of the complaint, Mrs. Ehlen, herein referred to as plaintiff, was suffering from a fever and consulted defendant to discover the cause thereof and to be treated for its cure; defendant diagnosed the trouble as being caused by four teeth which contained extensive fillings, although the latter had caused plaintiff no pain; that upon defendant's advice plaintiff consented to the removal of these teeth, and while she was under the general anaesthetic he not only removed them by opening the gums from the side but also removed three other sound teeth, without the consent of plaintiff or her husband and without any necessity therefor in order to save her life or to meet an extreme emergency; that subsequently, although the fever continued, plaintiff with defendant's consent traveled to Orange County where she remained with relatives, and while there consulted with a local physician and surgeon who diagnosed her illness as undulent fever and sent her to a hospital for treatment therefor and also operated for the removal of her appendix; that thereafter plaintiff discovered pus seeping from her gums, and upon consulting a dentist the latter caused X-ray pictures to be taken, from which it appeared that two broken roots had been left in the jaw at the place where defendant had removed some of her teeth, and that later, as soon as it could be done safely, the dentist operated and removed the roots, which had decayed and caused ulceration and decay of the jaw-bone. All of these matters are set forth in one statement of a cause of action, and damages both general and special are alleged, both to plaintiff and to her husband, who is joined as plaintiff.

The various dates involved, so far as they appear from the complaint, are as follows: Plaintiff first consulted defendant on June 30, 1939; plaintiff left for Orange County on August 2, 1939, and did not consult defendant thereafter; the date of the operation by defendant does not appear, but it was of course prior to the latter date; the date upon which the Orange County physician diagnosed the illness as undulent fever was August 12, 1939; plaintiff discovered the pus seeping through her gums "during the month of January, 1940," and thereupon consulted a dentist, who had X-ray pictures taken "and diagnosed therefrom" the presence of the broken roots, and operated to remove them on February 21, 1940. The complaint, which was filed January 18, 1941, does not allege the date upon which discovery of the broken roots was made.

From an analysis of the complaint it appears that plaintiffs are relying upon four distinct causes of action, all set forth in one count, as the basis for the damages sought. These causes are as follows:

(1) For negligent and unskillful diagnosis and treatment, in that defendant failed to properly diagnose the illness as undulent fever, thereby allowing the disease to make inroads upon plaintiff's system during all of the time of defendant's treatment and until later properly diagnosed and treated by another.

(2) For removing any of plaintiff's teeth, which was entirely unnecessary and resulted from an erroneous diagnosis.

(3) For removing the three sound teeth without plaintiff's consent and without immediate necessity in the nature of an emergency.

(4) For negligence and lack of skill in the operation of removing plaintiff's teeth, in that defendant left pieces of root in the jaw and gums and sewed up the latter without removing all of such roots.

[1, 2] The complaint is clearly vulnerable to the special demurrer interposed, to the effect that the several causes of action are not separately stated, and it was proper for the trial court to sustain the demurrer upon this ground. It would, however, be unreasonable to refuse to allow an amendment if this were the only ground of demurrer. The propriety of the action of the trial court in not permitting an amendment is properly before this court on appeal, it appearing on the face of the record that the objection could be cured by amendment. Code Civ.Proc. § 472c.

[3, 4] It is the general rule that an action by a patient against a physician and surgeon for injuries sustained by the former by reason of negligent or unskillful treatment by the latter is an action sounding in tort and not upon a contract. Such an action is therefore barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure one year after the date of the injury. However, there are certain recognized exceptions to this rule in California. Huysman v. Kirsch, 6 Cal.2d 302, 57 P.2d 908; Trombley v. Kolts, 29 Cal.App.2d 699, 85 P.2d 541; Petrucci v. Heidenreich, 43 Cal.App.2d 561, 111 P.2d 421, 422. One exception recognized by all three of these decisions is stated in the last cited case as follows: "That, if a physician and surgeon performs an operation in a negligent manner and continues thereafter to treat the patient, the Statute of Limitations does not commence to run during the continuance of the relationship of physician and patient, unless the patient has discovered the injury or through the use of reasonable diligence should have discovered it."

[5] In Trombley v. Kolts, supra [29 Cal.App.2d 699, 85 P.2d 546], which involved negligence upon the part of a surgeon in sewing up a wound and leaving a foreign object, viz., a skin clip, in the body, an additional exception is stated as follows: "Certainly the statute of limitations should not run against appellant's rights during the time she was in ignorance of the cause of her disability, and could not with reasonable care and diligence ascertain such cause * * *."

In Huysman v. Kirsch, supra [6 Cal. App.2d 302, 57 P.2d 913], the Supreme Court reviews a large number of cases, including cases arising under the Compensation Act, and states: "The principle running through all these authorities, and approved by our decision, was that the statute of limitations should not run against an injured employee's right to compensation during the time said person was in ignorance of the cause of his disability and could not with reasonable care and diligence ascertain such cause. If we apply this principle to the facts in the present action, the same results will follow as the appellants in this action had no knowledge of the presence of the drainage tube in the body of Mrs. Huysman until it was removed therefrom by the respondent on September 26, 1932."

Although it is true that under the facts in all three of these recent cases the first exception was sufficient to eliminate the statute of limitations, the second exception must also be considered as established in this state in cases where a foreign object has been left in the patient's body by a surgeon performing an operation.

[6-8] Applying these principles to the case under consideration, it appears that as to causes of action numbers (1) and (2), as set forth in the analysis hereinabove made, the statute began to run when plaintiff ceased to be a patient of defendant, and that such actions were therefore barred when the complaint was filed. As to cause number (3), the removal of the three sound teeth without consent, this has been held to constitute an assault. Valdez v. Percy, 35 Cal.App.2d 485, 96 P. 2d 142. However, it falls under the same section governing the limitation of actions; and in any event, the fact of the removal of these extra teeth must necessarily have been obvious to the plaintiff shortly after coming out from the influence of the anæsthetic. Therefore, this cause of action was also barred.

[9] As to cause of action number (4), there does not appear to be any difference in principle between leaving in the patient's body pieces of broken roots of teeth which the surgeon had undertaken to remove and a sponge or drainage tube which had served its purpose and should have been removed. As it does not appear on the face of the

complaint that plaintiff discovered, or by the use of reasonable diligence should have discovered, the presence of the broken roots at a date more than one year prior to the filing of the complaint, the plea of the statute is not available to defendant by demurrer.

The judgment of the trial court is therefore affirmed as to causes of action hereinabove referred to as numbers (1), (2) and (3); and as to cause of action herein referred to as number (4), the judgment is reversed and the case is remanded with instructions to permit an amendment to the complaint, if plaintiffs are so advised, so as to cover only this last mentioned cause of action. Neither party to recover costs on appeal.

MOORE, P. J., and McCOMB, J., concurred.

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51 Cal.App.2d 133

PEOPLE v. HARKNESS.

Cr. No. 3545.

District Court of Appeal, Second District, Division 1, California.

April 6, 1942.

Hearing Denied May 4, 1942.

1. Criminal law 🔑1144(13)

On appeal evidence must be viewed in a light most favorable to prosecution.

2. Criminal law 🔑304(2)

Trial court sitting without jury was authorized to take judicial notice of fact that sunset on July 15 occurred at 7:05 p. m.

3. Criminal law 🔑564(1)

In prosecution for rape and for violations of sections 288 and 288a of Penal Code, evidence was sufficient to establish that offenses charged occurred in county of Los Angeles. Pen.Code, §§ 288, 288a.

4. Criminal law 🔑564(2)

Necessity of proof beyond reasonable doubt applies only to issue of guilt and not to venue of crimes.

5. Criminal law 🔑564(3)

Venue may be established by circumstantial evidence, and proof of venue is sufficient if the circumstances shown lead to a conclusion that the crime was committed in the county as charged.

6. Criminal law 🔑1159(4)

In prosecution for rape and for violations of sections 288 and 288a of Penal Code, testimony of prosecutrix, who was six-year-old child, was not so strictured by inconsistencies as to require it being disregarded in its entirety. Pen.Code, §§ 288, 288a.

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Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

George Harkness was convicted of rape and of violations of sections 288 and 288a of the Penal Code, and he appeals.

Affirmed.

Gladys Towles Root and Eugene V. McPherson, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

WHITE, Justice.

Through an information filed by the District Attorney of Los Angeles County, defendant was accused in counts I and V of the crime of kidnaping; count II charged the offense of rape; counts III and VI alleged violations of section 288 of the Penal Code; and count IV charged a violation of section 288a of the same code. To each of the foregoing charges defendant entered a plea of not guilty and also interposed a plea of not guilty by reason of insanity. Three prior felony convictions charged against him were ultimately admitted by the defendant. Trial before the court sitting without a jury resulted in the conviction of the defendant on the charges contained in counts II, III and IV. On the issue presented by the pleas of not guilty by reason of insanity, the court found that the defendant was sane at the time of the commission of the offenses as well as at the time of trial. In the offenses of which defendant was acquitted the prosecutrix was not the same child as the one involved in the counts upon which convictions resulted. This appeal is prosecuted by defendant from the judgments of conviction and the order denying his motion for a new trial.

[1] Viewing the evidence in the light most favorable to the prosecution, as we are required to do following a conviction,

the essential facts are: The victim of defendant's licentious conduct was a young girl six years of age, who lived with her mother, the latter of whom was employed during the evening and left for work on the date here in question at about five minutes after six o'clock, leaving her daughter in care of a housekeeper, Corrine Aseline. Mr. and Mrs. Edward Killion lived in a house located on the rear of the same lot where the prosecutrix resided. On July 15, 1941, defendant came to the Killion home about 9 or 9:30 in the morning. He was there when Mr. Killion left for work at approximately 11:30 o'clock the same morning, as he was when Mr. Killion returned from work at about 5 or 5:30 that afternoon. About that time defendant offered to go out and purchase some food if Mrs. Killion would cook it. At this time the prosecutrix came to the Killion house and stood in the doorway with her little dog. The defendant came down to the house from the garage, sat down at the table, and said to the child, "I will buy you an ice-cream cone," and patted her on the head. It was then 6:20 p. m. The girl and defendant thereupon departed. The Killions waited at their home until 7:30, but did not see the defendant again. The latter had been drinking, but was not drunk, being able to walk straight, talk coherently and without difficulty.

The child testified that she first saw the defendant at the Killion home after her mother had left for work; that the defendant told her he was going to get some hamburgers and vegetables, and invited her to come along, offering to buy her some ice cream; that she accepted the invitation and went with him. He drove to a store, where he told her he wanted to get the ice cream, but upon returning to the automobile stated that the store did not have any ice cream. Thereupon defendant and the child went for a ride to a restaurant to get a drink of Coca Cola. Thereafter they drove around for a time estimated by the child to be about ten minutes, when they parked. According to the testimony of the child, the particular spot where they parked was near some water, but not near or at the ocean. There were no houses around the spot, nor were any people present thereabouts. At the time the automobile stopped it was not quite dark. Defendant and the child got out of the automobile, whereupon the defendant had her remove her sunsuit and panties. At that time she requested him to take her home, but he asked her to wait for a while. She testified that she then tried to start for home, but defendant would not allow her. It was at this time that the three offenses occurred of which the defendant was found guilty. In view of the obscene nature and character of the defendant's assault upon the child we do not deem it necessary to here record the details of the offenses.

According to the child's testimony, she asked the defendant three times to take her home. After perpetrating the offenses charged against him, according to the testimony of the child, defendant drove her home, but let her out of the car approximately three houses from where she resided. Upon her arrival at her home the child was crying. The housekeeper immediately took her to the place where the mother was employed, and the matter was reported to the police. This was about 8:45 o'clock in the evening. The housekeeper testified that the child had asked to go outside about six o'clock and that approximately twenty minutes thereafter, when the housekeeper went out to search for her, the child was missing. She next saw her at 8:30 o'clock, lying on the couch crying. At the time she removed the child's garments the housekeeper noticed that the child's panties had blood on them at the crotch and that her sunsuit was very dirty and wet.

Dr. Etta Gray, examining physician from Juvenile Hall, made an examination of the child on July 17. Her findings are as follows: "A. I found a recent rupture of the hymen at the lower left side. The ruptured edges of the hymen bled readily when touched with an applicator. There was ecchymosis of the vulva and marked irritation. There was dilatation of the hymen.

"Q. From your examination you believe that the hymen was actually broken? A. It was." The doctor further testified that the vaginal canal had not been stretched and that in her opinion the male organ had not entered therein; that the rupture of the hymen could have been caused by a finger or fingernail.

Defendant was apprehended July 17th, and was questioned at the police station, at which time he stated that he went to visit the Killions and remained there all day; that about 6:15 o'clock in the evening

Mrs. Killion sent him to the store for some groceries, and when he left he took the girl with him, stopped at a Japanese market where he bought some vegetables, and then drove west on Imperial Boulevard to Hawthorne, where they had some ice cream. He further stated that he remained there about fifteen or twenty minutes, during which time he had a couple of intoxicating drinks; that he then left with the child in the automobile, and when he arrived near the child's home he let her out, because the child said, "Don't go in, my mother will scold you." According to his statement to the police, he then drove away without going in the house. He also stated that for some three weeks he had been drinking heavily and was not so sure as to what had happened. At a subsequent conversation the officers again questioned defendant, at which time he stated that he did remember the little girl crying, and that if she stated that he had done the things charged against him it must be so, and expressed a desire to enter a plea of guilty rather than have the child testify against him in court. He said, "I guess I did it, but I was drinking."

A police officer testified that he was familiar with the district in the vicinity of Hawthorne and around the route which defendant stated that he traveled with the prosecutrix. This officer testified that there were several bodies of water in that district and that one was located at El Segundo Boulevard west of Western Avenue about a quarter of a mile; that between El Segundo Boulevard and Imperial Highway, and between Crenshaw and Western, there were approximately fifteen such bodies of water, some of them with trees and weeds around them, and others without. All these bodies of water, it was testified, were situate in Los Angeles County.

The defendant produced a witness who operated a service station in the city of Los Angeles, who testified that about seven o'clock in the evening of July 15th the defendant was in his service station. He based the certainty of his testimony upon the fact that he had a dental appointment at eight o'clock that night and closed his station at 7:30. In connection with the testimony of this witness it was shown that he had previously been twice convicted of a felony. Further, it was shown by the records of the dentist that his appointment was at eight o'clock on July 16th and also on July 18th, but that he had no appointment for the 15th. This witness later took the stand and testified that he had been mistaken; that he actually saw the defendant on July 16th.

Taking the witness stand in his own behalf, defendant testified that on the evening in question he was at the home of the Killions; that he saw the prosecutrix standing in the yard, crying because her dog had been scratched by a cat; that he told her he was going to the store and would bring her some ice cream or candy, but Mrs. Killion admonished him not to do so, which admonition he heeded; that he left shortly after for the market, but did not take the child with him. He positively denied committing the offenses charged against him. He further testified that Mrs. Killion and he had been at the house all day, during which time he consumed the better part of three pints of whiskey; that when he left the house he went to a liquor store in an attempt to purchase additional whiskey, but did not have the money therefor; that he then went to San Pedro. He denied telling police officers of the various routes he took in the vicinity of Hawthorne. Although defendant testified as to the names and addresses of people whom he claimed to have visited on the night of July 15th, he did not produce any of these people as witnesses. With reference to his conversation with the police officers as testified to by the latter, defendant in his testimony stated that he did not talk with them, and in fact had told them that he could not converse with them because he was too ill.

[2-4] It is first contended by appellant that the evidence touching upon the question of venue "lacks affirmative proof that the crime, if any, was committed in Los Angeles County." Briefly, the facts testified to in reference to venue are that at 6:20 p. m., July 15th, the prosecutrix was taken by defendant from 99th and Avalon Streets and returned to that place at 8:30, a period of approximately two hours and ten minutes. According to the testimony of the child, they drove for a short time, estimated by her to be about ten minutes, to a market of some sort to get ice cream. They remained there for about ten minutes. They then drove for a few minutes to a restaurant for some Coca Cola and remained there about ten minutes, after which they proceeded down the highway on to a dirt road near some water ponds, where there

were trees and weeds. The drive from the restaurant to the scene of the offenses consumed about ten minutes. According to the testimony of the child, at the time the crimes were being committed, it was still a little bit light. The court was authorized to take judicial notice of the fact that sunset occurred at 7:05 p. m., all of which circumstances point to the fact that the statement of the prosecutrix with reference to the passage of time from when she first got in the automobile until the offenses were committed is accurate. As heretofore pointed out, it was shown by the testimony of a police officer that in the vicinity of Hawthorne, which is located in Los Angeles County, there were numerous places where there were small bodies of water surrounded to some extent by both trees and weeds. It was also shown by the testimony that the nearest point in a county outside Los Angeles would be Seal Beach in Orange County, a distance of 25 or 30 miles. Strongly supporting the testimony of the child that the locus delicti was in Los Angeles County was the testimony of the defendant, who, although denying commission of the crimes, nevertheless testified as to where he had been on the evening in question, and according to his own testimony, he never left the county of Los Angeles. Under this state of the evidence, the court was justified in drawing the conclusion that the offenses charged occurred in the county of Los Angeles. As was said by this court in People v. Carter, 10 Cal.App.2d 387, 52 P.2d 294, 295, "The state gives no assurance to its feloniously insubordinate citizens that the venue of their crimes will be fixed beyond a reasonable doubt; that doctrine applies only to the issue of guilt. People v. McGill, [10 Cal.App.2d 155, at page 159], 51 P.2d 433; Underhill on Criminal Evidence, vol. I, § 36, p. 45. The defendant and appellant, therefore, is in no position to complain because the location of the offense was not established to a degree of certainty more to his liking."

[5] Venue, like any other fact in a criminal case, may also be established by circumstantial evidence, and proof of venue is sufficient if the circumstances shown in evidence lead to a conclusion that the crime was committed in the county as charged. People v. Peete, 54 Cal.App. 333, 361, 202 P. 51; People v. Hill, 2 Cal.App.2d 141, 150, 37 P.2d 849. Instead of indicating that the defendant was in any county other than Los Angeles, the only reasonable conclusion to be drawn from the testimony is that he never left that county.

[6] Appellant does not contend that the evidence is insufficient to sustain the judgments of conviction, nor is it asserted that the testimony is so inherently improbable as to challenge belief by reasonable people; but appellant points out what he terms "glaring inconsistencies" in the testimony given by the prosecuting witness. We have read the testimony of the prosecutrix, and we find therein nothing that would empower a reviewing court to conclude that such testimony is strictured by inconsistencies that would require the trial judge to disregard it in its entirety. This is especially true in the testimony of the child as to the immediate circumstances surrounding the cruel assaults made upon her. This alone would justify the trier of facts in concluding that the crimes charged were committed, however weak in places the testimony of the child witness may have been made to appear. Much of what we said in regard to a similar claim made by the appellant in People v. Roberts, 50 Cal.App.2d 558, 123 P.2d 628, is applicable here, and reference thereto is made for an exposition of our views concerning the power of an appellate tribunal to disturb the findings of a trial judge or jury on the ground that such findings are barren of sufficient evidence to support them because of claimed inconsistencies in the testimony. Furthermore in the instant case it should be pointed out that there are certain proven facts and circumstances strongly tending to corroborate the testimony of the child. For instance, she and appellant were seen together on the evening in question; they left for the store to get some ice cream for the girl and supposedly to purchase some foodstuffs which were to be prepared by Mrs. Killion. However, appellant did not return to the Killion home as he had promised, but did come back into the neighborhood about 8:30 o'clock, when he let the child out of his automobile. After leaving appellant and going into her home, the prosecutrix was crying and immediately made complaint, as well as a complete disclosure of what had transpired. There was also the testimony of the Juvenile Hall physician and the condition of the child's undergarments, all corroborative of the verity of the testimony given by the prosecutrix.

For the reasons herein stated, the judgments and the order denying defendant's motion for a new trial are, and each is, affirmed.

YORK, P. J., and DORAN, J., concurred.

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50 Cal.App.2d 856

DUVALL v. FIRST BAPTIST CHURCH OF VAN NUYS.

Civ. 13513.

District Court of Appeal, Second District, Division 2, California.

March 25, 1942.

Appeal and error 🔑801(1)

Motion to dismiss appeal, supported by certificate of clerk setting forth facts required by Court rule, was granted where grounds stated in motion were supported by certificate and by authorities cited. Rules of District Court of Appeal, rule VI.

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Appeal from Superior Court, Los Angeles County.

Suit by Cora L. Williams Duvall against the First Baptist Church of Van Nuys. From an adverse judgment, the plaintiff appeals. On motion to dismiss the appeal.

Appeal dismissed.

Henry Walleck, of Van Nuys, for appellant.

Hitchcock, Cook & Obegi, of Van Nuys, for respondent.

PER CURIAM.

The respondent having filed its motion to dismiss the appeal in the above entitled matter, supported by a certificate of the clerk of the Superior Court setting forth the facts required by rule VI of this court, and it appearing that all of the grounds stated in the motion are supported by said certificate and by the authorities cited,

It is hereby ordered that this appeal be, and it hereby is, dismissed.

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51 Cal.App.2d 11

HUNT et al. v. PACIFIC ELECTRIC RY. CO. et al.

Civ. 13197.

District Court of Appeal, Second District, Division 2, California.

March 31, 1942.

1. New trial 🔑6

The granting or refusing of motion for new trial is largely within trial court's discretion.

2. Appeal and error 🔑979(2)

A reviewing court has no power to interfere with the trial court's determination of motion for new trial, unless a manifest abuse of discretion appears or there is no substantial conflict in the testimony on material issues, and the evidence, as a whole, is insufficient as a matter of law to support a verdict for the moving party.

3. Appeal and error 🔑1046(5)

Action of trial court in granting a new trial could not be impeached because of remarks on defendants' motion for judgment notwithstanding verdict for plaintiff that trial court felt that all matters were properly submitted to jury, and that there was evidence sufficient to serve as a finding for verdict for plaintiff. Code Civ.Proc. § 657.

4. New trial 🔑71

Where record in death action disclosed sharp conflict in testimony as to manner in which fatal accident occurred, no abuse of discretion was shown in granting defendants' motion for new trial.

5. New trial 🔑71

Where there was evidence that passenger, after alighting from bus, fell under bus as it was starting up, instead of being struck by bus as contended by passenger's heirs seeking recovery from company operating bus, for his death, and evidence that passenger was unsteady on his feet and had been drinking whisky, trial court did not abuse its discretion in granting company a new trial after verdict for plaintiffs.

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Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Mittie B. Hunt and another against the Pacific Electric Railway Company and others to recover damages for the death of Robert S. Hunt, deceased. The jury returned a verdict in favor of the plaintiffs. From an order granting defendants a new trial, plaintiffs appeal.

Order affirmed.

John C. Miles, Lee J. Myers, and Harold Breacher, all of Los Angeles, for appellants.

Frank Karr, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondents.

JESS E. STEPHENS, Justice pro tem.

Action by the mother and sister of Robert S. Hunt to recover damages by reason of the death of the latter, which plaintiffs allege was caused by defendants in the operation of a motor coach. The answer denies negligence and sets up contributory negligence as an affirmative defense. The jury returned a verdict in favor of plaintiffs and assessed the damages at $20,000.

Defendants thereafter made a motion for judgment notwithstanding the verdict, and this motion was denied. Defendants then moved for a new trial, and in their notice of motion specified all of the statutory grounds as set forth in section 657 of the Code of Civil Procedure. This motion was granted, and in its order the court adjudged "that the motion of the defendants * * * for a new trial in the above entitled action be and the same is hereby granted, and the court further specifies that one of the grounds upon which said motion is so granted is the insufficiency of the evidence to sustain the verdict heretofore rendered in said action."

Decedent Robert S. Hunt was a passenger on a bus belonging to defendants, and alighted therefrom onto the sidewalk at a regular bus stop a short distance from a street intersection. The driver testified that he then started the bus and moved up to the pedestrian lane and, upon the green signal light appearing, continued and was in process of making a right-hand turn into the intersecting street when in his mirror he saw decedent lying in the street. Until then he did not know there had been an accident. Only two other witnesses testified as to how the accident happened. A newsboy, called by plaintiffs, testified that he was on the corner across the street; that he saw the front end of the bus strike decedent and knock him down and that thereafter his view was obstructed by other traffic. A motorist called by defendants testified that he was driving in the rear of the bus but in the adjoining lane; that he saw decedent walking along the sidewalk after alighting from the bus; that he appeared unsteady on his feet, and just as the bus started up he slipped and fell under it, the rear right wheel passing over him. Two police officers called by defendants testified that they talked to Mr. Hunt at the receiving hospital, that his breath was alcoholic and that they found a bottle of whiskey, partly consumed, in his pocket. The hospital surgeon also testified that the victim's breath was heavy with alcohol.

[1-5] The law is thoroughly settled that the matter of granting or refusing to grant a motion for new trial is largely within the discretion of the trial court. In the case of Malloway v. Hughes, 125 Cal.App. 573, 13 P.2d 1062, 1065, the subject is discussed and many cases reviewed. It is there said that "under the law as thus declared it is beyond the power of the reviewing court to interfere with the determination of the trial court unless a manifest abuse of discretion appears * * * or there is no substantial conflict in the testimony on material issues and the evidence as a whole is insufficient as a matter of law to support a verdict in favor of the moving party." Appellants in their brief contend that there was an abuse of discretion on the part of the trial judge, and quote at some length from his remarks made at the time of passing upon the motion for judgment notwithstanding the verdict, in which he is quoted as saying, among other things, that "I feel the matter submitted to the jury and all of those matters were properly submitted to the jury and that there was evidence sufficient to serve as a finding for the verdict which has been just returned by the jury." Whatever may have been the remarks or the views of the court on that occasion, he subsequently conducted a hearing upon the motion for new trial and became convinced that the motion should be granted. This action cannot now be impeached by any remarks made previously by the court during progress of the trial. Lucerne Country Club v. Beal, 21 Cal.App.2d 121, 123, 68 P.2d 408. The record discloses sharp conflict in the testimony as to the manner in which the accident occurred and no abuse of discretion is shown in the granting of the motion for new trial.

Other matters are discussed by counsel, involving a nunc pro tunc order made by the court subsequent to the appeal correcting the minute order made at the time of granting the motion. The effect of such correction was to include the other grounds of the motion as well as insufficiency of the evidence. However, the actual order signed by the court, as well as the original and corrected minutes, specified insufficiency of the evidence to justify the verdict. As already indicated, the action of the trial court must be sustained upon this ground, without invoking the others included in the order and discussed in the briefs.

The order granting a new trial is affirmed.

W. J. WOOD, Acting P. J., and McCOMB, J., concurred.

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51 Cal.App.2d 95

BENTLEY v. MOUNTAIN et al.

Civ. 11979.

District Court of Appeal, First District, Division 2, California.

April 2, 1942.

Rehearing Denied May 2, 1942.

Hearing Denied May 28, 1942.

1. Contracts 🔑215(1)

Contracts between union and beauty shop owners terminable at will could be terminated by shop owners at any time without violating any terms of contracts.

2. Injunction 🔑118(3)

In action on behalf of union members to enjoin violations of contracts between union and beauty shop owners and for damages, allegations that defendants violated contracts or caused violation thereof by others were mere "conclusions of law" which could not strengthen complaint in absence of allegation of fact showing violations.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law".

3. Injunction 🔑118(3)

In action on behalf of union members for injunctive relief and damages, complaint disclosing that defendants had not violated or induced others to violate any alleged contract between union and beauty shop owners, but had at most terminated and induced others to terminate certain contracts which were terminable at will, failed to state cause of action.

4. Master and servant 🔑16

Though it is the policy of the law to protect employees' right of collective bargaining, nothing in the law denies to either employers or employees the right of lawful collective action.

5. Conspiracy 🔑1

Conspiracy in and of itself is not actionable.

6. Conspiracy 🔑18

In action on behalf of union members for injunctive relief and damages, amended complaint, alleging that defendants entered into a conspiracy to violate contracts between union and beauty shop owners and to induce other owners to violate similar contracts, was demurrable in absence of allegations of fact showing that any of defendants' acts violated any right of plaintiff or union.

7. Injunction 🔑118(3)

A complaint, alleging that defendants picked up, took away, absconded with, and converted to their own use union beauty shop cards, did not show a violation of any contractual right of union or member seeking injunction and damages, where alleged contracts between union and shop owners required return of cards on demand, and it did not appear that cards were removed without consent of shop owners or that defendants refused to deliver cards on demand.

8. Trover and conversion 🔑2

An action for "conversion" lies only where tangible personalty of some value has been taken.

See Words and Phrases, Permanent Edition, for all other definitions of "Conversion".

9. Trover and conversion 🔑32(2)

A union member's amended complaint, alleging that defendants picked up, took away, absconded with, and converted to their own use union beauty shop cards, was insufficient to state a cause of action for "conversion" irrespective of alleged contractual rights between union and beauty shop owners in absence of allegation that cards, as such, had any value.

10. Action ⚷6

In action on behalf of union members for injunctive relief and damages, amended complaint, disclosing that defendants had not violated or induced violation of any contract between union and beauty shop owners but had at most terminated and induced others to terminate contracts which were terminable at will, showed that a "labor controversy" existed but did not disclose any "justiciable controversy" entitling plaintiff to relief. St.1937, p. 208, § 923.

See Words and Phrases, Permanent Edition, for all other definitions of "Justiciable Controversy" and "Labor Controversy".

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Beverly Bentley, individually and as a member and as president of Hairdressers and Cosmetology Union No. 582A, affiliated with Journeymen Barbers' International Union of America, on behalf of herself and all other members of Hairdressers and Cosmetology Union No. 582A, against John Mountain and others for an injunction and damages. From a judgment for defendants, plaintiff appeals.

Affirmed.

Clarence E. Todd and Henry C. Todd, both of San Francisco, for appellant.

Sefton & Quattrin, of San Francisco, for respondents.

SPENCE, Justice.

Plaintiff filed an amended complaint seeking an injunction and damages. The demurrer of defendants to said amended complaint was sustained without leave to amend and judgment was entered in favor of defendants. Plaintiff appeals from said judgment.

Plaintiff purported to sue "individually and as a member and as president of Hairdressers and Cosmetology Union No. 582A, affiliated with Journeymen Barbers' International Union of America, on behalf of herself and all other members of Hairdressers and Cosmetology Union No. 582 A." Her original complaint consisted of one count. Her amended complaint consisted of five counts. Said union was alleged to have jurisdiction "over all hairdressers, cosmetologists and beauticians within the County of Marin, State of California." The defendants were alleged to be persons who owned and maintained beauty shops within said county.

The amended complaint was a lengthy instrument but the theory of said amended complaint may be briefly stated. It was drawn upon the theory that said union had contracts with the defendants; that defendants entered into a conspiracy to violate said contracts and to induce other beauty shop-owners to violate similar contracts; and that as the result of the actions of defendants in pursuance of said conspiracy the contracts of defendants and others had been violated to the damage of "plaintiffs." Plaintiff prayed for an injunction prohibiting defendants from violating or causing the violation of any contract between the union and any beauty shop-owner in Marin County and for damages in the sum of $5,000. Defendants interposed a general and special demurrer to said complaint. The trial court "ordered, adjudged and decreed that defendants' general demurrer to said first amended complaint and the separate causes of action therein alleged, be sustained without leave to amend the same, and that defendants have judgment * * *."

Plaintiff contends that the trial court erred in sustaining the general demurrer but in our opinion this contention cannot be sustained. The alleged contracts referred to in the amended complaint were evidenced by exhibits attached to the amended complaint. The exhibits were designated as "Exhibit A" and "Exhibit B." It was alleged in the amended complaint that prior to August 7, 1940, defendants had entered into agreements in the form set out in "Exhibit B" and had received union beauty shop-cards and had displayed the same in their shops. The "Union Beauty Shop Card," together with the "Rules Governing Union Beauty Shop Cards," found on the back thereof, constituted "Exhibit A."

When "Exhibit B" is examined it is found to be a form entitled "Agreement Governing Display of Union Beauty Shop Cards." It is designed for execution by the shop-owner only and it provides that the shop-owner agrees, in consideration of being allowed to display the union beauty shop-card, to comply with the rules on the back of said card; that the card shall remain the property of the union; and that the shop-owner will permit the removal of said card by a representative of the union upon demand. When "Exhibit A" is examined, it is found to be a form entitled "Union Beauty Shop," with the seal of the union thereon and a statement that the card is the property of the union and is issued subject to the conditions set forth on the back thereof. On the back hereof are found the general rules governing union beauty shop-cards.

While it was alleged in the amended complaint that defendants executed said agreements in the form set out in "Exhibit B," it appears entirely clear from an examination of the two related exhibits that the alleged agreement did not obligate the shop-owners to do anything further than to do certain things during the time that they displayed the union shop-cards and to give up the cards to the representative of the union upon demand. In other words, there was no obligation imposed upon the shop-owner to conduct a union shop for any specified period of time.

[1-3] Assuming that the allegations of the amended complaint were sufficient to show that valid contracts existed between the union and the shop-owners, said contracts were contracts terminable at will and could therefore be terminated by the shop-owners at any time without violating any of the terms of said contracts. Adkins v. Model Laundry Co., 92 Cal.App. 575, 581, 268 P. 939; Williston on Contracts, vol. 1, p. 59, sec. 38. The allegations of the amended complaint to the effect that defendants "violated" said contracts, or "caused the violation" of said contracts by others, are mere conclusions of law which cannot strengthen the pleading in the absence of allegations of fact showing such violations. We find no such allegations of fact in said amended complaint. On the contrary, it affirmatively appears from the allegations of fact in said amended complaint that defendants had not violated or induced others to violate any alleged contract with the union but at most, had merely terminated and induced others to terminate certain contracts which were terminable at will.

Plaintiff takes the position that although said contracts were terminable at will, plaintiff was nevertheless entitled to the relief demanded. In support of this position, plaintiff cites and relies upon Patterson Glass Co. v. Thomas, 41 Cal.App. 559, 183 P. 190. Said case is not authority for the proposition for which it is cited. On page 566 of 41 Cal.App., on page 193 of 183 P., the court, after setting forth the terms of the contract of employment between the employer and the employees, said: "We do not believe that the section of the Civil Code [Civ.Code, sec. 1999] relied upon should be given a construction which would justify a court of equity in holding that these employés were working 'at will,' i. e., that they could quit work without notice and without paying plaintiff its money advances." And on page 568 of 41 Cal.App., on page 194 of 183 P., after discussing certain cases dealing with contracts of employment without specification as to the duration thereof, it is said: "We do not think it necessary in the present case to follow these cases in their view as to engagement 'at will,' * * *." In the concurring opinion, it is said at page 570 of 41 Cal.App., at page 195 of 183 P.: "I may add that, in my opinion, the situation does not call for a discussion of the rule applicable to instances of employment at will." Furthermore the cited case and the other cases discussed therein involved contracts of employment between the employers and their employees. As appears from the authorities discussed on page 569 of 41 Cal.App., on page 194 of 183 P., the decisions were based upon the then established rule that "The right of a master to have his servant continue in his employ without molestation * * * is a recognized property right" and "that no person has a right to entice away another's servant." In the present case, the only contracts involved are alleged contracts, terminable at will, between the union, on the one hand, and the shop-owners, on the other hand. This fact also distinguishes the present case from certain authorities cited by plaintiff such as Imperial Ice Co. v. Rossier, 18 Cal.2d 33, 112 P.2d 631, involving contracts which were not terminable at will.

[4] Much is said in plaintiff's briefs to the effect that the employees had the right of collective bargaining and that it is the policy of the law to protect such right. This may be conceded but we find nothing in the law which denies to either the employers or the employees the right of lawful collective action. As we view the amended complaint, it shows no more than that the shop-owners were exercising their right of lawful collective action.

[5, 6] Special mention should be made of certain allegations found in said amended complaint. Plaintiff alleged a "conspiracy" between defendants but conspira

cy, in and of itself, is not actionable. In Richmond Terminal Corp. v. Parr Terminal Co., 116 Cal.App. 368, 2 P.2d 579, the complaint alleged that defendants had conspired to do certain acts. This court there said at page 369 of 116 Cal.App., at page 579 of 2 P.2d, "Such allegations are insufficient unless it appears that some right of plaintiff has been violated by some alleged wrongful act or acts of defendants for 'conspiracy cannot be made the subject of a civil action unless something is done which, without the conspiracy, would give a right of action.'" See, also, Bowman v. Wohlke, 166 Cal. 121, 125, 135 P. 37, Ann. Cas.1915B, 1011; Moropoulus v. C. H. & O. B. Fuller Co., 186 Cal. 679, 200 P. 601. As above indicated there are no allegations of fact in the amended complaint before us which show that any of the acts of the defendants violated any right of plaintiff or the union.

[7-9] There is also an allegation in the amended complaint that on or about August 8, 1940, defendants "through the instrumentality of defendant Lola Blake, picked up, took away, absconded with and converted to their own use the shop-cards," from certain shops of defendants and other shop-owners. It does not appear, however, that the alleged acts of defendants in removing the shop-cards from the various shops was done without the consent of the shop-owners or that defendants refused to deliver said shop-cards to plaintiff or to any other representative of the union upon demand. These acts did not therefore constitute a violation of any right of plaintiff or the union under the alleged contracts as the only right of the union against the shop-owners under the contract with respect to return of the shop-cards was to have said shop-cards returned upon demand. Nor was said amended complaint sufficient to state a cause of action for conversion of the shop-cards, irrespective of the alleged contractual rights, as such action is confined to cases where tangible personal property of some value is taken. 65 Corp.Jur. 28. It was not alleged that said shop-cards, as such, had any value.

In counts two, three and four of the amended complaint, plaintiff repeats certain allegations of count one and sets forth allegations tending to show that the union had certain additional contracts with certain shop-owners specifically covering wages, hours and working conditions. But at no place in the amended complaint is it alleged that any contract with any shop-owner was for any specified period of time or that any alleged contract was not terminable at the will of the shop-owner. In count five of said amended complaint, plaintiff repeats certain allegations of count one, quotes section 923 of the Labor Code, St.1937, p. 208, and complains that defendants have refused to negotiate a contract with the union but we find nothing in said count which strengthens the allegations of count one which are repeated in said count.

[10] In conclusion we may state that while it appears from the allegations of the amended complaint that a labor controversy exists, it does not appear that any justiciable controversy has arisen in which plaintiff is entitled to the aid of the courts. Plaintiff has simply failed to allege facts showing a violation by defendants of any right of plaintiff or of the union. We therefore conclude that the trial court properly sustained the demurrer.

In view of the conclusions above set forth, it becomes unnecessary to consider the other points raised by defendants in support of the action of the trial court.

The judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

51 Cal.App.2d 39

In re SUMMERS' ESTATE.

TREADWELL v. WOODS.

Civ. 11950.

District Court of Appeal, First District,
Division 1, California.

April 1, 1942.

Hearing Denied May 28, 1942.

1. Adoption 🔑1

Adoption was unknown to the common law and exists as a pure creation of statute.

2. Adoption 🔑1

In order to effect an adoption, there must be a substantial compliance with all of the essential requirements of statutes under which right of adoption is claimed.

3. Adoption ⚷1
Statutes ⚷205

In determining what provisions of adoption law effective in 1881 were mandatory, the statute should receive a sensible construction and its intention ascertained not from the literal meaning of any particular word or single section, but from a consideration of the entire statute, its spirit and purpose. Civ.Code, §§ 222–227.

4. Adoption ⚷1

The adoption of a child under statutes in effect in 1881 was essentially a matter of contract between the parties whose consent was required, although the sanction of a judicial officer was required. Civ.Code, §§ 222–227.

5. Adoption ⚷13

Under statutes in effect in 1881, adoption could not be approved until court had satisfied itself that person adopting was ten years older than the child, that all parties whose consent was required consented fully and freely, and that adoption would be for the best interest of the child adopted. Civ. Code, §§ 222–227.

6. Adoption ⚷17

Uncontradicted testimony was sufficient to establish adoption under statute in effect in 1881 where the record of adoption, if any, had been destroyed in San Francisco fire of 1906. Civ.Code, §§ 222–227.

◆

Appeal from Superior Court, Alameda County; John D. Murphey, Judge.

Proceeding in the matter of the estate of C. F. Summers, deceased, wherein four separate petitions for letters of administration were filed. From an order granting the petition of Charlie Y. Woods and denying the other petitions, including that filed by James L. Treadwell, the latter appeals.

Order affirmed.

John J. Taaffe and Joseph C. Haughey, both of San Francisco, for appellant.

J. A. Kennedy, Raymond Salisbury, and Joseph C. Prior, all of Oakland, for respondent.

KNIGHT, Justice.

Calvin F. Summers died intestate on March 7, 1939, at the age of about 85 years, leaving an estate of considerable value, consisting chiefly of a bank deposit and mining property. He was a widower, and was not survived by any children, brothers or sisters. Four separate petitions for letters of administration were filed; one by Charlie Y. Woods, claiming to be the decedent's grandson, and another by James L. Treadwell, who was admittedly a grandnephew. The probate court granted Woods' petition and denied the others; and Treadwell alone has appealed. It is conceded that by virtue of section 422 of the Probate Code a grandson's right to administer an estate is prior to that of a grandnephew; but whether or not Woods was a grandson depended upon the determination of the question of whether, as claimed by him, his mother, Bertha Lois Summers, was the legally adopted daughter of the decedent. In this regard respondent claimed that the adoption proceeding took place in the superior court in and for the City and County of San Francisco about the year 1881; and at the hearing of the present proceeding it was stipulated that if any records of such adoption proceeding ever existed they were destroyed in the San Francisco fire of 1906. The probate court found in favor of the respondent on the adoption issue, and appellant attacks the finding upon the ground that the evidence is insufficient as a matter of law to sustain said finding.

In order to pass upon the correctness of the probate court's finding it becomes necessary to consider the evidence adduced at the hearing relating to the family history and the background of the parties. It appears therefrom that Isabel Mather Henderson and John Wilson Henderson, husband and wife, had two children, Bertha Lois (respondent's mother) and Isabel (known generally as "Belle"). In 1875 Mrs. Henderson obtained a divorce from her husband on the ground of extreme cruelty, and was awarded the custody of the children, who were then 4 and 8 years of age respectively. The children, however, remained living with their father, and Mrs. Henderson, who was then in her early thirties, took a position as governess for the children of Mrs. Mabel Summers Treadwell, wife of James Parker Treadwell Sr. and sister of Calvin F. Summers. Calvin at that time was about 19 years old, and lived with his sister at 16 Shephard Place, San Francisco. In 1877 he and Mrs. Isabel Henderson were married, and continued to live with Calvin's sister at 16 Shephard Place. In 1881 Bertha Lois and Belle, the Henderson childdren, went to live with their mother and Calvin Summers, and it was during that year that it is claimed the court proceedings took place whereby Calvin F. Summers legally adopted Bertha Lois.

Belle did not get along well with Summers, and a short time after the adoption of Bertha Lois, Belle went back to live with her father. Bertha Lois continued to live with Summers and her mother until about 1888, part of the time on Haight Street. She attended the College of Holy Names in Oakland during 1887, using the name "Lois Somers." (The name Summers was sometimes spelled Sumers and also Somers.) In 1893 Bertha Lois bore an illegitimate daughter, who died in 1934, leaving surviving her two daughters who were named as heirs of Calvin F. Summers in respondent's petition. Also in 1893 Bertha Lois married Albert S. Woods. They had two children, the respondent Charlie Y. Woods and his brother Eugene (Gene) B. Woods. Bertha Lois divorced Woods in 1911 and subsequently married Charles Howard, but had no children by him; and she died in 1927.

The main evidence relating to the adoption proceeding and the circumstances attending it consisted of the testimony given by Belle Henderson, the surviving sister of respondent's mother, Bertha Lois. At the time of the hearing of the present proceeding Belle (or Isabel) Henderson was married, and upon being sworn as a witness gave the name "Isabel Bryan." She testified that she was present in court at the time the adoption took place. In this regard she stated, in part, that about 1881 she and her sister Bertha Lois went to live with Summers and their mother at 16 Shephard Place in San Francisco—they had been living with their father up to that time; that in the presence of her sister, her mother and herself Summers said he wished to adopt her sister, that she was a very bright girl and he would be able to give her advantages that her father could not; that at that time the witness was between 12 and 13 years old, and her sister between 8 and 9. Continuing, she testified that about a month after the above discussion Summers, his wife and the two girls "went to the court out in the City Hall" and went into the courtroom and sat down, and her mother was introduced to the judge, Judge Halsey; that her mother and Summers were sworn to tell the truth, and Summers handed the judge some papers and said this was the little girl he wished to adopt; that the judge read the papers, and then asked her mother if she was willing for Summers to adopt the child and she said yes; that her mother and Summers then signed the paper, after which the judge wrote something on the paper himself; that then the judge said to Bertha, "Bertha, now you have a new father" and he hoped she would be very happy in her new surroundings. Continuing her narrative, Mrs. Bryan testified that she remained with her mother and Summers for about a year; but that Summers was not kind to her, so she told him she was going back to her father, and he replied, "Go ahead, but your sister can't go, she belongs to me. I have adopted her"; that after she went back to live with her father, Bertha's adoption was discussed many times, and that her father was quite hurt that Bertha had chosen to live with Summers. She also testified that after the court proceedings her sister used the name Lois Summers and never again used the name Henderson, and that she continued to live with Summers "till she was grown." She also testified that she had a copy of the divorce decree between her mother and her father up to 1939; that she knew from that document that they were divorced in San Francisco; that the grounds were extreme cruelty, and that the custody of the two children was given to the mother.

Considerable corroborative testimony was introduced. In part it consisted of the following: Albert S. Woods, husband of Bertha Lois and father of respondent, testified that Henderson, his wife's natural father, told him Bertha Lois had been adopted by Summers; and he testified that sometime prior to their marriage he and Bertha met Summers on Kearney Street and Bertha said, "There comes my father," and introduced Summers as her father; that about a week or two prior to their marriage he had a conversation with Summers; that Bertha told Summers they were going to get married and Summers inquired if Woods was working and what his salary was; that Summers said, "Well, now, she is my daughter, I adopted this girl, I am interested in her and I want you to take good care of her * * *." Furthermore, various other witnesses testified to admissions made in their presence, by Summers and Bertha Lois' mother, that Summers had adopted Bertha Lois as his child; and the registration books of the convent she attended in 1887–8 were introduced in evidence, showing she was registered there under the name "Lois Somers." There was no contradictory testimony introduced in behalf of appellant, nor on this appeal does he challenge the truth of any of the statements made by any of respondent's witnesses.

The sections of the Civil Code effective at the time it is claimed the adoption proceedings herein took place provided that the person adopting must be at least 10 years older than the person adopted (sec. 222); that a married man not lawfully separated from his wife cannot adopt a child without the consent of his wife (sec. 223); that a legitimate child cannot be adopted without the consent of its parents, if living, except that the consent is not necessary from a father adjudged guilty of cruelty and for that cause divorced (sec. 224); that the consent of a child if over the age of 12 years is necessary to its adoption (sec. 225); that the person adopting and the child adopted and the other persons, if within or residents of this state, whose consent is necessary, must appear before the judge of the superior court of the county wherein the person adopting resides and the necessary consent must thereupon be signed and the agreement be executed by the person adopting, to the effect that the child shall be adopted and treated in all respects as his own lawful child should be treated (sec. 226); that the judge must examine all persons appearing before him separately and if satisfied that the interests of the child will be promoted by the adoption, he shall make the order accordingly (sec. 227).

[1-5] In the Estate of Johnson, 98 Cal. 531, 33 P. 460, 461, 21 L.R.A. 380, the Supreme Court had occasion to review the foregoing code sections, and in doing so it said in part: "The right of one person to legally adopt the offspring of another, and thus to create between the person adopting and the child adopted the relation of parent and child, giving to the child all the rights and subjecting it to all the duties of that relation, was unknown to the common law, and exists in this state as a pure creation of statute law; and, in order to effect such adoption, it is necessary that there should be a substantial compliance with all of the essential requirements of the law under which the right is claimed; but, in determining what provisions of the law are essential, and therefore mandatory, the statute is to receive a sensible construction, and its intention is to be ascertained, not from the literal meaning of any particular word or single section, but from a consideration of the entire statute, its spirit and purpose." And later on the court said: "The adoption of a child under the section[s] of the Civil Code above cited is not a judicial proceeding (In re [Estate of] Stevens, 83 Cal. 322, 23 P. 379 [17 Am.St. Rep. 252]), although the sanction of a judicial officer is required for its consummation. The proceeding is essentially one of contract between the parties whose consent is required. It is a contract of a very solemn nature, and for this reason the law has wisely thrown around its creation certain safeguards, by requiring, not only that it shall be entered into in the presence of a judge, but also that it shall receive his sanction, which is not to be given until he has satisfied himself of these three things: First, that the person adopting is 10 years older than the child; second, that all the parties whose consent is required do consent, fully and freely, to the making of such contract; third, that the adoption contemplated by the contract will be for the best interest of the child adopted."

[6] In the present case the probate court accepted as true all of the testimony given by Mrs. Bryan; and it is our conclusion that it was justified in finding therefrom that all necessary jurisdictional and statutory requirements to establish a valid adoption had been satisfied. Summarized, the undisputed facts appearing therefrom are that the child was less than 12 years of age, and that Summers was more than 10 years older than the child; that the consent of the natural father of the child was not essential because of the decree of divorce; that the sole purpose in going before the judge of the court was to accomplish the act of adoption; that Summers and his wife were sworn as witnesses; that they were examined separately, and that consent to the adoption was fully given by Summers and his wife (the natural mother of the child); that Summers handed the judge some papers which were read by the judge and signed by Summers and his wife, and that thereafter the judge wrote something on the paper himself; whereupon the judge stated to Bertha, "* * * now you have a new father"; and bearing in mind the nature of the requirements of said sections 226 and 227, the only reasonable in-

ference to be drawn from the evidence is that the paper Summers handed to the judge and which Summers and his wife signed was the agreement to adopt, and that the paper signed by the judge was the order of adoption.

Appellant contends in effect, however, that in a case such as this where it is claimed that the record of the adoption has been destroyed, the fact of the adoption can be legally established only as provided by section 1855 of the Code of Civil Procedure, that is, either by the production of a copy of the original record, or by the testimony of one who has actually read the documents constituting the adoption record and can relate the substance of their contents by virtue of having read them; and in support of such contention he relies mainly upon the Estate of Sharon, 179 Cal. 447, 177 P. 283, 288. While a portion of the opinion therein was devoted to a discussion of the failure to produce any witness who had actually read the adoption papers which the appellant therein claimed had been destroyed by the San Francisco fire of 1906, an examination of the entire decision discloses that there were additional grounds upon which the court largely based its conclusion that no adoption had been established. One was a fatal defect in the proof in that there was a failure to prove the jurisdictional requirements demanded by sections 225 and 223. In this regard the court said: "The appellant admitted that he was over 12 years of age at the time, and he did not testify that he signed a consent to the adoption and produced no evidence to that effect. The wife of the decedent was capable of consenting, was not separated from her husband, was then in California, and she did not sign a consent thereto. It follows that even if the judge did make an order, as claimed, it was wholly void." There are no such defects in the proof in the present case. Another ground was that the evidence affirmatively established that the child was not supported by the alleged adopting parent nor treated as his own child. On this point the court said: "The appellant was kept in a boarding school for about four years thereafter and supported for some six months longer in Arizona, where he was sent because he was afflicted with tuberculosis. The appellant contends that his expenses during all this period were paid by the decedent. But the evidence is almost conclusive that the expenses were paid out of the funds belonging to the Sharon trust above mentioned, and charged to all the beneficiaries. At all events, it comes far short of proving that the decedent, after the alleged adoption, regarded and treated the appellant as his own child should have been treated. He did not treat him as he treated his own child, then living. He never took the appellant into his family, nor associated with him in any way, and in fact he never thereafter spoke to the appellant or communicated with him in any manner whatever. As corroboration of the fact of a valid adoption, the evidence could not well have been weaker without being absolutely immaterial and irrelevant." Here the evidence shows without dispute that the child was supported by the adopting parent and treated as his own child. Since, therefore, the two cases are essentially different in the matter of proof, we do not deem the decision in the Estate of Sharon as here controlling.

Appellant also emphasizes the Estate of McCombs, 174 Cal. 211, 162 P. 897, but there the probate court found against the claimant on the determinative question of fact and the Supreme Court declined to disturb the finding. Stated more precisely, the determinative question of fact there was whether in conformity with the law of the state of New York in force in 1887 a written instrument of adoption had ever been entered into between an orphanage and Mr. and Mrs. George W. McCombs for the adoption of the contestant and appellant therein, Helen McCombs Fairchild; and apparently the probate court was not convinced by the evidence produced that such an agreement had been executed, because it found that the claimant was not the legally adopted daughter. Here the probate court found in favor of the claimant on the determinative issue of fact, and as above stated, it is our opinion that the evidence is legally sufficient to sustain its finding. Moreover, in the McCombs case, it appears that there was no proof that the child was placed in the orphanage under such circumstances as gave the officers of that institution power to enter into a contract for its adoption.

A casual inspection of Estate of Guinasso, 13 Cal.App. 518, 110 P. 335, stressed by appellant, shows that it is not at all in point. There an attempt was made to probate a destroyed will, and the proceeding was governed by a code section enacted for the sole purpose of taking care of such cases, to wit, section 1339 of the Code of Civil Procedure, as it stood at that time.

Several other cases have been cited by appellant, but no useful purpose could be served by giving each of them special attention, because none of them dealt with a factual situation similar to the one here presented. Nearly all of them involved direct attacks by the natural parents upon the validity of existing adoption proceedings; and the decisions on appeal simply restated the general doctrine applicable to such cases, that the one claiming a valid adoption must show that there has been a compliance with every essential statutory requirement. There is nothing in the decision of the probate court in the present case, nor in our disposal of the appeal from that decision, which can be said to conflict with such general doctrine.

The order is affirmed.

PETERS, P. J., and WARD, J., concurred.

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51 Cal.App.2d 146

CHICHESTER v. BANK OF AMERICA NAT. TRUST & SAV. ASS'N.

Civ. 13199.

District Court of Appeal, Second District, Division 2, California.

April 6, 1942.

1. Appeal and error 🔑758(3)

Under court rules regarding briefs, appellant's assignments of error should take the form of propositions which, if sustained, would lend substantial support to appellant's request for a reversal of judgment. Rules for Supreme Court and District Courts of Appeal, rule 8, §§ 2, 4.

2. Appeal and error 🔑773(2)

Where appellant's brief was stricken from files because of failure to comply with court rule, and appellant failed to file brief within time allowed for filing of proper brief, motion to dismiss appeal was granted. Rules for Supreme Court and District Courts of Appeal, rule 8, §§ 2, 4.

◆

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Frank M. Chichester, as trustee, etc., against Bank of America National Trust & Savings Association. From the judgment, plaintiff appeals. On motion to dismiss appeal.

Motion granted.

J. K. Wilson, of Los Angeles, for appellant.

Louis Ferrari, of San Francisco, and Edmund Nelson and G. L. Berrey, both of Los Angeles, for respondent.

McCOMB, Justice.

This is a motion to dismiss the appeal on the ground that appellant has failed to file an opening brief pursuant to the rules of this court.

These are the facts:

March 13, 1941, appellant filed a notice of appeal from the decision of the Superior Court of Los Angeles County. August 28, 1941, appellant filed a document in this court denominated "appellant's opening brief." This brief contained the following headings:

(1) Statement of Facts.

(2) The Court Erred in Granting a Nonsuit.

(3) The Effect of Bankruptcy on Contracts of the Bankrupt.

(4) Vehicle Code v. Trust Receipts Law.

(5) The First Cause of Action—$2,222.36.

(6) The Third Cause of Action—$5,654.95.

(7) Second Cause of Action—Insolvency.

(8) Estoppel.

(9) Conclusion.

October 22, 1941, respondent moved to strike the foregoing document on the ground that it did not comply with the requirements of the last paragraph of section 2, rule VIII, Rules for the Supreme Court and District Courts of Appeal, which reads as follows:

"The brief or petition must present each point separately under an appropriate heading, showing the nature of the question to be presented or the point to be made." (Larmac Consolidated Index to Constitution and Laws of California (1941) 1623.)

[1] This motion was granted pursuant to the provisions of section 4, rule VIII, supra, and appellant allowed twenty days

within which to file an opening brief which would comply with the rules of this court. Such ruling was in accordance with numerous previous decisions holding that, in order to comply with the requirements of the last paragraph of rule VIII, section 2, supra, appellant's assignments of error should take the form of propositions which, if sustained, would lend substantial support to appellant's request for a reversal of the judgment of the lower court. (Adams v. Standard Accident Insurance Co., 124 Cal.App. 393, 394, 12 P.2d 464; Bernstein v. Congregational Anshi Sfart, 14 Cal.App.2d 96, 57 P.2d 954; Graybeal v. Press-Telegram Pub. Co., 14 Cal.App.2d 252, 57 P.2d 1343; Superior Sand Co. v. Smith, 19 Cal.App.2d 166, 64 P.2d 1149; Bright v. Zabler, 43 Cal.App.2d 706, 708, 111 P.2d 387).

[2] Appellant has not filed a brief pursuant to our order of October 22, 1941. Therefore, since more than twenty days have elapsed since the entry of such order, respondent's motion to dismiss the appeal should be and it is hereby granted.

MOORE, P. J., and WOOD, J., concurred.

HAAS v. CITY OF LOS ANGELES et al.*

Civ. 12978.

District Court of Appeal, Second District, Division 1, California.

April 2, 1942.

Hearing Granted May 28, 1942.

1. Mandamus ⇨172

Where Los Angeles board of fire commissioners denied application for fireman's pension made by painter in fire department, the sole legal questions that could be considered in mandamus proceeding to compel action by board were whether board acted within its prescribed authority and whether there was any evidence reasonably supporting its action. Code Civ.Proc. § 1085.

2. Mandamus ⇨172

Where Los Angeles board of fire commissioners denied application of a painter in fire department for a fireman's pension, the lower court had no authority to determine, in a mandamus proceeding, whether painter was a member of the fire department within applicable provisions of city charter. Code Civ.Proc. § 1085.

3. Municipal corporations ⇨200

Whether a painter in Los Angeles fire department was a member of the fire department entitled to a fireman's pension was a fact question addressed to discretion of the board of fire commissioners on application for pension, and board's determination could not be disturbed by the courts in absence of fraud or other actionable irregularity.

4. Constitutional law ⇨72

The courts have authority to pass judgment on the validity of the acts or omissions of the Los Angeles boards of fire and pension commissioners but not on the wisdom of their action.

5. Mandamus ⇨173

Where fraud or arbitrary or capricious action of an administrative body vested with discretion to determine fact questions is alleged, a court in a mandamus proceeding may resort to the equivalent of a trial de novo, but the court is limited to directing the body or officials comprising it to remain within the limits of their jurisdictional powers. Code Civ.Proc. § 1085.

6. Municipal corporations ⇨200

Action taken by city attorney and board of pension commissioners was not binding on Los Angeles board of fire commissioners when called on several years later to determine whether painter in fire department applying for a pension was a member of department entitled to a pension under applicable provisions of city charter.

7. Municipal corporations ⇨176(3)

Where constitutional grant of power constituting source of Los Angeles city charter contained no grant of power to define or create individual property rights by charter, provision of charter purporting to create a property right in an office or position in the fire department and to the compensation attached thereto is void.

8. Property ⇨1

The term "property" necessarily includes all rights appertaining to property and essentially a part of property, and a "property right" is dependent on property and is merely an incident thereto. Civ.Code, §§ 654, 655, 657, 663, 669, 671, 1000.

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* Subsequent opinion 132 P.2d 201.

See Words and Phrases, Permanent Edition, for all other definitions of "Property" and "Property Right".

9. Property 🔑1

A simple right cannot under the law be accorded the distinction of a "property right" unless its origin can actually be traced to property and its continued relation thereto retained. Civ.Code, §§ 654, 655, 657, 663, 669, 671, 1000.

10. Mandamus 🔑172

A determination of the Los Angeles board of fire commissioners on application for pension that applicant occupying civil service position of painter in fire department was not a member of fire department within city charter did not involve the question of deprivation of property, and determination was not reviewable by trial court in mandamus proceeding in absence of fraud or irregularity in board's action. Code Civ.Proc. § 1085.

WHITE, J., dissenting.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Mandamus proceeding by Nelson J. Haas against the City of Los Angeles, the Board of Fire Commissioners of the City of Los Angeles, and others, to compel the board to place petitioner on pension service on the pension rolls as a member of the Fire Department of the city. From a judgment ordering the issuance of a peremptory writ of mandate, defendants appeal.

Reversed.

Ray L. Chesebro, City Atty., Frederick Von Schrader, Asst. City Atty., and Robert J. Stahl, Deputy City Atty., all of Los Angeles, for appellants.

Joseph Scott and J. Howard Ziemann, both of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from a judgment ordering the issuance of a peremptory writ of mandate directing appellant Board of Fire Commissioners of the City of Los Angeles to place respondent on pension service upon the pension rolls as a member of the Fire Department of said city, in conformity with the provisions of Article XVII of the Los Angeles City Charter and certain ordinances of the same city.

The facts briefly are as follows: Respondent in 1911 took and passed a civil service examination for the position of painter in the Fire Department, and he was thereafter duly assigned to the civil service position of painter in the Fire Department of the City of Los Angeles. He worked as an employee in the fire department until June, 1939, when he made application for a fireman's pension as provided in Article XVII of the charter of the City of Los Angeles. The application was denied upon the ground that only those persons duly and regularly appointed in the fire department under civil service rules and regulations whose duty it is to prevent and extinguish fires in the City of Los Angeles are entitled to the benefits of the fire and police pension system, and that a person with the civil service status of painter in the fire department is not eligible for a fireman's pension. There is no dispute as to the facts.

The City of Los Angeles maintains a city employees' retirement system (Art. XXXIV, Los Angeles City Charter), the benefits of which inure to all employees in the city service in the classified civil service other than members or employees of the fire and police departments, who are entitled to benefits under the provisions of Article XVII of said charter. It is conceded that respondent, if not entitled to the benefits of the police and fire department pension fund, is entitled to the protection of the general city employees' retirement system.

Neither appellant nor respondent correctly states the only valid question involved. Respondent states the question as follows: "Does the respondent, duly appointed to and holding the civil service position of 'Painter—Fire Department', come within the purview of Article XVII of the Charter of the City of Los Angeles?" Appellants state it as follows: "Is a person occupying the position of painter and who is qualified, under civil service rules and regulations, for the position of painter and no other, a member of the fire department for pension purposes, when the charter declares that for such pension purposes 'the fire department shall consist of all persons duly and regularly appointed'," etc.

This is an action in mandamus "to compel the admission of a party to the use and enjoyment of a right or office to which [it is contended] he is entitled." Section 1085 of the Code of Civil Procedure.

[1] It is not the function of the courts to determine the foregoing question in the first instance, or indeed at all. That duty and responsibility is with the legally constituted authority created by the charter for such purposes. When the proper legally constituted authority has acted, the sole legal question that can result from such action, in connection with the issues herein sought to be raised is, first, whether, in this instance, the Board of Fire Commissioners acted within its prescribed authority and, second, whether there was any evidence reasonably supporting its action. Manifestly, the question was addressed to the judgment and discretion of the commission, which the courts are without authority to disturb in the absence of fraud, or other actionable irregularity.

It is urged that petitioner is unlawfully precluded from the use and enjoyment of a right and office to which he is entitled and that this is so by virtue of the city charter and the ordinances applicable to the facts upon which petitioner depends.

The court found as a fact as follows: "That since the 1st day of September 1911, the duties of petitioner have consisted of and petitioner has duly been engaged in the painting of fire hydrants, ladders and other fire-fighting equipment and appliances, and the testing and treating for preservation of fire-fighting equipment and appliances, and the painting of fire houses; that since the 1st day of September, 1911, petitioner was required to and did relieve firemen on duty, and was required to and did respond to certain fire alarms in the City of Los Angeles, and was required to and did assist the Fire Department of the City of Los Angeles at scenes of fire." And further in substance that petitioner's request to be retired and placed on a pension as a member of the Fire Department as provided by Article XVII of the city charter was denied. But that he was informed that he was to be included as a member of the City Employees Retirement System and that $900.66 which had theretofore been paid by him into the pension fund was returned to him.

[2, 3] The court found as a conclusion of law: "That since the 1st day of September, 1911, petitioner has been and is a member of the Fire Department of the City of Los Angeles within the meaning and purview and entitled to the benefits of Article XVII of the charter of the City of Los Angeles, as amended, and of ordinance No. 28252 (new series) and of all ordinances of the City of Los Angeles enacted pursuant to said section of said charter."

The above conclusion is without legal sanction. There is no legal authority authorizing the determination of such a question in mandamus proceedings in the premises. The question sought to be determined by the above conclusion is beside the issue. Moreover, the question as to whether petitioner was a member of the fire department within the meaning of Article XVII of the city charter was a question of fact and in the instant case a question addressed to the judgment and discretion of the Board of Fire Commissioners.

In the final analysis petitioner's action is based on a disagreement with the judgment of the commission on this question. That an honest difference of opinion can exist in the circumstance is at once evident from a review of the record. For example, it is petitioner's contention, quoting from petitioner's brief under the heading "Respondent's Fire Fighting Duties," that: "Under the Fire Department Rules of December 11, 1911, he was under the supervision of the mechanical engineer and the mechanical engineer had a duty to report to 'all second (or greater) alarm fires'. He was instructed by the Chief of the Fire Department that he would have to report to 'second alarm fires' and 'fill in' when any company was shorthanded. He actually did report to second alarm fires and filled in when a company was shorthanded. Furthermore, his name appears three times on the department's 'Roll of Merit' among the firemen who, the Roll states, '* * * are members of the department who have been placed in the roll of meritorious conduct for the' years ending June 30, 1913, June 30, 1915, January 30, 1916." And under the heading "Respondent's Fire Prevention Duties," that: "In addition to relieving firemen on duty and to responding to certain fire alarms in the City of Los Angeles, and assisting at scenes of fire upon certain occasions, respondent ever since his appointment in the Fire Department has, in addition to his duties as ordinary painter, also done a great deal of work in the nature of fire prevention, such as: Respondent tested fire hydrants to see if they were in working order and particularly to determine if the threads were in proper shape to permit the attachment of fire hose, and also painted fire hydrants; and this work continued after 1930. He took new hose to firehouses to replace damaged hose. Replaced glass in fire alarm boxes. Inspected, repainted and replaced broken bolts in fire ladders. Inspected and serviced fire fighting tools. Treated safety net. Treated materials to be used on fire hydrants. 'Laid line' at scene of fire and connected hose to engine and in earlier days unhitched horses from engine. Put out awning fires started by live sparks at scene of fire, and knocked sparks off hose jacket and helped stretch fire traffic lines. Drove coal wagons to fire engines at scene of fire. Drove and operated cellar pumps."

On the other hand appellant city, after reviewing the evidence relating to petitioner's activities in the fire department, sums up his position, quoting from appellants' brief, as follows: "Without further extending this portion of our brief, we believe that it may fairly be said, as to the facts of this case, that we are here confronted with an individual who, from boyhood on, lived in the immediate vicinity of a fire department station house and who personally was imbued with a desire to be a fireman, but, because of his physical characteristics, that is, his height and weight, was unable to meet the minimum requirements of the civil service department for fire service. He did the next best thing—he entered the department as a painter, which, so far as his civil service status is concerned and so far as the position occupied by him is concerned, was the only position he ever held. For the first two years of his employment he was assigned to the machine shop, which was located immediately adjacent to a building in which was housed both an engine company and a truck company, manned by the regular fire-fighting personnel. During this period he continued to reside immediately back of the building in which was located another engine company of the fire department. At all times, then, he was in close personal association with members of the fire-fighting force. While he knew that, so far as his civil service status was concerned, he had the position of painter and no other, he was undoubtedly told that he would be expected, as he says, to help out wherever possible where companies found themselves shorthanded at places where he was painting, which he undoubtedly did upon any and every occasion that presented itself. Of this there can be no doubt. That he regarded himself as a member of the fire department there can be no doubt. That he, upon many occasions substituted for regular firemen when those firemen wanted extra time off and for which they would have had to turn over to any other man the daily wage paid to firemen, cannot be denied. Human nature being what it is, we have no doubt but that respondent here could have spent every day, when not on duty at the machine shop, taking some fireman's place in an engine house, when he was apparently ready, willing and anxious to volunteer for such duty at no compensation."

It will be seen from the foregoing that there is an abundance of evidence to support the conclusion of the Board of Fire Commissioners that petitioner was not a member of the fire department within the meaning of Article XVII of the charter of the City of Los Angeles, section 185 of which is as follows, and is the pertinent part thereof: "For the purpose of the provisions contained herein, the Fire Department shall consist of all persons duly and regularly appointed in the Fire Department under civil service rules and regulations whose duty it is to prevent or extinguish fires in the City of Los Angeles, under whatever designation they may be described in any salary or departmental ordinance providing compensation for said Fire Department; * * *."

[4] Having decided in effect that it was no part of petitioner's duty to prevent or extinguish fires and having classified him accordingly, the Board of Fire Commissioners and the Board of Pension Commissioners have been ordered by the trial court to "place petitioner on pension service and on the pension rolls as a member of the Fire Department of the City of Los Angeles, and to grant to petitioner as a member of the Fire Department of the said city all the benefits of Article XVII of the charter of the City of Los Angeles, as amended, and of Ordinance No. 28252 (New Series) and of all other ordinances of the City of Los Angeles enacted pursuant to said article of said charter of said city, and to show or cause to be shown on the records of respondents that petitioner is entitled to all pension benefits of the fire and police pension system of

said city, and that they pay and cause to be paid all money incident thereto, together with costs of suit incurred herein by petitioner, taxed in the sum of $19.50." Thus the trial court has substituted the court's judgment for the judgment of those legally constituted governmental agencies charged with the administration of municipal affairs. Not because there was anything illegal, fraudulent, arbitrary, or because some other irregularity entered into their deliberations, but because of a difference of opinion between the court and the boards as to the outcome of the only test by which such question could be determined. This the trial court was without authority to do. The courts are vested with authority to pass judgment on the validity of the acts or omissions of the above mentioned boards but not the wisdom of such action.

Petitioner is not entitled to the enjoyment "of a right or office," herein sought to be enforced in mandamus proceedings, by virtue of the charter and the city ordinances applicable thereto. Petitioner is not entitled to the enjoyment of the right or office unless and until the Board of Fire Commissioners so decides. This the commission has decided by resort to the appropriate test provided in the charter. Hence, as above noted, it is the action of the commission only which the courts may review for the limited purpose above mentioned.

[5] It should be noted that the situation here presented bears no relation to those actions of a similar character that involve allegations of fraud, arbitrary or capricious action of administrative bodies vested with discretion to determine questions of fact. In such actions, for the purposes of determining those issues, it appears to be well settled that the court in a mandamus proceeding may resort to the equivalent of a trial de novo. But, even in these cases the court is limited, in effect and in proper cases, to directing such administrative bodies or officials to remain within the limits of their jurisdictional powers, which manifestly do not include the power to act fraudulently or arbitrarily.

Referring again to respondent's statement of the question involved, to-wit: does the respondent, duly appointed to and holding the civil service position of "Painter—Fire Department," come within the purview of Article XVII of the charter of the City of Los Angeles? It is argued, quoting from respondent's brief, that "this question has been answered unqualifiedly in the affirmative: (1) In 1929, by the then City Attorney: (2) In 1932, by the Board of Pension Commissioners in granting respondent a Certificate of Service entitling him to such a pension; (3) By the official annual reports of the Fire Department; (4) By the City Council by ordinance; (5) By the trial court herein".

[6] It may be conceded that such events occurred, but neither the opinion of the city attorney in 1929 nor the action of the board of pension commissioners in 1932 nor whatever the annual reports of the fire department may reveal, nor any ordinance that the record discloses, are of any help in deciding the above mentioned sole question here presented. Respondent concedes that the doctrine of estoppel does not apply. The action taken in the past, as above described, was not binding on the board of fire commissioners, called upon to determine petitioner's status when his application for a pension was filed. It is the action of this commission, and this commission only, that is before the court for review.

[7] The city charter of the City of Los Angeles provides that: "The right of an officer or employee of the Fire Department to hold his office or position and to the compensation attached to such office or position is hereby declared to be a substantial property right of which he shall not be deprived arbitrarily or summarily, nor otherwise than as herein in this section provided." Because of the above provision it may be urged that the right to the final determination of the issues in a court, where only judicial power can be exercised, cannot be denied by reason of the due process clause in the constitution. If such a property right exists, authority therefor must be found elsewhere than in the city charter, for the constitutional grant of power that constitutes the source of the charter contains no grant of power to define or create individual property rights by charter. Hence, the provision purporting to create such a property right is void.

In a decision by the Supreme Court of California, filed March 16, 1942, not yet final, the power of the court in mandate proceedings was considered at length. Laisne v. California State Board of Optometry et al., 19 Cal.2d 831, 123 P.2d 457. There, appellant's license to practice optometry had been revoked by the California State Board of Optometry and in an attempt to set aside the order of said board, relief was denied by the trial court.

In the Laisne case the trial court had denied appellant the right to introduce any new and material evidence and compelled the submission of the case on the record and proceedings before the board of optometry. The Supreme Court reached the conclusion that the validity of the judgment hinged upon the action of the trial court in denying the appellant the right to introduce such evidence. The Supreme Court in that connection pointed out that if the superior court in the mandate proceedings were limited to the evidence presented before the board, or if the findings of fact were conclusive on the court, then the board would be exercising the complete judicial power reserved to the courts. The decision further declared that "the appellant's right to practice optometry was a vested property right." And that "such right cannot be finally destroyed by a nonjudicial body if the action of that body is questioned in a court of law in a mandate proceeding." It was held in substance therefore that only a trial de novo would afford appellant his full constitutional rights in the circumstances and that the judgment of the court as to the facts could, and should in proper cases, supersede the judgment of the board. It is assumed throughout the prevailing opinion that the license to practice optometry is a property right entitled to protection under and by virtue of the due process clause of the constitution. Manifestly, if the license to practice optometry were not property the due process clause of the constitution would not apply. It is at once evident that if such an assumption is unwarranted, it follows that the conclusion is based on a fallacy underlying the whole opinion that effectively annuls the conclusion, for it is axiomatic in logic that the validity of a conclusion can survive only so long as the truth of the premise upon which it is based can be sustained. This being true, it is important to inquire whether the license to practice optometry is actually a property right. This subject is not discussed in the prevailing opinion. It is assumed as a matter of fact and as a matter of law without further comment. However, two former decisions of the Supreme Court of California are relied on as authority, viz: Hewitt v. State Board of Medical Examiners, 148 Cal. 590, 84 P. 39, 3 L.R.A.,N.S., 896, 113 Am.St.Rep. 315, 7 Ann.Cas. 750, and Suckow v. Alderson, 182 Cal. 247, 187 P. 965, 966. In the Hewitt case it is assumed, without comment or citation of authority, that the license to practice medicine is a property right. The Suckow case also involved the act regulating the practice of medicine and followed the Hewitt case as authority for the proposition that the right to practice medicine is a property right. The Suckow case, however, adhered to the old rule that the board of medical examiners was not exercising "the judicial power of the State." Neither case turned on the question as to whether the right to practice medicine was a property right.

Title I of part I of the Civil Code deals with the nature of property. The pertinent provisions are as follows:

Section 654: "The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this code, the thing of which there may be ownership is called property."

Section 655: "There may be ownership of all inanimate things which are capable of appropriation or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill as the composition of an author, the good-will of a business, trade-marks and signs, and of rights created or granted by statute."

Section 657: "Property is either: 1. Real or immovable; or, 2. Personal or movable."

Section 663: "Every kind of property that is not real is personal."

Section 669: "All property has an owner, whether that owner is the state, and the property public, or the owner an individual, and the property private. The state may also hold property as a private proprietor."

Section 671: "Any person, whether citizen or alien, may take, hold, and dispose of property real or personal, within this state." And property may be acquired by: Occupancy, accession, transfer, will, or succession. Section 1000, Civil Code.

[8, 9] The above provisions are of a general nature and have a uniform operation, as the constitution requires; they affect all alike, whether minors or adults, citizens or aliens, sane or insane. And it

is significant to note that the above provisions omit the use of the term property rights. The reason for the omission both in the constitution and the statutes, however, is at once obvious. The term property necessarily includes all rights appertaining to property; essentially a part of property. A property right, of necessity, is dependent on property; it is merely an incident to property. A simple right cannot under the law be accorded the distinction of a property right unless its origin can actually be traced to property and its continued relation thereto retained. Unless capable of such identification it cannot be accepted as a property right. Thus it will be seen that unless it can be shown that the license to practice optometry is an incident to property, the assumption that nevertheless it is a property right is without foundation. Property, as such, as the above-quoted provisions of the Civil Code demonstrate, has definite legal characteristics; for example, it is, as noted above, capable of ownership; it may be sold, mortgaged, inherited, etc.; in addition to many others too well known to require enumeration. Of all of the characteristics peculiar to property, what single one can be identified with the license to practice optometry? Therefore, how can the license to practice optometry be upheld as an incident to property? If it cannot be so upheld as an incident to property, how can the contention that it is a property right be successfully maintained? And finally, in this connection, if the license to practice optometry cannot be demonstrated to be either property or a so-called property right, how can the action of the board of optometry be held to be an invasion of the judicial power vested exclusively in the courts? That the right to practice optometry is a personal right and the license in the nature of a conditional or qualified privilege, properly subject to regulation under the police power of the state, there can be no question. Manifestly, it is the right of everyone to practice optometry, providing the conditions precedent are met. But the license so to practice remains a privilege. Once granted, professional success does not alter the status of the license. Nor does material success alter the conditions upon which the license is granted. Hence, in the matter of revoking a license the question of deprivation of property is irrelevant.

[10] Likewise, the determination of the question of whether a civil service employee is a fireman, is one separate and apart from that of his right to a pension. An employee cannot be held to be a fireman merely because otherwise he would not be entitled to the benefits of a fireman's pension. Nor can it be argued that because a fireman is entitled to such benefits the power to determine his status as a member of the fire department involves the power to determine a property right. Here again, the question of deprivation of property is irrelevant. Such a question only becomes relevant after the status of the employee is determined; and any argument to the effect that, because of property rights involved, a fire department employee's status as a fireman may not be finally determined by an administrative board, is without substance.

For the foregoing reasons the judgment is reversed.

YORK, P. J., concurred.

WHITE, Justice (dissenting).

I dissent. The inevitable effect of the majority opinion in this case will be the abrogation of the right of one possessed of a property or contractual right to appeal to the courts from the spoliation of such rights and to leave the possessor of such rights to the mercy of legislative administrative agencies, working as they do in a field peculiarly exposed to political demands. True, these boards grant a hearing and take evidence, but are the courts to say that the findings of fact of such boards are conclusive when the evidence clearly establishes that the findings are erroneous and that personal or property rights have been invaded or abridged? St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 52, 56 S.Ct. 720, 80 L.Ed. 1033. To answer this inquiry in the affirmative is to admit that the judicial power of a court of competent jurisdiction can be circumscribed by giving finality to the actions of such boards even though such actions transcend the limits of constitutional authority and due process of law.

That respondent was a member of the fire department is conceded. He was appointed following a civil service examination, and it has frequently been held that a classified civil service employee possesses a vested right to his office under the law. Indeed, subdivision 1 of section 135 of the Los Angeles City Charter, which has to do with the discharge of members of the city fire department, specifically declares a position in the fire department to be "a substantial property right of which he" (the fire department employee) "shall not be deprived arbitrarily or summarily." Such being the case, does not the fire department employee have a vested property right in the emoluments or perquisites of his office, such as the pension provided for such employees, when his duties in the fire department bring him within the pale of section 185 of the charter? It has been held with reference to such vested rights that when a board or commission acts arbitrarily against such vested rights existent under the law, such board or commission acts against the law itself, and in such cases the courts will by mandamus compel recognition by the board of the individual's right and conformity by such administrative tribunal with law. Lotts v. Board of Park Commissioners, 13 Cal. App.2d 625, 634, 57 P.2d 215.

If respondent herein possessed, as I believe he did, both a property and a contractual right to receive the pension he had earned by the character and manner in which, as well as the period over which, he discharged his duties in the fire department, then if the findings of the board upon his claim are conclusive upon the courts, we must conclude under the majority opinion that such boards are entitled to and do exercise complete judicial power, reserved, as I feel, by the Constitution of this state, to enumerated courts thereof. Const. art. VI, sec. 1; Laisne v. California State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457. To my mind, any such exercise of judicial power by such administrative board is in direct conflict with the cited constitutional provision. To quote from a concurring opinion by Chief Justice Beatty in Glide v. Superior Court, 147 Cal. 21, 30, 81 P. 225, 229, "Vested rights of property and contract rights are placed by the Constitution under the protection of the courts where alone the questions of law and fact upon which they depend can be finally decided." In my judgment, the administrative board whose acts are here challenged was without authority to make conclusive findings of fact and to predicate thereon a final order, not reviewable by the courts, which would deprive respondent of a property right vested in him to receive his pension as a member of the fire department. Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 87 P.2d 848; McDonough v. Goodcell, 13 Cal.2d 741, 752, 91 P.2d 1035, 123 A.L.R. 1205; Laisne v. California State Board of Optometry, supra.

If the foregoing be the law in cases which involve factual differences and where the owner of a property right is entitled to the independent judgment of a competent court in what amounts to a trial de novo, then certainly the possessor of a property right incident to a civil service position is entitled to the independent judgment of a court of law when an administrative board, in the face of stipulated and conceded facts, arbitrarily, unlawfully, and in defiance of the plain provisions of the city charter, deprives him of his vested right to participate in the pension system provided for fire department employees performing the duties assigned to him. The instant proceeding does not partake of a situation where it is sought to control the unabused discretion conferred upon an administrative board. It rather provides a case where a certain contingency, viz., the performance of services of a certain type over a prescribed number of years, has taken place, by reason whereof the charter requires the board to perform a prescribed act, viz., retire the employee on a pension. In such case the functions of the board are ministerial, and upon the happening of the contingency the writ of mandate will issue to control the action of the board.

I take the position that whether respondent is entitled to participate in the pension benefits of the fire and police pension system is dependent upon a construction of section 185 of the city charter, which provides that for the purpose of determining the eligibility of a person working in the fire department to participate in the pension system, such person must be a member of the fire department "duly and regularly appointed * * * under civil service rules and regulations whose duty it is to prevent or extinguish fires in the City of Los Angeles, under whatever designation they may be described in any salary or departmental ordinance providing compensation for said fire department; * * *."

That respondent is a member of the fire department cannot be questioned. In 1911 he passed a civil service examination for the position of "painter in the fire department," and was thereafter duly appointed to such position in the department. Appellant Board of Fire Commissioners, however, takes the position that regardless of his membership in the fire department, respondent is not entitled to a pension because the civil service classification of his position did not impose upon him as a matter of law the duty of extinguishing or aiding in the prevention of fires. I, however, take the position that had the framers of the charter provision governing pensions in the fire department intended to so limit the benefits of that system, they could and would have so stated. Instead, we find the charter provision providing in clear and unequivocal language that pension benefits should inure to "all persons duly and regularly appointed in the fire department under civil service rules and regulations whose duty it is to prevent or extinguish fires * * * under whatever designation they may be described. * * *"

The trial court found upon clear and convincing evidence that while respondent was employed as a painter in the fire department, his duties included certain definite fire-fighting and fire-prevention activities. We cannot be indifferent to the rule which requires of us in ascertaining the intent and meaning of the charter provisions, to indulge in a liberal construction thereof to the end that the beneficial results aimed at may be achieved. Hurley v. Sykes, 69 Cal.App. 310, 231 P. 748. The clear intent of the fire department pension provisions is to protect all persons employed in the fire department whose duty it is to aid in the extinguishment or prevention of fires. The language of the charter provisions in question indicates without peradventure of a doubt that it is not the classification of a member of the fire department that determines his eligibility for a pension, but it is the duties performed by such member that is decisive.

That respondent was engaged in the duties of both extinguishing and preventing fires cannot be questioned, when, as the record shows, he was required by the chief of the department to report to all second or greater alarms of fire; to "fill in" when any company of fire-fighters was short-handed; and that he actually did both. His name appears three times on the department's "roll of merit," made up of members of the fire department who performed outstanding or meritorious services. Respondent also actually participated in putting out fires. During his incumbency in the fire department he drove fire apparatus to the scene of fires; he "laid line" at the fires; and connected hose to the engine. Included among his fire-prevention activities was his inspection of fire-fighting tools and treating materials used in fire hydrants. Through his years of service in the department the Board of Pension Commissioners accepted respondent's payments to the pension fund; and as far back as May 22, 1932, the last-mentioned board issued to respondent a certificate of service pursuant to ordinance No. 67778, which certified that he had served as a member of the fire department for twenty years and was entitled to retirement as provided in section 181 of the Los Angeles city charter. The ordinance just mentioned reads in part: "Upon the completion of the period of service mentioned in section 181 of the charter of the City of Los Angeles, entitling such member to retire under its provisions, such member shall be entitled to retire at any time thereafter from active service from such department in accordance with the provisions of said section 181 hereinabove referred to, which right shall be a fully matured, absolute, vested property right, reserved for such member as a constituted and granted right to retire." Pursuant to the terms of another city ordinance, respondent was classified as a "pension employee," as distinguished from a "non-pension employee" or "civilian employee."

This case furnishes a striking example of the inequity and injustice that would ensue were we to accept the claim of appellants that only those members of the department who are classified in civil service as fire-fighters are eligible to participate in the fire and police pension system. It also furnishes a clear reason why the framers of the charter provision used language the clarity of which admits of no denial that the meaning and intent was to extend the benefits of the pension system to all persons working in the fire department whose duty was to extinguish or prevent fires, and that, notwithstanding any designation by which they might be described in any salary or departmental ordinance.

It is unnecessary to here again reiterate at greater length my views of the meaning and intent of the charter provisions under consideration. Such views are further set forth in dissenting opinions filed by me in the cases of Knoll v. City of Los Angeles, Cal.App., 124 P.2d 113, and McKeag v. Board of Pension Commissioners, Cal.App., 124 P.2d 109, this day decided.

For the reasons stated in the last-cited cases as well as for the reasons advanced herein, the judgment in my opinion should be affirmed.

McKEAG v. BOARD OF PENSION COM'RS OF CITY OF LOS ANGELES.*

Civ. 13049.

District Court of Appeal, Second District, Division 1, California.

April 2, 1942.

Hearing Granted May 28, 1942.

Mandamus 🔑172

A determination of the Los Angeles board of pension commissioners denying petitioner a widow's pension on ground that during his lifetime, petitioner's husband, who had acted as secretary of board of fire commissioners, was not legally entitled to receive pension paid to him from police and fire pension system was not reviewable by trial court in mandamus proceeding.

WHITE, J., dissenting.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Mandamus proceeding by Nettie K. McKeag against the Board of Pension Commissioners of the City of Los Angeles and others to compel defendants to pay a pension to petitioner. From a judgment granting a peremptory writ of mandate, defendants appeal.

Reversed.

Ray L. Chesebro, City Atty., and Robert J. Stahl and Edward J. Olstyn, Deputy City Attys., all of Los Angeles, for appellants.

Don M. Kitzmiller, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal from a judgment in a proceeding in mandamus wherein the court below granted a peremptory writ to compel the appellants, as members of the Board of Pension Commissioners of the City of Los Angeles, to pay to petitioner a pension pursuant to certain of the terms and provisions of article XVII of the Los Angeles city charter. There is no dispute as to the facts, which are that petitioner is the widow of Charles E. McKeag, who for many years acted as secretary of the Board of Fire and Police Commissioners, having been appointed to that position in 1906. From 1925 to 1932, he acted as secretary of the Board of Fire Commissioners exclusively. He was retired on February 16, 1932, and was paid a pension from the police and fire pension system of said city until the time of his death on August 23, 1939. Thereafter his widow, petitioner herein, pursuant to the provisions of section 183 of the city charter, made application for a widow's pension. There is no dispute as to petitioner's claim that for more than one year prior to her husband's death she was his wife; but on September 26, 1939, appellant commissioners denied her a widow's pension on the ground that during his lifetime her husband was not legally entitled to receive the pension paid him, by reason of which fact petitioner herein was foreclosed from participating in the pension system benefits.

The question here involved is the same as that in Haas v. City of Los Angeles, Cal.App., 124 P.2d 100, this day decided, and for the reasons given in the opinion in the Haas case the judgment herein is reversed.

YORK, P. J., concurred.

WHITE, Justice (dissenting).

I dissent. Section 183 of the city charter, so far as here pertinent, provides in part as follows: "Whenever any member of the fire or police department shall die * * * after retirement, or while eligible to retirement from such department on account of years of service, then an annual pension shall be paid in equal monthly installments to his widow. * * *"

It is first contended by respondent that under the aforesaid charter provision the Board of Pension Commissioners had no alternative than to grant her a widow's pension, for the reason that in 1932 her husband was duly retired on a pension which was regularly paid him for some seven years up to the time of his demise. Respondent argues that in 1939 the pension board was without authority to review its determination made in 1932 that her husband was a member of the fire department and of the class thereof entitled to share in the benefits of the pension fund. I am not in accord with respondent's claim in this regard. The law seems well settled that where, as here, there is no provision in the charter giving to the Board of Pension Commissioners acting in any judicial capacity, the power to determine a question of fact in connection with the granting or withholding of a pension, the board is in the same position "with relation to such a matter as is any officer required by law to do a prescribed act in a certain contingency, where no special method is provided by law for the ascertainment of the facts. Under such circumstances it may often be true that there is uncertainty or dispute as to the facts, but in such a case the only resort of the officer is such investigation as he may be able to himself make for the purpose of determining his own course of action. His determination as to the facts, however, is not effectual for any other purpose. If not satisfied as to the evidence of the essential facts, he may refuse to act until required to do so by the judgment of some tribunal invested with the power to finally determine such controversy, but before such tribunal any conclusion to which he may have come on the facts has no legal force whatever. The sole question there is whether the facts are in realty such as to require the performance of the act, and this altogether regardless of the officer's conclusion as to the facts. The party having a vested right in the performance of the act, if the facts are as claimed by him, has also the right to have his claim as to the facts judicially determined. The functions of the board in such a matter as this are really ministerial only, and come under the same principle as would apply in the case of a county or city auditor, in so far as any finality to its conclusions are concerned. * * * As we read the charter, it gives no judicial function whatever to the board in such a matter as this, confers upon it no authority to hear and determine a controversy in a judicial sense." French v. Cook, 173 Cal. 126, 160 P. 411, 413; Sheehan v. Board of Police Commissioners, 197 Cal. 70, 239 P. 844.

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* Subsequent opinion 124 P.2d 109.

The determination of the Board of Pension Commissioners in 1932, when it voted respondent's husband a pension pursuant to section 185 of the charter, not being judicial in character, possesses no legal force whatever as such and amounts to nothing more than an indication of the board's course of action in the premises at the time such action was taken. From what has just been said, it follows that when called upon to determine the validity of respondent's application for a widow's pension in 1939, the board was not bound by its determination in 1932 to the effect that her husband was a member of the fire department entitled to a retirement pension. In its determination of respondent's application, the board was empowered to make an investigation thereof for the purpose of deciding its course of action thereon, and if such investigation satisfied the board that at the time of the death of respondent's husband he was not and durnig his period of retirement on pension never had been a member of the fire department as contemplated by section 185 of the charter, then the board was not bound by the course of action determined upon by it or its predecessor board in 1932. The right of the board in this regard does not of course foreclose respondent from having her claim as to the facts of the case in connection with the status of her husband in the fire department and its pension system judicially determined.

We come now to a consideration of appellant's claim that respondent, as the widow of Mr. McKeag, was not entitled to a pension because the latter was never employed in the fire department within the class of such departmental employees that are entitled to participate in the fire and police pension fund system. The question of the eligibility of respondent's husband to retire upon a pension is dependent upon a construction of the provisions of section 185 of the Los Angeles city charter as applied to the duties performed by him in his position as secretary to the Board of Fire Commissioners. The cited section, so far as here material reads: "For the purpose of the provisions contained herein, the Fire Department shall consist of all persons duly and regularly appointed in the Fire Department under civil service rules and regulations whose duty it is to prevent or extinguish fires in the City of Los Angeles, under whatever designation they may be described in any salary or departmental ordinance providing compensation for said fire department."

A further chronological review of the factual background surrounding the status of Secretary McKeag reveals the following: At all times, beginning with his appointment in 1906 and continuing until his retirement in 1932, he was paid by the fire department and carried on the payroll of such department. This was true during the period he also acted as secretary to the Board of Police Commissioners, for which service he received no compensation from or through the police department. Throughout the years here involved, the fire department was under the control and direction of the Board of Fire Commissioners, who so far as Secretary McKeag was concerned were empowered to require of him in addition to his secretarial activities the performance of "such other duties as the board may prescribe." It seems to me that any question as to whether respondent's husband was a member of the fire department is settled by the provision of section 80 of the present city charter which reads: "Subject to the provisions of this charter * * * said general manager (chief engineer) shall have the power and duty * * * (2) to appoint, discharge, suspend or transfer the employees of the department, other than the secretary and the chief accounting employees; * * *."

The just-quoted section would appear to amount to a recognition of Mr. McKeag in his capacity as secretary to the Fire Commission as one of the employees of the fire department, but an employee whose appointment, discharge, suspension or transfer was not within the power of the chief of the fire department. The word "employee" used in the foregoing charter section is synonymous with "member," used in section 185 of the charter. Hurley v. Sykes, 69 Cal.App. 310, 231 P. 748. In connection with Secretary McKeag's status with the fire department, it is noteworthy that upon his retirement a promotional civil service examination was held in the fire department to fill his position as secretary to the Board of Fire Commissioners. This promotional examination was limited to certain members of the fire department, viz., firemen, auto firemen, captains, etc. In other words, only members of the fire department could participate in the civil service examination for secretary to the Board of Fire Commissioners. In 1932 the council of the city of Los Angeles by ordinance determined who were and were not members of the fire department and segregated members of such department into two groups, (1) pension, and (2) nonpension employees. At this time the position of secretary held by Mr. McKeag was included in the pensioned group. This action certainly amounted to a legislative determination of the fact that the secretary to the Board of Fire Commissioners was a position created for the purpose of preventing or extinguishing fires in the city of Los Angeles, and as cogently stated by the city attorney of Los Angeles in an opinion furnished appellant Board of Fire Commissioners, "may generally be accepted by your honorable body for the purpose of determining the question of membership in the fire and police pension system."

As far back as 1930 appellant Board of Pension Commissioners, pursuant to ordinance No. 67778 of the city of Los Angeles, duly certified that Charles E. McKeag was "a member of the fire department, has served in such department the aggregate number of years, to-wit, 24, entitling such member to retirement as provided in section 181 of the Charter of the City of Los Angeles."

The record shows that the Board of Fire Commissioners found as a fact that Secretary McKeag was a member of the fire department "whose duty it is to prevent or extinguish fires in the City of Los Angeles"; and it also appears that in addition to his routine duties as secretary, Mr. McKeag was ordered by appellant Board of Fire Commissioners to "respond to such alarms of fire as the Board of Fire Commissioners may direct, and perform such other duties as may be required by the Board of Fire Commissioners or the chief engineer for the purpose of prevention and extinguishment of fires in the City of Los Angeles." It remains uncontradicted in the record that pursuant to directions of the fire commissioners, Secretary McKeag responded to fire alarms and performed actual work at the scene of fires in connection with the extinguishment thereof. In addition to the foregoing, he made records of conditions prevailing at these fires for the purpose of studying such conditions at a later date; he prepared legislation, resolutions and orders tending to decrease fire hazards and to make for more efficient operation of the fire department; he personally took steps to remedy hazardous situations.

From the foregoing recital it appears plainly to me that in the course of his duties as secretary to the Board of Fire Commissioners Mr. McKeag was actually engaged in the prevention and extinguishment of fires in the city of Los Angeles, and therefore, under the provisions of section 185 of the city charter, was entitled to participate in the benefits of the pension fund.

Appellant commission, however, takes the position that it is not the duties performed by a member of the fire department, but the status of such person in the classified civil service that establishes his right to participate in the pension benefits. In other words, the Board of Pension Commissioners now asserts that in order to obtain the benefits of the pension system, a member of the fire department must hold a civil service classification or position which requires the performance of duties tending to prevent or extinguish fires in the city, and this assertion is now indulged in by appellant commission notwithstanding the fact that over a long period of years it recognized Secretary McKeag as a member of the fire department who was entitled to receive a pension and actually paid him such pension until the time of his death. I am not impressed with the argument of appellant board in the light of the plain and unequivocal language used in section 185 of the charter. I feel that the following quotation from my dissenting opinion in the case of Knoll v. City of Los Angeles, Cal. App., 124 P.2d 113, this day filed, effectively answers the last-mentioned contention of appellants herein: "* * * respondent argues that if a regularly classified civil service fireman were assigned appellant's duties or were assigned to the salvage bureau or fire prevention bureau, such employee would nevertheless be entitled to participate in the pension system, not because of the duties he was performing, but because of the duties imposed by law upon one holding the civil service classification of a fireman. I do not concede the soundness of this argument, in view of the plain and understandable language of the charter, section 185 of which provides that 'for the purpose of the provisions contained herein the fire department shall consist of all persons duly and regularly appointed in the fire department under civil service rules and regulations whose duty it is to prevent or extinguish fires in the City of Los Angeles, under whatever designation they may be described in any salary or departmental ordinance providing compensation for said department.'

"It is noteworthy that the section does not restrict the operation of the fire department pension fund to those members of the department of any particular designation described in any salary or departmental ordinance, but on the contrary, provides that notwithstanding any descriptive designation in the rules or ordinances, any employee whose duties involve the prevention or extinguishment of fires shall be regarded as a member of the fire department entitled to participate in the pension benefits of the fire department pension system. If the framers of the charter or the people in adopting the same had intended to limit the benefits of the system to those classified as firemen, it would have been very simple to so state. That they did not intend such a limitation is evident from the use of the language providing that any member of the fire department whose duty it is to prevent or extinguish fires in the City of Los Angeles shall be eligible to share in the pension funds regardless of the designation given him in any salary or departmental ordinance. * * *"

There is another phase of this case which adds strength to the conclusion that Secretary McKeag was a member of the fire department within the purview of section 185 of the charter, and that is the fact that appellant Board of Pension Commissioners, charged with the duty of interpreting the provisions of the charter in relation to applicants for pension rights, continued over a period of some ten years to determine and recognize that Secretary McKeag was entitled to pension rights. The record further shows that such a course of action on the part of the commission was in accordance with the advice and counsel of the city attorney of Los Angeles. This established course of conduct on the part of the commission, followed uninterruptedly for some ten years, constituted a contemporaneous practical construction of the applicable pension provisions of the charter by those charged with the duty of administering it. While such contemporaneous and practical construction is not controlling, it is nevertheless entitled to considerable respect and recognition. In United States v. Philbrick, 120 U.S. 52, 59, 7 S.Ct. 413, 417, 30 L.Ed. 559, it was said: "A contemporaneous construction by the officers upon whom was imposed the duty of executing those statutes is entitled to great weight; and, since it is not clear that that construction was erroneous, it ought not now to be overturned."

Construing the Los Angeles city charter provisions governing fire department pensions in a light which will render them reasonable, fair and harmonious with the manifest and apparent purpose, and which will conform to the spirit and intent of the charter, I am impressed that the trial court was correct in determining that Secretary McKeag was a member of the fire department and belonged to the class of members therein that entitled him to retire as he did on a pension; that accordingly, upon his death his wife, respondent herein, was entitled under the provisions of section 183 of the charter to receive and have paid to her the pension allowance therein provided for.

For the foregoing reasons, as well as for the reasons advanced in the dissenting opinions this day filed by me in the cases of Knoll v. City of Los Angeles and Haas v. City of Los Angeles, I feel that the judgment of the trial court should be affirmed.

KNOLL v. CITY OF LOS ANGELES et al.[*]

Civ. 12705.

District Court of Appeal, Second District,
Division 1, California.

April 2, 1942.

Hearing Granted May 28, 1942.

Mandamus 🔑172

In mandamus proceeding by general clerk of Los Angeles fire department to compel board of fire commissioners to admit clerk to membership in fire and police pension system, trial court had no authority to pass directly on question whether clerk was a member of the fire department and entitled to share in benefits of system.

WHITE, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Mandamus proceeding by Lily Knoll against the City of Los Angeles, the Board of Fire Commissioners of the City of Los Angeles, and others, to compel the board to admit petitioner to membership in the fire and police pension system of the city. From an adverse judgment, petitioner appeals.

Affirmed.

Loren A. Butts, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., F. Von Schrader, Asst. City Atty., and Robert J. Stahl, Deputy City Atty., all of Los Angeles, for respondents.

DORAN, Justice.

This is a proceeding in mandamus brought by appellant to compel respondent Board of Fire Commissioners of the City of Los Angeles to admit her to membership in the fire and police pension system of said city.

It is conceded by all parties that so far as the determination of the question of law involved herein is concerned, there is no dispute as to the pertinent facts, which are that on November 3, 1917, appellant was, in accordance with the civil service rules and regulations of the City of Los Angeles, appointed and employed as a member of the fire department of said city, and has been at all times subsequent thereto, and was at the time of the commencement of this action, a member of the fire department, holding and occupying in such department a position the title of which is that of general clerk, designated in the fire department salary ordinance of said city as code number 2353-M.

By ordinance number 71513, adopted by the Council of the City of Los Angeles in 1932, the departmental salary ordinance of the fire department was subdivided into two groups, the first being entitled "Pension Employees," followed by "Non-Pension Employees." These designations continued until July 1, 1938, when by the provisions of ordinance number 79867 the two classifications aforesaid were changed to read (a) "Firemen" and (b) "Civilian Employees." During all the times just mentioned, all positions designated code 2353-M in the salary ordinance, and which code designation covers the position occupied by appellant, have been carried as "Non-Pension" or "Civilian Employees."

The trial court found that the duties performed by appellant did not in any way relate to the prevention or extinguishment

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[*] Subsequent opinion 132 P.2d 203.

of fires. It was further found by the court that appellant was not a regular member of the Los Angeles city fire department within the intent and meaning of sections 180 to 189 inclusive of the City Charter and therefore was not entitled to share in the benefits of the police and fire pension system.

The question here involved is the same as that in Haas v. City of Los Angeles, Cal. App., 124 P.2d 100, this day decided. While it is true that the trial court was without authority to pass directly upon the question of whether appellant was a member of the fire department and entitled to share in the benefits of the police and fire pension system, yet for the reasons given in the opinion in the Haas case the judgment herein is affirmed.

YORK, P. J., concurred.

WHITE, Justice (dissenting).

I dissent. My views with respect to the right of the court to review and control by mandate the action of the administrative board by reason of the happening of certain contingencies is fully covered in the dissenting opinion this day filed by me in the case of Haas v. City of Los Angeles, Cal.App., 124 P.2d 100.

In the instant case, as in the case just cited, there can be no question but that appellant is a member of the fire department. Section 185 of the charter specifically provides that "for the purpose of the provisions contained herein, the Fire Department shall consist of all persons duly and regularly appointed in the Fire Department under civil service rules and regulations whose duty it is to prevent or extinguish fires in the City of Los Angeles, under whatever designation they may be described in any salary or departmental ordinance providing compensation for said Fire Department; and the Police Department shall consist of all members of such Police Department appointed under civil service rules and regulations and sworn in, as provided by law, to perform the duties of a regular police officer of the City of Los Angeles, under whatever designation that they may be described in any salary or departmental ordinance providing compensation for the members of said Police Department. The provisions as herein in this charter contained shall apply to all members of the Fire and Police Departments as in this section defined, and to all members of said departments who have been heretofore granted pensions."

There can be no doubt that appellant is a person "duly and regularly appointed in the fire department under civil service rules and regulations," but the controversy presented herein centers around the question of whether in appellant's position in the fire department she was one whose "duty it is to prevent or extinguish fires in the City of Los Angeles." The duties performed by appellant as a member of the fire department, as disclosed by the record, may be thus summarized: To keep a full and complete record of all fires with data of such fires which occur in the City of Los Angeles; to give out information and reports of such fires to the various bureaus and fire department officials when such information and reports are necessary; to maintain tables and analyses of fires; to render a daily report to the Fire Prevention Bureau, showing the location of fires, the inspection district in which fires have occurred, the nature of such fires, the estimated loss because of such fires, and the cause of such fires; to prepare and submit reports to the chief engineer and the Board of Fire Commissioners showing fire losses, causes of fires, location and type of buildings in which fires have occurred; to prepare and submit to the chief engineer of the fire department statistical data, schedules, tables and analyses of the causes of fires and fire alarms, sources of fires, analyses of fire alarms as to type of construction, the number of buildings damaged by fire, analyses of fire alarms relative to the spread and extent of damage to buildings by fire, classification of fire losses in the different types of buildings; analyses of the various methods of fire extinguishment; and to furnish data, prepare tables, analyses and reports whenever necessary, and to do all other duties which may be assigned to her within the scope of her ability.

In connection with the foregoing, the chief engineer of the Los Angeles Fire Department testified: "She is called upon in the performance of her duties to use her incentive, judgment and discretion. There is no question about it at all. She is indispensable in that respect." A battalion chief of the same department, in charge of the Fire Prevention Bureau, testified: "The reports are essential and necessary to the performance of the duties of my position. We must find out the reason of the fires. We do not get that information that I have just referred to before the inspection of the reports."

A deputy fire prevention engineer of the fire department testified: "* * * I receive reports from Miss Knoll daily. They show where fires have occurred, the type of building in which these fires occur and the cause of the fire and the loss. I use these reports very much in the work of the fire prevention bureau. The reports are used in connection with my work as follows: If we did not know what the causes of the fires were and how to safeguard the city in fire prevention, we could not really function over there as a fire prevention bureau very well. * * * We have to depend on the analyses, the table of schedules, the daily reports of Miss Knoll here to determine what are the proper safeguards to take in preventing fires."

Section 185 of the charter specifically provides that for the purpose of the pension provisions therein contained the members of the fire department eligible to participate in its benefits must be those "whose duty it is to prevent or extinguish fires in the City of Los Angeles." That such restriction was contemplated by the people in adopting the charter is emphasized by the language immediately following that just mentioned in section 185, which provides that members of the police department entitled to pension benefits shall consist only of "all members of such police department * * * appointed under civil service rules and regulations, and sworn in, as provided by law, to perform the duties of a regular police officer for the City of Los Angeles." This brings us to a consideration of the question as to whether or not appellant in her position of a general clerk in the fire department was a member of said department "whose duty it is to prevent or extinguish fires." I am not unmindful of the rule which requires that in ascertaining the intent and meaning of the charter provision regarding pensions we should indulge in a liberal construction to the end that the beneficial purpose aimed at shall be carried out, but in so doing I do not think we are authorized to disregard or ignore the plain intent and meaning of language used by the framers of the charter and adopted by the electors when they voted for such charter. Where, as here, the language of section 185 of the charter seems so explicit in its meaning that the benefits of the pension system in question shall be restricted to certain members of the fire department, it would be unfair to such members who contribute to the pension fund, as well as to the public whose funds also support the system, to extend its benefits to others than those within the class established by the charter as entitled thereto. In other words, the equities are not always exclusively on the side of the applicant for pension benefits, however helpful to the maintenance of the fire department the services of such applicant may be, when such services do not come within the classification set up in the charter provisions creating the pension system.

I do not construe the charter as limiting the fire department pension benefits only to those members of the fire department who are constantly exposed to injury and death in the extinguishment of fires, but do feel that except for such firemen the pension benefits are not available to others unless they be engaged in the performance of duties which aid in the prevention of fires. Does appellant come within the last-named category of fire department employees? I think she does. As heretofore pointed out, the charter does not limit the pension benefits solely to those firemen engaged in a physical struggle with the flames, but includes those whose duties are to aid in the prevention as well as the extinguishment of fires. Surely it would not be contended that members of the fire department who check private premises for the presence thereon of combustible materials or other fire hazards would not be entitled to participate in the pension system. In People ex rel. Tucker v. Ennis, City Ct., 7 N.Y.S. 630, a telegraph operator in the employ of the fire department was held to be a member of the force for extinguishing fires. So also in People ex rel. Smith v. Wurster, 89 Hun 7, 35 N.Y.S. 86, it was held that a surgeon whose duty it was to attend sick members and answer fire alarms was a member of the force for extinguishing fires.

I do not wish to be understood as holding that every clerk or stenographer employed by the fire department is entitled to participate in the pension fund, but the duties performed by appellant herein were not merely clerical. They involved the exercise of discretion, judgment and initiative on her part. She classified, analyzed, and transmitted to various officials of the fire department her conclusions derived from such analyses. When the charter provisions herein are read in connection with the subject matter thereof, it seems to me at once apparent that participation in the pension fund is not to be restricted to those who actually combat the flames, but is available to those whose duties require them to aid in the prevention of conflagrations. Included among appellant's duties is the furnishing of daily reports to the fire prevention bureau, showing in which inspection districts fires occurred, the location of and nature of such fires, and the estimated loss sustained, as well as the cause of such fires. The reports furnished by appellant are checked against the fire prevention records to determine when the premises as shown in said reports were previously inspected, what conditions were found to exist, and whether the existing conditions constitute a violation of fire ordinances. The reports are also utilized to determine whether the district has been properly inspected by the inspector; to determine what type of buildings are proving the greatest fire hazard; to determine from the reports the greatest causes of fires and what measures to adopt to combat these causes, such as the drafting of new fire ordinances; to determine where the greatest number of fires is occurring in order to arrange the assignment of fire inspectors to the various districts; to determine the responsibility of inspectors and the question of whether they are fulfilling their duties; to make spot maps showing location of grass fires and other causes. Appellant's reports are also used in fire prevention instructions and public education regarding various fire hazards; in preparing fire facts for publicity and school use during Fire Prevention Week; in checking the number of fires, causes and losses before, during and after Fire Prevention Week, for the purpose of making a report to the National Fire Waste Council. They also serve to check on false alarms to determine the effectiveness of various methods of reducing the number of such alarms.

I have heretofore set forth some of the testimony given by ranking officials of the fire department as to the nature, value and indispensability of appellant's contribution to the fire-prevention program of the department. To the testimony already narrated might be added the testimony of a fire department captain in charge of the school detail of the fire prevention bureau, who testified that he was an instructor in the fire college, and "had specialized reports from Miss Knoll for instructional purposes as well as for inspection in the field and public education. * * * The reports aided and assisted me in performing my duties. * * * The reports must be made up with judgment and careful selection. The reports are available to me. I take the reports that Miss Knoll gives me, consider that information and use it in my work. She has to use judgment in selecting material and I, in turn, use judgment in distributing that material."

Respondent concedes the importance of the work done by appellant, so far as the efficient conduct of the fire department is concerned, but insists that it is not the duties performed by a member of the fire department, but the civil service status and the duties imposed upon holders of such civil service status that determine eligibility for pension benefits. In other words, respondent argues that if a regularly classified civil service fireman were assigned appellant's duties or were assigned to the salvage bureau or fire prevention bureau, such employee would nevertheless be entitled to participate in the pension system, not because of the duties he was performing, but because of the duties imposed by law upon one holding the civil service classification of a fireman. I do not concede the soundness of this argument, in view of the plain and understandable language of the charter, section 185 of which provides that "for the purpose of the provisions contained herein the fire department shall consist of all persons duly and regularly appointed in the fire department under civil service rules and regulations whose duty it is to prevent or extinguish fires in the City of Los Angeles, under whatever designation they may be described in any salary or departmental ordinance providing compensation for said department."

It is noteworthy that the section does not restrict the operation of the fire department pension fund to those members of the department of any particular designation described in any salary or departmental ordinance, but on the contrary, provides that notwithstanding any descriptive designation in the rules or ordinances, any employee whose duties involve the prevention or extinguishment of fires shall be regarded as a member of the fire department entitled to participate in the pension benefits of the fire department pension system. If the framers of the charter or the people in adopting the same had intended to limit the benefits of the system to those classified as firemen, it would have been very simple to so state. That they did not intend such a limitation is evident from the use of the language providing that any member of the fire department whose duty it is to prevent or extinguish fires in the City of Los Angeles shall be eligible to share in the pension funds regardless of the designation given him in any salary or departmental ordinance. From what has been said it follows that the action of the city council in passing an ordinance which placed appellant by reason of her civil service classification in the "Non-Pension" class was without force or effect because it contravened the plain intent, purpose and meaning of the charter provision. It is clear to me that appellant, because her duties related to and were part of the fire prevention program of the department, is entitled to share and participate in the benefits of the pension system set up by the charter for the benefit of members of the fire department as described and provided for in sections 180 to 189 of the charter.

For the reasons herein stated, as well as for the reasons advanced in the cases of Haas v. City of Los Angeles and McKeag v. Board of Pension Commissioners, Cal. App., 124 P.2d 109, I am of the opinion that the judgment of the trial court should be reversed and the cause remanded with directions to enter judgment in favor of the plaintiff.

51 Cal.App.2d 29

SMITH v. SMITH.

Civ. 11773.

District Court of Appeal, First District, Division 1, California.

April 1, 1942.

Hearing Denied May 28, 1942.

1. Execution 🔑391

In proceedings supplementary to execution levied on interest of beneficiary of spendthrift trust, wherein motion was made to release the levy, court had jurisdiction to determine issue of how much money was reasonably necessary for support of the beneficiary, as against contention that such issue could only be determined in equity by creditor's bill. Code Civ.Proc. § 714 et seq.

2. Execution 🔑358

The statutory "proceedings supplementary to execution" were designed to take the place of a creditor's bill and any property which was reachable by a creditor's bill may be reached by the process of such proceedings. Code Civ.Proc. § 714 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Proceedings Supplementary to Execution".

3. Execution 🔑358

"Supplementary proceedings" are special proceedings of statutory origin, summary in character, instituted subsequent to a judgment and to the issuance of execution and sometimes after return of execution unsatisfied for purpose of discovering and reaching assets of a judgment debtor and applying them to the satisfaction of the judgment. Code Civ.Proc. § 714 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Supplementary Proceeding".

4. Appeal and error 🔑1036(3)

In creditor's proceedings supplementary to execution levied on interest of beneficiary of a spendthrift trust and involving issue of how much money was reasonably necessary for support of the beneficiary, where trustee was bound to pay beneficiary entire nine-tenths less $100 of income from trust, the creditor's rights were not affected by not having trustee brought in as a party, as against contention that trustee was a "necessary party" or "indispensable party". Code Civ.Proc. § 714 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party" and "Indispensable Party".

5. Execution 🔑402

In proceedings supplementary to execution levied on interest of beneficiary of a spendthrift trust, order declaring that $750 a month was reasonably necessary for beneficiary's support, that beneficiary's receipt from trust had fallen short and that beneficiary was entitled to the receipts exempt from legal process until they attained an average of $750 a month, was not objectionable on ground that it increased the beneficiary's allowance from the trust fund. Code Civ.Proc. § 714 et seq.

6. Execution 🔑366

In proceedings supplementary to execution levied on interest of beneficiary of spendthrift trust, evidence sustained finding that $750 a month was reasonably necessary for the beneficiary's support. Code Civ.Proc. § 714 et seq.

7. Trusts 🔑152

The beneficiary of a spendthrift trust is entitled to receive free from claims of his creditors sufficient income to support himself and those dependent upon him according to the mode of life to which they had been accustomed and to care for any affliction from which the beneficiary or his family may be suffering. Code Civ.Proc. § 714 et seq.

8. Appeal and error 🔑1008(1)

The question regarding amount necessary for support of beneficiary of spendthrift trust which beneficiary is entitled to receive free from claims of creditors is one peculiarly proper for determination of trial court after hearing evidence regarding character, circumstances and condition of the beneficiary. Code Civ.Proc. § 714 et seq.

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Appeal from Superior Court, Santa Clara County; William F. James, Judge.

Proceedings supplementary to execution by Grace Helen Smith against James Franklin Smith. From an order determining exemption from legal process of income from a spendthrift trust, the plaintiff appeals.

Affirmed.

Joseph F. O'Malley, of San Francisco, for appellant.

John Elliott Cook, of San Francisco, and Louis Oneal, of San Jose, for respondent.

KNIGHT, Justice.

This is an appeal from an order made pursuant to proceedings supplementary to execution levied on the interest of a beneficiary of a spendthrift trust. Appellant participated in the proceedings without objection and among other things asked for general relief, but now contends that the court decided issues which could be heard and determined by it only in the exercise of its jurisdiction in equity, by way of a creditor's bill.

[1] The parties to the appeal were husband and wife. They separated in 1923, at which time they entered into a property settlement agreement. In 1928 appellant (the wife) obtained an interlocutory decree of divorce, wherein the court approved the property settlement agreement; and in 1929 the final decree of divorce was granted. In 1940 appellant obtained a judgment against respondent for moneys due under said agreement, and thereafter caused an execution to be levied on the trustee of a spendthrift trust created by the will of respondent's sister, of which respondent is principal beneficiary. Respondent moved to release the levy upon the ground that all moneys due him from the trust fund were necessary for his support according to his station in life. It was stated in the notice of motion that the motion would be based on respondent's affidavit and any evidence adduced at the hearing. Such affidavit was attached to the notice of motion, and annexed to the affidavit and made part thereof by special reference was respondent's verified demand wherein in detail he set forth his financial condition, the circumstances attending his mode of life, past and present, and his living requirements and necessities. Appellant appeared by counsel in opposition to the motion and presented her own affidavit wherein she admitted some of the averments made by respondent, and denied others. The affidavit then went on affirmatively to aver facts upon which she relied as showing that no part of the income from said trust was necessary for respondent's support; and the affidavit concluded as follows: "Wherefore, affiant prays the order of court denying said defendant's claim as an exemption of his beneficial interest under his herein stated testamentary trust, and that an order be made directing said testamentary trustee to withhold all of the aforesaid sums of money monthly now being paid to said defendant; and for such other and further relief or orders as to the court may seem meet and proper in the premises." When the motion came on for hearing the parties stipulated that respondent's right to the income from the trust was liable to the levy of execution, subject, however, to his claim of exemption by reason of the spendthrift provisions and his necessities of life; and thereupon the

parties proceeded to try and have the court determine the issue of how much money was reasonably necessary for the support of respondent according to his station in life. Evidence was introduced by both parties, and after a full hearing on the merits the trial court made its order whereby it found and determined the maximum amount that was conservatively and reasonably necessary for respondent's support according to his station in life. It was ordered, therefore, that he was entitled to receive and take all income from said trust exempt from legal process "unless and until" the same "shall have attained" the maximum amount fixed by said order; and the sheriff was directed to release the levy of execution as to said income accordingly. Appellant, being dissatisfied with the maximum amount so fixed by the trial court, took this appeal from said order, and as stated, for the first time challenges the jurisdiction of the trial court to hear and determine the issue thus submitted to it. In this regard she contends that it could exercise its jurisdiction in a matter of this kind only in equity through the medium of a creditor's bill. There is no merit in the contention.

[2, 3] In this state it has been held repeatedly that statutory proceedings supplementary to execution (sec. 714 et seq., Code Civ.Proc.) were designed to take the place of a creditor's bill (Adams v. Hackett, 7 Cal. 187; Staples v. May, 87 Cal. 178, 25 P. 346; Pacific Bank v. Robinson, 57 Cal. 520, 40 Am.Rep. 120; Travis Glass Co. v. Ibbetson, 186 Cal. 724, 200 P. 595; McCullough v. Clark, 41 Cal. 298; McKenzie v. Hill, 9 Cal.App. 78, 98 P. 55; Herrlich v. Kaufmann, 99 Cal. 271, 33 P. 857, 37 Am.St.Rep. 50; 7 Cal.Jur. p. 800); so that any property which was reachable by a creditor's bill may now be reached by the process of such proceedings. Staples v. May, supra; Pacific Bank v. Robinson, supra. See, also, 11 Cal.Jur. p. 156. As said in 11 Cal.Jur. pp. 146, 147: "Supplementary proceedings are special proceedings of statutory origin, summary in character, instituted subsequent to a judgment in an action and to the issuance of execution, and sometimes after the return of execution unsatisfied, for the purpose of discovering and reaching assets of a judgment debtor, and applying them to the satisfaction of the judgment. They are regarded as proceedings in an action, but auxiliary and supplementary thereto. Under the old system of practice when a judgment creditor had exhausted the remedy by writ of execution, he had a right to invoke the jurisdiction of a court of equity by a proceeding known as a creditor's suit for the purpose of compelling a discovery of assets tangible or intangible and applying them to the satisfaction of his execution. And formerly this was the only method of reaching assets which could not be seized on execution. Supplementary proceedings were created to provide an easier and less expensive method of reaching the same result, and are intended as a substitute for creditors' suits."

In the leading case of Herrlich v. Kaufmann, supra, 99 Cal. at pages 274, 275, 276, 33 P. at page 858, 37 Am.St.Rep. 50, it was said: "Formerly, assets of a judgment debtor, which could not be effectively seized by the sheriff under an execution, such as a debt owing to the defendant, could be reached, upon a proper showing, through a court of equity, by means of a creditor's bill or suit; but in this state, and in most of the other states, a legal remedy is afforded by statutes providing for proceedings supplementary to execution, and the general rule is that when there are such statutory proceedings they must be pursued. * * * It has been several times held by this court that the statutory proceedings supplementary to execution are a substitute for a creditor's bill. In Adams v. Hackett, 7 Cal. [187], 201, the court say: 'In reference to the chapter prescribing the mode of proceedings supplementary to execution, it seems clear that those provisions were intended as a substitute for what was called "a creditor's bill." This is so stated by the practice commissioners in their original note to this chapter in the New York Code. The design was, in the language of those commissioners, "to furnish a cheaper and easier method." The different sections of this chapter, when taken together, form a consistent and harmonious whole, and, when fairly and liberally carried out, afford a cheaper and easier method than the former one, by creditor's bill.' In [Pacific] Bank v. Robinson, 57 Cal. [520], 522 [40 Am.Rep. 120], the court say: 'Proceedings under sections 714 to 721 and section 574 of the Code of Civil Procedure were intended as a substitute for the creditor's bill, as formerly used in chancery. Adams v. Hackett, 7 Cal. [187], 201; Lynch v. Johnson, 48 N.Y. [27], 33. So that any property which was reached by a creditor's bill may now be reached by the process of proceedings supplementary to execution.' In Habenicht v. Lissak, 78 Cal. [351], 357, 20 P. 874 [5 L.R.A. 713, 12 Am.St.Rep. 63], the court say: 'In [Pacific] Bank v. Robinson, 57 Cal. 520 [40 Am.Rep. 120], it was held that the proceedings supplemental to execution are intended to take the place of the creditor's bill.' See, also, McCullough v. Clark, 41 Cal. [298], 302; High v. Bank [of Commerce], 95 Cal. 386, 30 P. 556 [29 Am.St. Rep. 121]. Also, Graham v. [La Crosse, etc.], R. Co., 10 Wis. 459; Hexter v. Clifford, 5 Colo. 168; and cases cited in note to Lathrop v. Clapp [40 N.Y. 328], 100 Am.Dec. [493], 501, in support of the statement therein made, that 'in nearly all of the states these proceedings supplemental to execution are regarded as a substitute for the creditor's bill of the chancery practice.' It is not necessary, however, to go to the length of saying that a creditor's bill could not be sustained here under any circumstances, for there might, perhaps, be cases in which the statutory proceedings would not afford adequate relief. But they must be pursued, unless in those exceptional cases in which it appears that equity must be invoked because legal remedies are unavailing."

It follows, therefore, that since the parties here elected to invoke the summary proceedings provided by the statute, rather than have their controversy heard and determined in equity by way of a creditor's bill, it was within the scope of the trial court's jurisdiction so to hear and determine the matter at issue in such proceeding.

The case of Canfield v. Security-First Nat. Bank, 13 Cal.2d 1, 87 P.2d 830, 846, involved in part a similar issue, and in passing upon the question of the application of section 859 of the Civil Code the court there said: "Appellants' rights are given to them by section 859 of the Civil Code—that is by creditor's bill in equity;" and doubtless the matter here could have been so heard and determined. But there is nothing to be found in the Canfield decision, nor in said section 859, which declares that a creditor's bill is the exclusive remedy. Here, unlike the Canfield case, there were no intervening rights of third parties, for under the terms of the spendthrift trust respondent was entitled to a definite nine-tenths of the income after payment of one tenth plus $100 to another. Therefore, even though the trial court had heard and determined the matter through the medium of a creditor's bill rather than by way of this supplementary proceeding, the subject matter of the controversy, the parties thereto, and the issue involved, would have been precisely the same. The same tribunal was vested with original jurisdiction over both cases at law and suits in equity; therefore, since as we have seen under the decisions above cited the controversy could be heard and determined either as a proceeding at law or in equity, and the parties chose to have it disposed of as a proceeding at law, there was no want of jurisdiction in the trial court so to do. If as appellant asserts a contrary rule prevails in some other state, it is doubtless in conflict with the law of this state, and therefore is not here controlling.

[4] Appellant also makes for the first time on appeal the point that the trustee was a necessary and indispensable party to the present proceeding. But the record shows that the execution was levied on the trustee, and that he made answer to the sheriff at the time of the service of the writ; furthermore, the proceeding in no way involved the trustee's title, interests, discretion or management of the trust fund. If the amount to be paid to the beneficiary had been discretionary with the trustee, as in the Canfield case, then a different situation would have been presented; but here, as stated, the trustee was bound to pay to this beneficiary the entire nine-tenths less $100 of the income from the trust; consequently appellant's rights herein were in no way affected by not having the trustee brought in as a party, if in fact he was not already made so by levying the execution on him.

[5] Another contention urged by appellant is that the effect of the order was to "increase" respondent's allowance from the trust fund to $750 a month. But a reading of the order shows that the contention is without merit. The contention is based upon the fact that from 1935, the date of the rendition of the decree of distribution, to October, 1940, the date of the levy of the execution, respondent received from said trust fund monthly payments ranging only from $210.48 to $548.17. The order declared that "a sum of $750 a month is conservatively and reasonably necessary for his support in accordance with his station in life," and that "his receipts from said trust are wholly disbursed so far as

they will go for necessary personal and household expenses. They have fallen short, and must continue to fall short so far as is now known, of what is reasonably necessary for his support in accordance with his station in life. He is entitled to receive and take the same exempt from legal process and the claims of creditors, and this plaintiff's claim thereto, *unless and until* they shall have attained an average amount of $750 a month, the average to be taken in each calendar year." (Italics added.) It will be seen, therefore, that the court simply decided the issue presented, that is, the amount reasonably necessary for respondent's support according to his station in life; and held in effect that any sum paid in excess of this amount was liable to the claims of his creditors. Before the court could find whether there was a surplus, it was necessary for it to determine the amount necessary for the defendant's support, and in doing so it was within its power to fix such sum in excess of what respondent was actually receiving, under the circumstances. It may be conceded that if respondent's financial condition becomes changed, for instance if the trust income ceases to be his sole means of support, such change could be urged as ground for modification of the present order.

The statement is made in appellant's brief that the trial court was "informed in limine that there was then pending a creditor's bill filed by the plaintiff elsewhere;" but this statement is positively denied in respondent's brief, and the record fails to disclose anything which may be taken in support of appellant's statement or from which it may be inferred that a creditor's bill was pending at the time these supplementary proceedings took place. In any event, nowhere does the record show, nor does appellant claim, that she made any objection whatever to the hearing or determination of the issue in the present proceeding.

[6] Nor can we sustain appellant's second major ground of appeal that the evidence is insufficient to support the trial court's basic finding that $750 a month is conservatively and reasonably necessary for respondent's support in accordance with his station in life.

A former appeal was taken by appellant from a judgment in respondent's favor, based on the verdict of a jury in an action brought by appellant to recover money claimed to be due under an agreement made in 1928 modifying the agreement of 1923, wherein the judgment was affirmed (Smith v. Smith, 7 Cal.App.2d 271, 46 P.2d 232); and the background of the case as it appears from the decision rendered on that appeal and as shown by the record herein may be stated as follows: Respondent is a retired physician, and at the time these supplementary proceedings were had was 67 years of age, and resided at the Huntington Apartments in San Francisco. He is a graduate of Cooper Medical School and the Royal College of Surgeons in England, and at the time of his retirement in 1929 enjoyed a lucrative practice averaging $25,000 a year. Following his separation from appellant in 1923 and during the last years of his practice his income from sources apart from his practice ranged from $200,000 to $400,000 a year. But subsequent to his retirement and during the ensuing depression years, the financial reverses he suffered and the heavy expenses he was compelled to meet wiped out his entire fortune, so that for several years preceding the levy of the execution herein his only source of income was from the trust created by his sister's will; and because of having undergone a major abdominal operation a few years ago he has been incapacitated from again entering the medical practice or engaging in any gainful occupation.

By the terms of the 1923 property settlement agreement respondent agreed to pay appellant $250 monthly during her lifetime; and he fully performed his part of that agreement up to May, 1928, when a new agreement was made. It confirmed the 1923 agreement, but provided that the monthly payments be increased to $300; and respondent further agreed to make a cash payment to appellant of $10,000, in consideration of which appellant agreed to refrain from attacking the agreement or from making any demands on respondent or his property; also from molesting or interfering with respondent or his full enjoyment of his property. It was further agreed that upon the breach by appellant of the latter promise, the 1928 agreement should be of no further force; that the rights of the parties should thereafter be governed by the 1923 agreement, and that the extra $50 a month and the $10,000 theretofore paid pursuant to the 1928 agreement should be applied as advance payments on the 1923 agreement. On the day following the execution of the 1928 agreement appellant obtained an interlocutory decree of divorce, and therein the property settlement agreement was approved by the court. In January, 1929, respondent retired from the practice; a few months later the final decree of divorce was entered; and some time thereafter, the year not appearing in the record, respondent again married. He paid the $10,000 and the monthly $300 payments to appellant in compliance with the 1928 agreement until October, 1931, when his monthly payments grew less; and about April, 1933, he discontinued them entirely. Thereafter and in 1934 appellant commenced an action on the 1928 agreement, and as a defense respondent pleaded a breach by appellant of the molestation covenants thereof, and claimed that the total extra payments made by him under the 1928 agreement were in excess of all sums accruing under the 1923 agreement. The jury found for respondent, and as stated the judgment entered thereon was affirmed on appeal, the reviewing court saying in part that the evidence of molestation showed that respondent felt obliged to move from San Francisco and seek a new and less troubled home and field for practice in Los Angeles. Thereafter, due to heavy financial losses and the fact that he had given up his medical practice, he fell in arrears in making the payments required by the 1923 agreement, and in June, 1940, appellant obtained a judgment against him therefor in the sum of approximately $11,500. Meanwhile respondent's sister died, leaving the will creating said spendthrift trust. The decree of distribution was rendered in September, 1935, and as above mentioned, from that time until October, 1940, when the execution was levied, respondent's nine-tenths of the income from the trust ranged from some $210 to about $548 monthly, which was paid to him by the trustee.

The trial court found and the evidence shows that respondent has always been accustomed to all reasonable comforts in his home and surroundings, including servants and automobiles, and to extended trips abroad; and that his circle of friends embraces persons of independent means, prominent in professional, business and social groups in his home community. The evidence further shows that on account of his financial reverses he has been compelled to dispense with the use of an automobile and with servants, except occasional household help; that he has been forced to give up recreations and club memberships, and has minimized entertainment of friends to a point where he can but occasionally have guests at his home; that he has had to forego travelling, and many other pleasures he formerly enjoyed; that all of the income from the trust has been expended for his necessary living expenses and household bills, so far as it would go; and that the receipts have fallen very considerably short of his reasonable necessities of life.

[7, 8] Appellant argues that the trial court fixed the amount necessary to support respondent on the basis of his station in life as it was ten years ago, when he was extremely wealthy, rather than on the basis of what is now actually necessary for his support; and in this connection she avers in her affidavit that standing in his present wife's name is an elaborate home in Palo Alto. Respondent testified, however, that the property in Palo Alto is heavily mortgaged; and there is in his testimony and affidavit ample evidentiary support of the trial court's findings in the particulars in which they are attacked by appellant; and there can be no comparison whatever between this case and the Canfield case, wherein it was shown that the beneficiary's "needs" therein included unreasonable extravagances and luxuries, and expenses for lavish entertainment and gambling losses. As said in the Canfield case, the statute fixes no standards by which the amounts necessary for the support of the beneficiary are to be ascertained; and that in ascertaining the proper allowance, the courts of this state have held that the beneficiary is entitled to receive free from the claims of his creditors sufficient income to support himself and those dependent upon him, according to the mode of life to which they have been accustomed, and to care for any affliction from which he or his family may be suffering; that the amount varies according to the station in life of the beneficiary; that no absolute fixed sum can be used to apply to all cases; that the "cost of living, cost of housing, medical cost, the manner in which the beneficiary has been reared, the number and health of his dependents, his own health, his entire background—all these and perhaps others should be considered." [13 Cal.2d 1, 87 P.2d 841.] Furthermore, as pointed out in that case, the question is one peculiarly proper, primarily at least, for the determination of the trial court, after hearing evidence as

to the character, circumstances and condition of the party. Applying the foregoing legal principles to the present case, it is our conclusion that the trial court's findings are not wanting in evidentiary support, and that the maximum amount fixed is not unreasonable.

The judgment is affirmed.

PETERS, P. J., and B. C. JONES, J., pro tem., concurred.

51 Cal.App.2d 14

BLACKMAN et al. v. DALTON'S AUTO & FURNITURE LOANS, Ltd. et al.

Civ. 12801.

District Court of Appeal, Second District, Division 3, California.

March 31, 1942.

1. Landlord and tenant 🔑230(9)

In action for rent by two of beneficiaries of trust who signed the lease, lease was not inadmissible on ground of "variance" because lease purported to be a lease by a trust and trustee as lessors and not by the plaintiffs, where lessee was charged with knowledge that lease was not signed by the trust or trustee but by individual beneficiaries as lessors.

See Words and Phrases, Permanent Edition, for all other definitions of "Variance".

2. Landlord and tenant 🔑62(1)

Where lessee signed lease using a name different from name appearing as lessee in body of lease and accepted lease as signed by individual trust beneficiaries as lessors even though it appeared from body of lease that trust and a trustee were lessors and lessee accepted keys, entered into possession and was not disturbed therein and lease was treated as fully executed, lessee could not, in beneficiaries' action for rent, deny beneficiaries' title.

3. Landlord and tenant 🔑63(1)

A tenant in undisputed possession under lease cannot question his landlord's title.

4. Action 🔑24

"Mutuality of remedy" is a rule of equity and hence does not apply in action for rent.

See Words and Phrases, Permanent Edition, for all other definitions of "Mutuality of Remedy".

5. Landlord and tenant 🔑24(1)

Where lessors were liable to lessee on implied covenant of quiet enjoyment, and lessee was obligated on its covenant to pay rent, lease was not invalid for lack of "mutuality of obligation".

See Words and Phrases, Permanent Edition, for all other definitions of "Mutuality of Obligation".

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by F. C. Blackman and others against Dalton's Auto and Furniture Loans, Limited, and others to recover rent wherein defendants filed a cross complaint. From a judgment for plaintiffs, Dalton's, a corporation, appeals.

Affirmed.

Cannon & Callister and Reed E. Callister, all of Los Angeles, for appellant.

W. Ward Johnson, of Long Beach, for respondents.

PARKER WOOD, Justice.

The complaint for rent under a written lease was filed in the municipal court. A cross-complaint for $2,500 damages was filed also in the municipal court, and the action was transferred to the superior court. Trial was without a jury and judgment was for plaintiffs Blackman and Brandenstein upon the complaint against Dalton's, a corporation. There is no provision in the judgment as to the cross-complaint, however, the conclusions of law state that the cross-complainant is not entitled to recover. The appeal is by defendant Dalton's from the judgment.

The complaint alleged that plaintiffs and defendants entered into a written lease for a period of one year to commence on March 29, 1939. In answer to the complaint defendant Dalton's, a corporation, denied that it entered into a lease with plaintiffs.

At the trial it was stipulated that the lease sued upon was signed by duly qualified agents of defendant Dalton's, a corporation, and that no rent had been paid and that the lease had been signed by F. C. Blackman and Fannie Brandenstein. It is stated in the first paragraph of the lease that the lease is between F. C. Blackman Trust No. 1896, Western Trust and Savings Bank, known as lessors, and Dalton's Auto and Furniture Loans, Ltd., known as lessees. At the end of the lease it is signed "Fabe C. Blackman Fannie Brandenstein Lessors" and "Dalton's W. C. Fonda Pres. R. A. Bashep Sect. Lessees." Plaintiffs offered the lease in evidence. Defendant objected to the offer on the ground that said lease purported to be a lease between F. C. Blackman Trust No. 1896, Western Trust and Savings Bank of Long Beach, as lessors; and the lease had not been executed by the parties named in the lease and had no bearing on the issues; and that said lease lacked mutuality; and that there was no showing that F. C. Blackman and Fannie Brandenstein were authorized to sign the lease for the trust or the bank.

Before the court ruled upon the objection a declaration of trust, known as the F. C. Blackman Trust No. 1896, and the amendments thereto were offered in evidence by defendant and received. That declaration of trust, executed in 1936, and the amendments thereto show that the beneficiaries and their interest at the time of the making of the lease were: Fannie Brandenstein, one-half; and F. C. Blackman and La Fern L. Blackman, his wife, one-half; and that the trustee was Western Trust and Savings Bank, a corporation; and that the property involved herein was a part of the trust property and was conveyed to the trustee by "deed absolute in form" prior to the making of the lease; and that the trustors reserved to themselves the right to full and undisturbed possession of the whole of the trust estate without any rental or accounting to the trustee; and that the trustee agreed to lease the property upon the written order of the trustors. The court then overruled the objection which had been made by defendant to plaintiffs' offer of the lease in evidence and received the lease in evidence.

The keys to the building were turned over to the defendants and were not returned. Soon after the delivery of the keys the defendant placed various billboards and signs on the outside of the building and they remained there for four or five weeks.

[1] The court properly overruled defendant's objection to the offer of the lease in evidence. There was no material variance between the allegations of the complaint and the proof. It was alleged that "plaintiffs" entered into a lease. The lease offered in evidence was signed by two of the four plaintiffs. The two who signed were two of the three beneficiaries under the trust, referred to as a plaintiff. It does not appear that the "trust" is an entity or has capacity to sue. The bank was the trustee subject to the reservations above mentioned. Although it is stated in the first paragraph of the lease that the "trust" and the bank are lessors, the lease was signed by the two plaintiffs Blackman and Brandenstein, as lessors. It will be noted that the name of the lessee as stated in the body of the lease, to wit: "Dalton's Auto and Furniture Loans, Ltd.", is also different from the name of the lessee as signed at the end of the lease, to wit: "Dalton's." The defendant is charged with knowledge that the lease was not signed by the "trust" and the bank, as lessors, but was signed by the two individual plaintiffs, as lessors. Defendant, therefore, was not misled or taken by surprise as to what lease was referred to in the allegations of the complaint.

[2] Defendant signed the lease, as lessee, using a name different from the name appearing as lessee in the body of the lease, and accepted the lease as signed by plaintiffs Blackman and Brandenstein, as lessors, even though it appeared from the body of the lease that there was a trust known as the "F. C. Blackman Trust No. 1896" and that the "trust" and the Western Trust and Savings Bank were the lessors; and entered into possession of the property. Defendant accepted the keys and has not returned them, and placed signs upon the building and the signs remained there four or five weeks, and the defendant was not disturbed in its possession of the premises. The lease was treated by the parties who signed it as a fully executed instrument at the time possession of the premises was delivered and accepted. The defendant, having gone into possession under these circumstances and its possession not having been disturbed, is not permitted in this action for rent to deny the title of those who signed the lease as lessors. Lataillade v. Santa Barbara Gas Co., 1881, 58 Cal. 4, 5; Reynolds v. Lewis, 1881, 59 Cal. 20, 21; San Juan Gold Co. v. San Juan Ridge, etc.,

Association, 1939, 34 Cal.App.2d 159, 167, 93 P.2d 582.

[3] A concise statement of the principles applicable here is in Connolly v. Kilcourse, 1934, 285 Mass. 398, 189 N.E. 199, as follows: "A tenant in undisturbed possession under a lease cannot question his lessor's title. * * * He has agreed to pay for use of the premises and he is liable on his covenant so long as he has the use. It is immaterial whether or not the landlord has a good title. * * *

"We need not consider questions of title even if they have been argued, and although the parties tried the case upon these immaterial issues. The only defence possible for the defendant is eviction by superior title, and he has not been evicted, nor has he so pleaded."

[4, 5] Defendant asserts that the lease is invalid because it lacks mutuality. It is not clear whether the reference is to mutuality of remedy or mutuality of obligation. Mutuality of remedy is a rule of equity, and therefore, does not apply in this action for rent. There is mutuality of obligation, the plaintiffs Blackman and Brandenstein being liable to defendant on the implied covenant of quiet enjoyment (LaFrance v. Kashishian, 1928, 204 Cal. 643, 269 P. 655), and the defendant being obligated on his covenant to pay rent.

The judgment is affirmed.

SCHAUER, P. J., and SHINN, J., concurred.

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51 Cal.App.2d 111

APPIER v. HAYES.

Civ. 12903.

District Court of Appeal, Second District, Division 1, California.

April 2, 1942.

Hearing Denied May 28, 1942.

1. Appeal and error 🔑1071(6)

Where trial court found that officer assaulted minor and struck him on or about the face, failure to make finding on issue regarding whether officer used only such force as was necessary to place the minor under arrest was harmless since, in view of finding made, a finding on such issue would have been adverse to the police officer.

2. Appeal and error 🔑1071(6)

Even though the trial court fails to adopt findings on material issues, judgment will not be reversed provided the adoption of such omitted findings would not require the rendering of a judgment different from that which was rendered.

3. Assault and battery 🔑35

In minor's action for assault committed by police officer, evidence sustained finding that officer assaulted minor and struck him on or about the face and record would not warrant conclusion that judgment for minor was a miscarriage of justice.

4. Assault and battery 🔑27

In minor's action for assault committed by police officer, evidence of reputation of neighborhood in which minor was arrested and of persons who habitually congregated there was properly excluded where there was no evidence that the minor was at any time connected with such persons or the gang which congregated in the neighborhood.

5. Appeal and error 🔑1004(1)

In absence of showing of passion or prejudice on part of trier of facts, an award of damages will not be disturbed.

6. Assault and battery 🔑40

$500 damages for assault of minor who was struck on or about the face with such force that his nose was injured and two teeth were damaged to extent that reasonable value of dental treatment would be $125 was not excessive.

◆

Appeal from Superior Court, Los Angeles County; Orlando H. Rhodes, Judge pro tem.

Action for damages for assault and battery by Reford Appier, a minor, etc., against Walter C. Hayes. From an adverse judgment, defendant appeals.

Affirmed.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and Wm. U. Handy, Deputy City Atty., all of Los Angeles, for appellant.

Robert Ryan and Grover Bossert, both of Santa Monica, for respondent.

YORK, Presiding Justice.

This appeal from a judgment in favor of the minor plaintiff, in an action for damages for assault and battery brought against defendant police officer, is presented to this court upon a bill of exceptions and appellant's opening brief, it being contended (1) that the court erred in failing to find on the issue of necessary force, in view of the fact that appellant alleged in his answer to the complaint that he used such force and no more than was necessary to effect respondent's arrest; (2) that the court erred in the rejection of certain evidence offered by appellant; (3) that the evidence is insufficient to support the findings as to the amount of damages awarded and that said damages are excessive.

The complaint alleged that the defendant police officer employed by the city of Los Angeles "did willfully and unlawfully assault the plaintiff and strike him on and about the face and body with his fists and with a blackjack or 'billy' * * * ", and asked for general damages in the sum of $5,000, punitive damages in the sum of $5,000, and special damages (1) $300 for dental service treating injuries to teeth, and (2) $300 for services of a physician and surgeon in treating an injured nose.

The answer, among other things, alleged that appellant placed respondent under arrest "and without subjecting plaintiff to any more restraint or force than necessary for his arrest and detention, proceeded to conduct plaintiff to the police car nearby and plaintiff thereupon resisted arrest, whereupon this defendant used such force—and no more—as was necessary to restrain plaintiff."

The trial court sitting without a jury found "1. That on or about the 4th day of November, 1939, in the city of Los Angeles, California, the defendant Walter C. Hayes did assault the plaintiff and strike him on or about the face.

"2. That as a result of said assault, plaintiff's face was bruised and he sustained injury to his teeth, to-wit: the lower left, central and lateral incisors were broken lingually and approximately ⅓ of their incisal surface was also fractured. The lower right lateral incisor was broken laterally and incisally. That as a result of said damage to plaintiff's teeth it was necessary that he engage the services of a dentist to treat the same. That the reasonable value of the said dental treatment is the sum of $125 and that plaintiff has sustained special damage in that sum.

"3. That as a result of said assault plaintiff sustained general damages in the sum of $625.00."

Accordingly, judgment was entered for the sum of $750. Thereafter appellant's motion for a new trial was denied provided respondent agreed in writing to a reduction of the amount of the judgment from $750 to $500. Respondent on July 29, 1940 filed his written agreement to such reduction. Appellant's principal assignment of error is failure of the court to find "on the issue of whether the force used was in excess of that necessary to arrest the plaintiff."

An examination of the record herein reveals that on the evening of November 4, 1939, respondent Appier, 19 years of age, with several other young men drove into a parking lot located at the rear of some business houses facing on Santa Monica Boulevard in West Los Angeles. This lot provided free parking space to patrons of a motion picture theater in the neighborhood. An argument ensued between John Ware, the parking attendant, and Raymond Coffman, respondent's cousin, who was the driver of the car in which respondent was then seated, as to where the car should be parked. Meanwhile, appellant and another police officer drove into the parking lot and appellant handed Coffman a traffic ticket for unlawfully crossing a pedestrian zone just before driving into the parking lot. Ware requested the officers to settle the argument he was having with the boys, but the officers refused, saying it was not a criminal offense and they could not interfere. Respondent and Coffman became angry at Ware's statements to the police officers, and told him if he would come out into the alley they would "work him over," whereupon Ware left the parking lot and proceeded to the entrance of the neighborhood theatre. When the officers and the boys arrived at the theatre a few moments later, Ware requested plaintiff's arrest.

With respect to what then took place, respondent testified in brief that appellant took him by the left shoulder and right arm, twisting the right arm behind respondent and pushed him in front of him to the police car which had proceeded up the alley to the parking lot; that he went with the officer willingly; that when they reached the police car appellant walked respondent directly into the car and held him there while he (appellant) opened the rear door with his left hand, whereupon he turned respondent around and hit him in the mouth and nose with his fist, all in one motion, and then pushed him into the car; that appellant then climbed into the car and beat respondent about the face, head and body and hit him in the mouth with a blackjack or some other hard instrument, cracking the enamel on his teeth; that the blow struck outside the car caused respondent's nose to bleed; that appellant continued to beat respondent continuously until they arrived at the police station which was approximately two blocks away; that upon arriving there he was conducted to the washroom where he washed blood from his face; that he was covered with blood from head to foot; that he remained in the washroom three or four minutes during which time his nose stopped bleeding; that his face was swollen and bruised and he thought his nose was broken; that the jail physician who examined him said his nose was only bruised and would be all right; that respondent's underlip was cut and he was bleeding at the mouth; that his lips and mouth were swollen out of shape for several days; that he was arrested Saturday night, November 4, 1939, and was released on Monday, the 6th, no complaint having been filed against him by Ware, the parking lot attendant; that on November 8th, he went to a dentist to have his teeth examined.

The dentist who examined him testified that he found that respondent's lower right central and right lateral incisors were broken lingually, approximately one-third of their lingual surface being broken away, leaving a ragged edge on the teeth so that the tongue was slightly chafed; that in his opinion the enamel had been broken recently and could have been broken at any time within the week, otherwise they would have been stained; by reason of the breakage of the enamel the teeth were not in acclusion; that there would be a slight space between the upper and lower teeth when brought together; that the reasonable value for putting a porcelain cover over the back of the teeth where the enamel was broken was $125; that by using gold instead of porcelain the cost would be $30; that the gold would last as long and would be every bit as good as the porcelain, there being no difference between the effectiveness of the two materials; that the life of the teeth would be the same and the only difference in appearance would be that a thin gold line would be visible on the edge of the two injured teeth. This witness further testified that when he examined respondent on November 8, 1939, he did not recall that respondent's lips were swollen, nor did he see any bruises on his lips, but that the gums were slightly inflamed at the roots of the two injured teeth.

Several witnesses testified that they saw appellant strike respondent as he put him in the car; that respondent was not resisting the officer; that they did not see what happened inside the car.

John Ware, the parking lot attendant, testified that "when first arrested plaintiff objected and as defendant started to take him up the alley he held back; that defendant pushed him along; that the witness followed them about fifteen feet behind; that when they got to the car plaintiff turned around and faced defendant; that there was a moment's pause, and then defendant hit plaintiff on the side of the face and pushed him into the car; that no blows were struck in the car."

Appellant testified he told respondent he was under arrest and thereupon took hold of him by the right arm; that "plaintiff jerked away and defendant then grabbed his arm tighter and twisted the right arm behind him; that there was a distance of some 60 to 70 feet from where plaintiff was arrested on the sidewalk to the police car in the parking lot up the alley; that the plaintiff resisted by holding back and 'wrestling with' him; that plaintiff was not fighting but he was not going willingly; that the witness walked the plaintiff right into the car and held him there until he had opened the rear door of the car with his left hand; that he then let go of the plaintiff and told him to get into the car; that the plaintiff instead of getting into the car turned, and with his back to the car, faced the defendant, doubled up his fists and put up his hands as though to strike a blow; that he believed that if he did not hit the plaintiff that he (the plaintiff) would hit him (the defendant); that defendant thereupon hit plaintiff a short, sharp blow on the side of the mouth and nose with the 'heel' of his open hand; that at the same time he pushed plaintiff into the car where he landed across the seat 'on his ribs and rump'; that the witness then got into the car; that he did not strike the plaintiff after he got into the car; that he was busy getting back his wind."

The officer further testified that when respondent threw up his fists as though to strike him, the witness hit the plaintiff not only in order to protect himself, but because he believed such force was necessary to effect the arrest; that there was a large group of men in the vicinity of the police car; that he believed them to be friends of respondent and that if the arrest was not made quickly there would be a free-for-all fight.

The several officers who saw respondent when he was brought into the police station testified to the effect that there was no blood on respondent's clothes; that respondent had been drinking; that his face was not bruised, cut or disfigured in any way; that his appearance was normal, and that he complained of no injury except that to his nose. The police surgeon at the West Los Angeles Station testified that he examined respondent on the night of November 4, 1939, and found his nose was bruised but not otherwise injured; that he observed no other injuries to the respondent's face and that respondent complained of no other injuries; that he did not examine respondent for alcoholism.

[1] Upon these facts, the trial court made the findings of fact heretofore recited, to the effect that appellant "did assault the plaintiff and strike him on or about the face." While it is true the answer alleged that appellant used only such force as was necessary to place respondent under arrest, and the trial court failed to adopt findings in that regard, such omission is harmless. Since the court found that appellant "did assault the plaintiff," a finding on the issue presented by the affirmative defense set up in the answer would necessarily have been adverse to appellant.

[2] "It is established law that even though the court fails to adopt findings on material issues involved in the case the judgment will not be reversed on that account provided the adoption of such omitted findings would not require the rendering of a different judgment from that which was rendered." Strauch v. Bieloh, 16 Cal.App. 2d 278, 282, 60 P.2d 582, 584, and cases there cited.

[3] An examination of the evidence discloses that the findings of fact and the judgment are supported thereby, and that nothing has been shown which would warrant the conclusion that the result was a miscarriage of justice.

[4] The trial court properly rejected evidence of the reputation of the neighborhood in which the arrest was made and of the persons who habitually congregated there, it having been stipulated that there was no evidence that respondent was at any time connected with such persons or "gangs of young ruffians" who congregated in the neighborhood.

[5, 6] In the absence of a showing of passion or prejudice on the part of the trier of the facts, an award of damages will not be disturbed. The amount of the judgment is not excessive if the testimony of respondent is to be believed.

For the reasons stated, the judgment is affirmed; the appeal from the order denying motion for new trial is dismissed.

DORAN and WHITE, JJ., concurred.

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51 Cal.App.2d 18

COLGROVE v. LOMPOC MODEL T CLUB, Inc., et al.

Civ. 13004.

District Court of Appeal, Second District, Division 3, California.

March 31, 1942.

1. Negligence ⚷32(1)

The rule that only duty owing to licensee is to refrain from wilful or wanton conduct applies only to cases relating to duty owed with respect to condition of premises, that is, to cases involving "passive negligence" as distinguished from "active negligence".

See Words and Phrases, Permanent Edition, for all other definitions of "Active Negligence" and "Passive Negligence".

2. Automobiles ⚷155

If plaintiff attending automobile racetrack was a licensee and was upon part of premises where operator of automobile which had been driven in the races knew or had good reason to expect him to be, operator owed duty to plaintiff to exercise ordinary care to avoid injury to him.

3. Appeal and error ⟹1066
Trial ⟹253(4)

In action by spectator at automobile race track for injuries sustained when struck by racing automobile, brought against both operator of track and driver, where one of issues was whether there was an agency relationship between driver and track operator, instructions that only duty owed to plaintiff, if a licensee, was to refrain from wilful or wanton injury, which contained no provision relative to duty of track operator based upon an agency relationship, were prejudicially erroneous, in view of evidence.

4. Appeal and error ⟹216(2)

If law applicable to facts of case is stated correctly in a general charge, a party may not, in absence of a request for more specific instruction, complain that a more specific instruction should have been given.

5. Appeal and error ⟹216(3)

Where instructions as given were erroneous, plaintiff was not precluded from asserting that error was committed, even though he did not request a proper instruction.

Appeal from Superior Court, Santa Barbara County; C. Douglas Smith, Judge.

Action by Earl D. Colgrove against Lompoc Model T Club, Inc., and another for personal injuries, wherein a judgment was entered in favor of both defendants. From an order granting plaintiff's motion for a new trial, the defendants appeal.

Affirmed.

Glines & Libeu, of Santa Maria, for appellants.

Fred A. Shaeffer, of Santa Maria, and Wilbur D. Garber, of Temple City, for respondent.

PARKER WOOD, Justice.

The action is for damages for personal injuries to plaintiff as a result of being struck by an automobile driven by defendant Cazenave upon the premises of the defendant Lompoc Model "T" Club, Inc. Judgment was upon a verdict in favor of both defendants. The appeal is from an order granting plaintiff's motion for a new trial. In granting the motion the judge signed an order as follows: "The motion of plaintiff for a new trial is granted on the ground of errors of law occurring in the trial."

Defendant Lompoc Model "T" Club, Inc., operated a race track for model "T" Fords about 10 miles from Lompoc. The track was oblong with the longer sides on the north and south. A single cable, referred to as a fence, extended along the north side of the track about forty feet from the north edge of the track. The space between the cable and the track was slightly rough and had some weeds on it. On July 23, 1939, plaintiff attended the races after having paid an admission charge. He watched the races from a point at the northeast turn of the track just outside the cable. About 5 or 10 minutes after the last race he started to walk to his car which was parked at the northwest turn of the track. About 2,000 persons attended the races that day and cars were parked almost solidly along the outside of the cable and, as he walked, many of the cars were moving preparatory to leaving. After he had walked for some distance outside the cable among the parked and moving cars and in the brush he went under the cable and walked toward his car and was struck by a race car which was being driven by defendant Cazenave. There was testimony that signs were on the cable and trees stating "Keep off tracks" and that announcements were made over a loud speaker system during and after the races to the effect that the people should keep off the tracks; and there was testimony in opposition thereto. There were from 25 to 150 persons in the area on the track side of the cable at the time of the collision. Defendant Cazenave was a member of the Model "T" Club and had driven in the races that day, and because he had steering gear trouble with his car he was ordered out of the race and required to wait inside the track until the race was finished. After the race he and two girls entered the front seat of the race car and he started to give the girls a ride around the track and was traveling about 30 miles per hour, when according to some testimony his car went out of control, and struck plaintiff.

Appellants (defendants) contend that no errors of law occurred during the trial and that the order granting a new trial upon that ground is erroneous.

It is the position of respondent (plaintiff) that in this case, in which plaintiff was injured by a moving automobile, that certain instructions given at the request of defendants to the effect that the only duty owed to plaintiff, if a licensee, was to refrain from wilful or wanton injury, were erroneous for the reason they were not applicable to the facts in this case; that those instructions apply to cases in which no overt act of negligence is involved such as cases relating to the duty owing to a licensee with respect to the condition of the premises or, as sometimes expressed, to cases involving passive negligence as distinguished from active negligence.

Plaintiff further contends that, even if it be assumed that he was a licensee rather than an invitee, the duty owed to plaintiff by the operator of the automobile was not merely to refrain from wilfully or wantonly injuring him but was the duty to exercise ordinary care. This contention is sustained.

The instructions, above referred to, are as follows:

"No. 49, Defendants'. Your are further instructed that a person who enters the premises of another at the express or implied invitation of the occupant of said premises is an invitee. However, when said person uses or traverses a portion of said premises where he is not invited or normally expected to go, and the object of his visit to that portion of the premises is solely for his own benefit, pleasure, convenience or curiousity, having no relation to the business of the occupant of the premises, he is at best a mere licensee, the license being enjoyed by him with its concomitant perils, and with the assumption of all risks attached to the condition of that portion of the premises, or which are incident to the operation of the business conducted thereon, the occupant owing him no duty, except to refrain from doing him wilful or wanton injury. Given"

"No. 50, Defendants'. You are further instructed that if you find that at the time and place of the happening of the accident involved in this case the plaintiff, Earl D. Colgrove, was upon a portion of the premises occupied by the defendant Lompoc Model 'T' Club, Inc., a corporation, where the said plaintiff, Earl D. Colgrove, was not invited to be, nor usually expected to be, and was there only for his own benefit, convenience, or curiosity, then you must find that the plaintiff, Earl D. Colgrove, was a mere licensee, and that the defendants Lompoc Model 'T' Club, Inc., a corporation, and Edward Cazenave owed him no duty other than that they should not wantonly or wilfully injure him. Given"

"No 51, Defendants'. You are further instructed that if you find that at the time and place of the happening of said accident that defendant, Edward Cazenave, was rightfully upon said portion of the premises at the time and place of the happening of said accident, and that plaintiff, Earl D. Colgrove, was a mere licensee at the time and place of the happening of said accident, then you are instructed that defendant Edward Cazenave, owed no greater duty to plaintiff, Earl D. Colgrove, at such time and place than did defendant, Lompoc Model 'T' Club, Inc., a corporation, and that said measure of duty by both defendants was merely to refrain from doing wanton or wilful injury to said Earl D. Colgrove at the time and place of the happening of said accident. Given"

"No. 52, Defendants'. Your are further instructed that if you find that at the time and place of the happening of the accident involved in this case the plaintiff, Earl D. Colgrove, was a mere licensee, then you are instructed to disregard any instructions that I have or may give in reference to the duty of the occupier of the premises to an invitee, and must confine your deliberations to determining whether at such time and place either of the defendants were guilty of wantonly or wilfully injuring plaintiff Earl D. Colgrove, and if you find that under such circumstances that defendants, or either of them, did not wantonly or wilfully injure the plaintiff, then your verdict must be for the defendants, and both of them, and against the plaintiff. Given"

[1, 2] Each of the instructions above quoted states that the duty owed to plaintiff, if he was a licensee, was to refrain from wanton or wilful injury. That is a general rule which applies to cases relating to the duty owed to a licensee with respect to the condition of premises, that is to cases involving passive negligence as distinguished from active negligence. If plaintiff was a licensee and was upon a part of the premises where the operator of the automobile *knew or had good reason to expect him to be,* the duty owed to plaintiff by the operator of the automobile was to exercise ordinary care to avoid injury to plaintiff.

Another issue was whether there was an agency relationship between the operator of the automobile and the club. The instructions quoted did not include a provision relative to the duty of the club toward plaintiff based upon such alleged relationship.

[3] These instructions, in view of the facts in the case, were prejudicially erroneous.

In the case of Yamauchi v. O'Neill, 1940, 38 Cal.App.2d 703, 102 P.2d 365, plaintiff was on a driveway which served the rear entrance of defendants' store and was struck by defendants' truck. Defendants contended the plaintiff was a licensee and the only duty owed to plaintiff was to refrain from wilful or wanton conduct. The court stated that even if it be assumed that plaintiff was a licensee rather than an invitee the contentions of defendants had no application to the facts before the court. In that case it was stated further at page 707 of 38 Cal.App.2d, at page 367 of 102 P. 2d: "there can be no doubt whatever that the negligent operation of a moving vehicle in a place where the operator has good reason to expect the presence of licensees constitutes active negligence as distinguished from passive negligence. Under such circumstances the duty owed by the operator of the moving vehicle to a licensee, whether such operator be the licensor or any other person, is not merely the duty to refrain from wilful or wanton conduct but is the duty to exercise ordinary care."

In the case of Lucas v. Walker, 1913, 22 Cal.App. 296, 301, 134 P. 374, 376, 379, it is said: "A licensee under such circumstances is entitled to recover for any injury to himself * * * resulting from the active negligence of the licensor, and such licensor is responsible in damages for any overt act of negligence, though the same be neither willful nor wanton."

Plaintiff contends that two other instructions were erroneous. One of them was to the effect that a habit of an owner in allowing people to use premises is indicative of license, and user is licensee and not invitee. The other one defines wilful injury, wanton injury, and negligent injury. By reason of the decision herein relative to the above quoted instructions, it is not necessary to discuss these two additional instructions.

In their argument on this point appellants (defendants) refer to three other instructions given at the request of defendants, and to four other instructions given at the request of plaintiff. Appellants state that these seven instructions and the six claimed to be erroneous by plaintiff should be considered together, and contend that when so considered they correctly state the law. Such a consideration of these instructions does not reveal that the jury was instructed correctly as to the duty of defendants to plaintiff, if plaintiff was a licensee and was injured by reason of the active negligence of defendants.

Appellants cite the cases of Hamakawa v. Crescent Wharf, etc., Co., 1935, 4 Cal. 2d 499, 50 P.2d 803, and Lindholm v. Northwestern Pac. R. R. Co., 1926, 79 Cal.App. 34, 248 P. 1033, and rely principally upon them in support of their contention that the instructions were not erroneous. In the Yamauchi case, 1940, supra, the court distinguishes those cases from a situation similar to the one now before the court, and for that reason it is unnecessary to discuss those cases further.

Defendants assert that since plaintiff did not request an instruction embodying the principle of law which is announced in the Yamauchi case, supra, relative to active negligence, that he may not complain on appeal because such an instruction was not given.

[4, 5] If the law applicable to the facts of a case is stated correctly in a general charge to the jury, a party may not, in the absence of a request for a more specific or elaborate instruction, complain that a more specific or elaborate instruction should have been given. Townsend v. Butterfield, 1914, 168 Cal. 564, at page 569, 143 P. 760; Ohran v. County of Yolo, 1940, 40 Cal.App.2d 298, at page 307, 104 P.2d 700; 24 Cal.Jur. 796. In this case, however, the instructions as to the duty owing to a licensee injured by active negligence were erroneous, and plaintiff is not precluded from asserting that error was committed in instructions which were given, even though he did not request a proper instruction.

The order granting the motion for a new trial is affirmed.

SCHAUER, P. J., and SHINN, J., concurred.

MUELLER v. ELBA OIL CO. et al.*

Civ. 11624.

District Court of Appeal, First District,
Division 1, California.

April 3, 1942.

Hearing Granted June 1, 1942.

1. Bankruptcy 🔑384

Bankruptcy referee's order by which referee purported to discharge partners from individual liability for debt of bankrupt partnership was void, since it was an "order confirming a composition" which under Bankruptcy Act could only be made by judge. Bankr.Act § 12, 11 U.S.C.A. § 30.

See Words and Phrases, Permanent Edition, for all other definitions of "Order Confirming a Composition".

2. Bankruptcy 🔑149, 354

Where a partnership has been adjudicated a bankrupt, the individual assets of the general partners may be drawn into the administration of the bankrupt estate, and any surplus remaining after paying partners' individual creditors is applicable to partnership debts. Bankr.Act § 5, sub. g, 11 U.S.C.A. § 23, sub. g.

3. Partnership 🔑165

A partner is individually liable for partnership debts.

4. Bankruptcy 🔑375

Where, during pendency of proceedings to bring assets of partners into partnership bankruptcy proceedings, two partners offered specified sum to be applied in part payment of partnership creditors on condition that such partners be released and discharged in full from individual liability to the creditors, the plan was essentially one for a "composition" so that provisions of Bankruptcy Act regarding composition were required to be complied with. Bankr.Act § 5, sub. g, and §§ 12, 14, sub. c, 74, 11 U.S.C.A. § 23, sub. g, and §§ 30, 32, sub. c, 202.

See Words and Phrases, Permanent Edition, for all other definitions of "Composition".

5. Bankruptcy 🔑375

A "composition" of creditors is a proceeding voluntary on both sides by which the debtor of his own motion offers to pay his creditors a certain percentage of their claims in exchange for a release from his liability and the offer of composition may be of a lump sum.

6. Bankruptcy 🔑387

A composition when confirmed operates as a discharge in bankruptcy. Bankr.Act §§ 14, sub. c, 371, 11 U.S.C.A. §§ 32, sub. c, 771.

7. Bankruptcy 🔑377

In bankruptcy proceeding before confirmation of composition is sought the composition must be accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of claims. Bankr.Act §§ 12, 74, 11 U.S.C.A. §§ 30, 202.

8. Bankruptcy 🔑375

In bankruptcy proceeding a composition when confirmed is binding on creditors who do not assent, and therefore there must be strict compliance with the statutory requirements. Bankr.Act §§ 12, 74, 11 U.S.C.A. §§ 30, 202.

9. Bankruptcy 🔑38

The term "arrangements" in 1938 amendment to Bankruptcy Act includes compositions. Bankr.Act § 301 et seq., 11 U.S.C.A. § 701 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Arrangement".

10. Bankruptcy 🔑384

Where involuntary bankruptcy proceeding was instituted against partnership in December, 1937, and offer of composition of individual liability of partners for partnership debts was made on or about June 28, 1938, validity of referee's order purporting to confirm the composition was required to be determined under Bankruptcy Act as it existed prior to 1938 amendment which became effective in September, 1938. Bankr. Act §§ 12, 38, 73, 74, 306, 361–372, 11 U.S.C.A. §§ 30, 66, 201, 202, 706, 761–772; Bankr. Act 1938, § 7, 11 U.S.C.A. § 1 note.

11. Bankruptcy 🔑375

Under Bankruptcy Act prior to 1938 amendment, a composition originates in an offer of composition, and is made by filing of petition or answer in which the debtor states that he desires to effect a composition. Bankr.Act §§ 12, 74, 11 U.S.C.A. §§ 30, 202.

12. Bankruptcy 🔑384

Under Bankruptcy Act providing that the judge shall confirm a composition, referee does not have authority to confirm composition, since when the Bankruptcy Act uses the term "court" the referee may be included but when the term "judge" is used the referee is excluded. Bankr.Act 1898, § 1(16), 11 U.S.C.A. § 1(16); Bankr.Act § 12, 11 U.S.C.A. § 30.

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* Subsequent opinion 130 P.2d 961.

See Words and Phrases, Permanent Edition, for all other definitions of "Court" and "Judge".

13. Bankruptcy 🔑387

Where bankruptcy referee's order confirming composition of individual liability of partners for debts of bankrupt partnership was void, judge's subsequent order discharging partnership did not operate as a "release" of individual liability of partners for partnership debt. Bankr.Act § 5, sub. g, and §§ 12, 74, 11 U.S.C.A. § 23, sub. g, and §§ 30, 202.

See Words and Phrases, Permanent Edition, for all other definitions of "Release".

14. Bankruptcy 🔑429

Where 1938 amendment to Bankruptcy Act provided that discharge of partnership shall not discharge individual general partners from partnership debts and that except as otherwise provided the amendatory act shall govern proceedings so far as practicable in cases pending when it takes effect, the amendatory act governs interpretation of discharge granted after the amendment took effect in proceedings instituted before effective date of the amendment. Bankr.Act § 5, sub. j, and § 6, sub. b, 11 U.S.C.A. § 23, sub. j, and § 1 note.

15. Bankruptcy 🔑375

Where offer of composition is made by partners of partnership adjudicated bankrupt, it should not be made until after schedule of individual assets and liabilities as well as of partnership assets is on file. Bankr.Act § 5, sub. g, and §§ 12, 74, 11 U.S.C.A. § 23, sub. g, and §§ 30, 202.

16. Bankruptcy 🔑382

In involuntary bankruptcy proceedings against partnership, where notice was given to creditors of a petition praying for discharge of liability of two partners to creditors who had filed claims, order of referee discharging the two partners from any and all liability which might exist against either of them as partners was irregular. Bankr.Act § 5, sub. g, and §§ 12, 74, 11 U.S.C.A. § 23, sub. g, and §§ 30, 202.

17. Compositions with creditors 🔑2

In involuntary bankruptcy proceedings against partnership where order confirming composition and discharging two partners from individual liability for partnership debts was void on its face because made by referee rather than by judge, the composition was binding as a "common-law composition" on those who participated in it. Bankr.Act § 5, sub. g, and §§ 12, 74, 11 U.S.C.A. § 23, sub. g, and §§ 30, 202.

See Words and Phrases, Permanent Edition, for all other definitions of "Common-Law Composition".

18. Bankruptcy 🔑386

The fact that plaintiff's assignor did not file a claim in bankruptcy proceeding against partnership did not bar plaintiff or its assignor from attacking void order of confirmation of composition of individual liability of partners for partnership debts, where the offer of composition was made within six month period following adjudication of bankruptcy in which claims were required to be filed. Bankr.Act 1898, § 57, sub. n, as amended in 1926, 11 U.S.C.A. § 93, sub. n.

19. Bankruptcy 🔑375

An offer of composition should extend to all creditors whose claims are listed by bankrupt. Bankr.Act § 12, 11 U.S.C.A. § 30.

20. Bankruptcy 🔑387

Where offer of composition of individual liability of two partners for debts of bankrupt partnership was made before time for filing claims had passed, and order confirming composition was void because made by referee and not by judge, although the order operated as a common-law composition on those who participated in the proceeding, the order did not operate to discharge individual liability of the two partners to assignee of creditor who did not file claim, and who did not participate in the composition proceedings. Bankr.Act § 5, sub. g, and §§ 12, 74, 11 U.S.C.A. § 23, sub. g, and §§ 30, 202.

21. Bankruptcy 🔑252

Under Bankruptcy Act authorizing receiver or trustee, with approval of "court", to compromise any controversy arising in administration of estate, approval of compromise may be by the referee. Bankr.Act § 27, 11 U.S.C.A. § 50.

22. Bankruptcy ⚷375

Under Bankruptcy Act, that which is as a matter of law a composition cannot be accomplished without complying with statutory requirements under the guise of being a compromise of controversy. Bankr.Act, §§ 12, 27, 11 U.S.C.A. §§ 30, 50.

23. Bankruptcy ⚷252

A "compromise of controversy" within Bankruptcy Act authorizing receiver or trustee to compromise any controversy implies a dispute to be settled. Bankr.Act § 27, 11 U.S.C.A. § 50.

See Words and Phrases, Permanent Edition, for all other definitions of "Compromise of Controversy".

24. Bankruptcy ⚷252

In partnership bankruptcy proceeding, dispute regarding whether liquidation of individual assets of two partners would yield any surplus for partnership creditors could not be made the subject of a "compromise of controversy" which would authorize discharge of the general partners from individual liability to partnership creditors. Bankr. Act § 27, 11 U.S.C.A. § 50.

25. Bankruptcy ⚷404(1)

The Bankruptcy Act, prior to 1938 amendment, provided only for discharge of bankrupt following full administration in bankruptcy or for discharge upon confirmation of composition of creditors, but under the 1938 amendment, a discharge may be secured upon confirmation of an arrangement, and right of a partner to secure discharge from individual liability to partnership creditors where bankrupt is a partnership, is similarly limited. Bankr. Act § 5, sub. g, and §§ 12, 74, 301 et seq., 11 U.S.C.A. § 23, sub. g, and §§ 30, 202, 701 et seq.

26. Bankruptcy ⚷252

A bankruptcy trustee, with approval of court, may arrange for compromise of a dispute based on a claim of liability of a third person to the bankrupt, but the trustee cannot arrange for a compromise of liability of such third person to creditors of the bankrupt. Bankr.Act § 27, 11 U.S.C.A. § 50.

KNIGHT, J., dissenting.

◆

Appeal from Superior Court, Monterey County; Henry G. Jorgensen, Judge.

Action by D. J. Mueller against Elba Oil Company and others to recover purchase price of goods sold. From a judgment determining that defendants Frank Raiter and Louis Oleari had been discharged from liability in bankruptcy, plaintiff appeals.

Reversed.

Mueller & Westover, of San Francisco, for appellant.

Rosendale, Thomas & Muller, of Salinas, for respondents.

PETERS, Presiding Justice.

Plaintiff, as the assignee for collection of the MacClatchie Manufacturing Company of California, brought this action against the Elba Oil Company and its four general partners to recover from them the sum of $362.23, the purchase price of certain goods sold the partnership. General partners Frank Raiter and Louis Oleari defended the action on the ground that the debt was a partnership debt; that the partnership was adjudicated a bankrupt; that these two defendants paid $7,500 to the trustee in bankruptcy in full settlement, discharge and compromise of all their liability to creditors of the copartnership and as a composition of creditors of the copartnership; that the court made an order discharging these two defendants from any and all liability to creditors of the copartnership individually and as copartners. It is further alleged that the copartnership was discharged in bankruptcy. From a judgment determining that Raiter and Oleari had been discharged from liability for this debt plaintiff prosecutes this appeal.

The cause was tried upon an agreed statement of facts. It therein appears that in October of 1937 the Elba Oil Company, a limited partnership with four general partners including Raiter and Oleari, became indebted to the MacClatchie Manufacturing Company of California for the purchase price of certain materials. This debt was unsecured and has never been paid. On December 31, 1937, an involuntary petition in bankruptcy was filed against the partnership, and on January 4, 1938, the partnership was adjudicated a bankrupt, and one Russell B. Seymour became the trustee for the bankrupt. The debt owing to plaintiff's assignor was duly scheduled as an unsecured partnership debt, and thereafter the notice to creditors and other notices were properly sent to this creditor. Although its debt had thus been duly scheduled, the MacClatchie Company filed no claim in the bankruptcy proceeding.

On April 4, 1938, the trustee filed a petition to marshal the individual assets of the partners, in which he prayed that they be directed to file forthwith a schedule of their assets and liabilities. He averred in the petition, on information and belief, that the purported limited partners, naming them, were in fact general partners. The record shows two orders to show cause, directed to both general and limited partners, issued by the referee in April, 1938. A third order to show cause, dated December 19, 1938, was directed to the four general partners only, including Raiter and Oleari. Apparently no hearings were ever held on any of these orders to show cause.

On June 28, 1938, a bank wrote a letter to Seymour as trustee, on behalf of Raiter and Oleari, enclosing a cashier's check for $7,500, and offering to compromise Raiter's and Oleari's liability for the partnership debts. The letter stated that the check should be used for effecting "a composition of creditors of said Elba Oil Company." The letter containing this offer expressly stated that it was subject to the following conditions: (1) All secured creditors must accept their security in full discharge; (2) that all unsecured creditors and costs and fees of the bankruptcy proceeding should be paid from the $7,500; and (3) that each creditor of the partnership should execute a full release of Raiter and Oleari "of and from any and all individual liability to each of said creditors."

On January 30, 1939, the trustee filed with the referee a "petition to compromise controversy." This petition recites that the trustee had filed a petition to marshal the assets of the individual partners; that on December 19, 1938, an order to show cause had been issued on the petition directed to the four general partners, which order was set for hearing on January 26, 1939. While the proceeding to marshal the assets of the individual partners was pending, the petition continues, many conferences were held between the trustee and counsel for Raiter and Oleari. The trustee recommended that if the sum of $7,500 was paid to the trustee in full settlement and discharge of the individual liability of Raiter and Oleari to the creditors of the bankrupt, he, the trustee, would present to the court a petition "to compromise the controversy."

On June 28, 1938, the petition proceeds, the trustee received the cashier's check for $7,500; that thereafter numerous conferences were had between the trustee and attorneys for "various creditors of the estate" and a basis of compromise arrived at "between all of the parties to the litigation hereinabove set forth," which petitioner believes is for the best interest of the estate; that it is doubtful whether the estate could realize any greater sum from any order directing Raiter and Oleari to turn over their assets to the trustee, and that there is "also some doubt as to the ability" of the trustee "to prevail in the said proceeding to marshal the assets of the said Frank E. Raiter and Louis G. Oleari." The prayer is for an order authorizing the trustee to compromise the controversy and "completely releasing and discharging the said Frank E. Raiter and Louis G. Oleari of and from any and all individual liabilities to each and every one of the creditors who have filed claims in the above entitled bankrupt estate."

On February 20, 1939, the referee made an order granting the trustee's petition to compromise, in which it is recited that it is in the best interests of the creditors of the bankrupt estate that the compromise petitioned for should be approved. The order directs the trustee to compromise the controversy by accepting the $7,500, and further provides that, upon the receipt of the $7,500 by the trustee, Raiter and Oleari "are fully and completely released and discharged from any and all claims, demands, liability, causes of action or judgments against them or either of them, as general partners of the above-named bankrupt." It should be noted that this order purports to release Oleari and Raiter from the claims of all creditors, while the petition was limited to creditors who had filed claims.

On March 6, 1939, the judge of the Federal District Court made an order of discharge in bankruptcy by which it was provided that "Elba Oil Company, a copartnership composed of * * * Louis Oleari and F. E. Raiter be discharged from all debts and claims which are made provable by said Acts [bankruptcy laws] against its estate" which existed on the day the petition for adjudication of bankruptcy was filed, excepting such debts as are excepted by law from the operation of a discharge in bankruptcy. It is to be noted that the discharge is of the partnership. It does not provide for discharge of the individual liability of the partners for the partnership debts.

[1] We are of the view that the referee's order of February 20, 1939, by which he purported to discharge Raiter and Oleari from individual liability for parnership debts was void on its face for the reason that as an order confirming a composition under § 12 of the Bankruptcy Act, 11 U.S.C.A. § 30, it was required to be made by the judge, and could not validly be made by a referee.

[2, 3] Where a partnership has been adjudicated a bankrupt the individual assets of the general partners may be drawn into the administration of the bankrupt estate, and any surplus remaining after paying individual creditors is applicable to the partnership debts. Section 5, sub. g, of the Bankruptcy Act, 11 U.S.C.A. § 23, sub. g; Francis v. McNeal, 3 Cir., 186 F. 481, 108 C.C.A. 459; 6 Remington on Bankruptcy [4th ed.] p. 499, 505. This results from the rule that a partner is individually liable for partnership debts.

[4, 5] In the case herein, while proceedings to bring the assets of the partners into the bankruptcy were pending, Raiter and Oleari offered $7,500 to be applied in part payment of the partnership creditors on condition that they be released and discharged in full from individual liability to such creditors. The plan was essentially one for a composition. A composition of creditors is a "proceeding, voluntary on both sides, by which the debtor, of his own motion, offers to pay his creditors a certain percentage of their claims in exchange for a release from his liabilities." 6 Am. Jur. 776, § 416. The offer of composition may be of a lump sum, as in the case herein. In re Bickmore Shoe Co., D.C., 263 F. 926.

[6-8] A composition when confirmed operates as a discharge in bankruptcy. "The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge." 11 U.S.C.A. § 32, see cases cited p. 133, note 631; for similar provision as to arrangements under the 1938 amendments, see 11 U.S.C.A. § 771; Myers v. International Trust Co., 273 U.S. 380, 47 S.Ct. 372, 71 L.Ed. 692. Before confirmation of the composition is sought it is required that it be accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of claims. 11 U.S.C.A. §§ 30, 202. Since a composition when confirmed is binding on creditors who do not assent, it is settled that there must be strict compliance with the statutory requirements. In re Palmer, D.C., 2 F.Supp. 275, 277; In re Frear, D.C., 120 F. 978; 8 C.J.S., Bankruptcy, § 653, p. 1689.

[9] Prior to the 1938 amendments to the Bankruptcy Act, compositions were provided for by §§ 12 and 74. 11 U.S.C.A. §§ 30, 202. Under the 1938 amendments these sections were superseded by provision for "arrangements." 52 Stats. 840, enacting clause, and Chap. XI at p. 905, 11 U.S.C.A. § 701 et seq. The new procedure includes compositions in the term "arrangements." This is plain from the definition, as follows: "'Arrangement' shall mean any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts, upon any terms." 11 U.S.C.A. § 706. An arrangement is not required to be confirmed by the judge. Under the 1938 amendments referees are invested with jurisdiction, subject to review by the judge, to "confirm or refuse to confirm arrangements or wage-earner plans, or set aside the confirmation of arrangements or wage-earner plans and reinstate the proceedings or cases." 11 U.S.C.A. § 66; see, also, 11 U.S.C.A. §§ 761–772, providing for confirmation by the "court," but not requiring confirmation by the "judge."

[10, 11] These sections are not applicable to this proceeding. The 1938 amendments expressly provide that §§ 12, 73 and 74, as amended, "shall continue in full force and effect with respect to proceedings pending under those sections upon the effective date of this amendatory Act." 52 Stats. p. 916, 11 U.S.C.A. § 799(3). The composition in the present case is referable to § 12. A composition under § 74 is initiated by the filing of a petition or answer in which the debtor states that he desires to effect a composition. Upon the judge approving the petition the composition proceeding goes forward with a meeting of creditors and other formalities. 11 U.S.C.A. § 202. Such procedure was not followed in the present case. A composition under § 12 originates in an "offer of composition." 11 U.S.C.A. § 30; Nassau Smelting & Refining Works v. Bright-

wood Bronze F. Co., 265 U.S. 269, 271, 44 S.Ct. 506, 68 L.Ed. 1013; Myers v. International Trust Co., 273 U.S. 380, 47 S.Ct. 372, 71 L.Ed. 692; 8 C.J.S., Bankruptcy, § 653, p. 1688. The offer in the present case was made "on or about June 28, 1938," according to the agreed statement of facts. The 1938 amendments were approved on June 22, 1938, and by terms of the amendatory act went into effect three months later, that is, on September 22, 1938. 52 Stats. p. 940, 11 U.S.C.A. § 1 note.

[12] By virtue of the express provision of the amendatory act above-referred to, § 12 was applicable to the pending proceeding herein involved. Section 12 provides that "the judge shall confirm a composition." 11 U.S.C.A. § 30; In re Bloodworth-Stembridge Co., D.C., 178 F. 372; In re Everick Art Corp., 2 Cir., 39 F.2d 765, 768. When the act uses the term "court," the referee may be included, but when the term "judge" is used the referee is excluded. In re McMurray, D.C., 8 F. Supp. 449; 8 C.J.S., Bankruptcy, §§ 268, 270, pp. 976, 978; 2 Remington on Bankruptcy, 5th Ed., 92. Section 1 of the act provides: "'Judge' shall mean a judge of a court of bankruptcy, not including the referee." 11 U.S.C.A. § 1, subd. 16; subd. 20 under the section as amended in 1938.

[13] The judge's subsequent order of discharge does not operate as a release of the individual liability of the partners for the partnership debts. The discharge was of the partnership. It was provided therein that "Elba Oil Company, a copartnership composed of Joseph E. Barrett, J. S. Lees, Louis Oleari and F. E. Raiter be discharged from all debts and claims which are made provable by said Acts against its estate, and which existed on the 31st day of December, A. D. 1937, on which day the petition for adjudication was filed against it; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy."

[14] The 1938 amendment added to § 5 of the Bankruptcy Act, paragraph j, reads as follows: "The discharge of a partnership shall not discharge the individual general partners thereof from the partnership debts." 11 U.S.C.A. § 23, sub. j. The amendatory act contained the following provision: "Except as otherwise provided in this amendatory Act, the provisions of this amendatory Act shall govern proceedings so far as practicable in cases pending when it takes effect." 52 Stats., p. 940, 11 U.S.C.A. § 1 note; see, In re Wm. Akers, Jr., Co., Inc., D.C., 31 F.Supp. 900. In view of this provision section 5, sub. j, 11 U.S.C.A. § 23, sub. j, governs the interpretation of the discharge herein.

Prior to the enactment of § 5, sub. j, there was some doubt as to whether a discharge of the partnership only had the effect of discharging the individual liability of the partners for the partnership debts. Myers v International Trust Co., supra; 7 Remington on Bankruptcy, 5th Ed., p. 863; 8 C.J.S., Bankruptcy, § 580, p. 1546; 37 Harv.Law Rev. 614. The 1938 provision removed this doubt.

[15] There appear to be other defects in the proceeding viewed as a composition, in addition to the absence of confirmation by the judge. Where the offer of composition is made by partners of a partnership adjudicated bankrupt it should not be made until after the schedule of individual assets and liabilities as well as of partnership assets is on file. In re Palmer, D.C., 2 F.Supp. 275, 277. This is because the creditors in determining whether it is to their advantage to assent to an offer of composition should have full information as to assets available to satisfy their claims. Any surplus of individual assets after paying individual debts may be used to pay partnership claims. In the present case the offer was made while proceedings to compel the partners to file their schedules were still pending and before individual schedules had been filed.

[16] The notice to creditors was of a petition praying for discharge of the liability of the partners Raiter and Oleari to creditors who had filed claims, whereas the order of the referee entered on the petition discharges them from any and all liability which might exist against either of them as partners.

[17] The bankruptcy papers included in the present record also show a failure to comply with the requirement that before confirmation is sought the composition must have been accepted in writing by a majority of the creditors. 11 U.S.C.A. § 30. The apparent reason for these omissions will be discussed hereafter. It is not necessary to determine whether these irregularities singly or together would render the composition void as a discharge. It

is clear that, where the act requires the judge to confirm a composition, confirmation by a referee, a subordinate official of the court, is of no legal effect. Such confirmation is void on its face as to creditors who did not participate in the composition. The composition is binding, however, as a common law composition, on those who participated in it. In re Clarence A. Nachman Co., 2 Cir., 6 F.2d 427; Paris Medicine Co. v. Lusby, 174 Ark. 749, 297 S.W. 1015; Welles-Kahn Co. v. Klein, 81 Fla. 524, 527, 88 So. 315; 8 C.J.S., Bankruptcy, § 653, p. 1688.

[**18, 19**] The fact that plaintiff's assignor had not filed a claim in the bankruptcy proceeding does not bar it or its assignor from attacking the void order of confirmation. The offer of composition was made on June 28, 1938. The adjudication took place on January 4, 1938. Hence, the offer of composition was made within six months' period following adjudication of bankruptcy, in which claims are required to be filed. 11 U.S.C.A. § 93, sub. n; 44 U.S.Stats. 666, amending § 57 of the Bankruptcy Act. The claim of plaintiff's assignor was listed in the partnership schedules filed. An offer of composition should extend to all creditors whose claims are listed by the bankrupt. 8 C.J.S., Bankruptcy, §§ 654, 658, pp. 1689, 1692; 7 Rem., 4th Ed., pp. 196, 238; 8 Collier on Bankruptcy, 14th Ed., pp. 959, 1237, 1238; Nassau Smelting & Refining Works v. Brightwood Bronze F. Co., 265 U.S. 269, 44 S.Ct. 506, 68 L.Ed. 1013; In re Adamson, 2 Cir., 83 F.2d 211. Thus it has been held that where the bankrupt makes an offer of composition before the time to file claims has passed, creditors whose claims are scheduled by the bankrupt need not make proof of claims to share in the composition. Nassau Smelting & Refining Works v. Brightwood Bronze F. Co., supra.

[**20**] It should be noted that the terms of the offer of composition here involved did not confine it to creditors who had filed claims, nor did the referee's order of approval so limit it. But the trustee's interpretation of the offer evidently was that payment should be made only to those who had proved claims, since he prayed in his petition that Raiter and Oleari be released from individual liability to creditors who had filed claims. In any event no payment was made to plaintiff's assignor, nor did it in any way participate in the composition proceedings. In the circumstances the void order of confirmation did not operate as to it to discharge the individual liability of the general partners Raiter and Oleari.

[**21**] It appears that the failure to follow the procedure prescribed for a composition was due to the fact that the matter was handled as "a compromise of controversy." The act provides: "The receiver or trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate." 11 U.S.C.A. § 50; 2 Remington on Bankruptcy, 5th Ed., p. 717; 8 C.J.S., Bankruptcy, § 305, p. 1032. Since approval of the "court," rather than of the "judge" is required, approval of a compromise may be given by the referee.

[**22**] But that which is as a matter of law a composition may not be accomplished without complying with the statutory requirements under the guise of being a compromise of controversy. "This section [§ 27, 11 U.S.C.A. § 50] should not be confused with § 12 on compositions. It is intended to supply a summary and inexpensive way of settling questions arising in the administration of bankrupt estates. It is most often used in connection with contests on claims filed against the estate, or the contested collections of claims due the estate. It cannot, of course, be resorted to where the matter in controversy is the right to a discharge." Gilbert's Collier on Bankruptcy, one vol., 4th Ed., p. 570.

[**23**] A "compromise of controversy" implies a dispute to be settled. In the case herein the papers in the bankruptcy proceeding which have been made part of the record in the present case show a dispute as to whether certain persons who claimed to be limited partners were in fact general partners. But there is no intimation of any dispute as to the status of the four general partners, including Raiter and Oleari. The trustee's petitions described them as general partners and the stipulation of facts upon which the present action was heard so describes them.

[**24**] The petition to compromise recites that it is doubtful that the estate can realize from marshaling of the individual assets of Raiter and Oleari a greater sum than they offered to pay, that is, $7,500, and that "there is also some doubt as to the

ability of your Trustee to prevail in the said proceeding to marshal the assets of the said Frank E. Raiter and Louis G. Oleari." However, as to general partners the authority of the trustee to marshal assets to the end of applying any surplus remaining after paying individual debts to partnership obligations exists as a matter of right, unless, perhaps, where it appears unlikely that any surplus above individual debts will result. It would seem, therefore, that on the record the only dispute which could exist was whether liquidation of the individual assets of Raiter and Oleari would yield any surplus for partnership creditors. In our view such a dispute may not be made the subject of a compromise of controversy which will result in discharge of general partners from individual liability to partnership creditors.

[25] The Act, prior to the 1938 amendment, provided only two methods whereby a bankrupt could secure a discharge—the discharge granted following full administration in bankruptcy, and a discharge upon confirmation of a composition of creditors. Welles-Kahn Co. v. Klein, supra. Under the 1938 amendment a discharge may be secured upon confirmation of an arrangement. The right of a partner to secure a discharge from individual liability to partnership creditors where the bankrupt is a partnership is similarly limited. The individual assets of a partner may be drawn into the bankruptcy administration. The Act makes no provision whereby one whose assets are subject to the jurisdiction of the court in a bankruptcy proceeding may secure a discharge from liability to creditors of the bankrupt in any other way. See In re Northampton Portland Cement Co., D.C., 185 F. 542.

But for the fact that the court in the bankruptcy proceeding has jurisdiction of the individual assets of a partner where a partnership has been adjudicated bankrupt, it would be without jurisdiction to discharge a partner at all. This is made plain by the decision in Hamilton-Brown Shoe Co. v. Ben L. Berwald Shoe Co., 5 Cir., 10 F.2d 275, writ of certiorari denied by Supreme Court, 271 U.S. 671, 46 S.Ct. 485, 70 L.Ed. 1143. In that case a corporation was adjudicated bankrupt. Its president and chief stockholder made an offer to the trustee to pay unsecured creditors 55% of their claims on condition that the corporation and all its officers and directors be released from all liability growing out of operation of the bankrupt corporation. Suits were then pending in a state court by certain of the creditors against the officers and directors on claims of individual liability growing out of corporate transactions. The Circuit Court of Appeals held that the court in bankruptcy was without jurisdiction to discharge the officers and directors under the compromise of controversy provision or at all. The court reversed the decision of the district court approving the compromise. In re Ben L. Berwald Shoe Co., D.C., 1 F.2d 494. The circuit court was of the view that the court in bankruptcy was without right thus to cut off the individual liability, if any, of the officers and directors to creditors of the corporation. The court said [10 F.2d 276]: "We cannot assume that these claims [the claims of the creditors against the officers and directors which were being asserted in the state court suits] are without substance, and with regard to them the trustee was not authorized to represent appellants. A simple illustration will demonstrate this: It would never be contended by any one that the trustee could compromise the claim of an individual creditor against a third person arising from his indorsement of the bankrupt's note. There is no difference in principle in the case here presented. Furthermore, none of the parties has submitted himself to the jurisdiction of the District Court with regard to these suits, and the District Court was without jurisdiction to bind appellants to the full extent of the compromise offered."

[26] That is, the trustee, with the approval of the court, may arrange for compromise of a dispute based on a claim of liability of a third person to the bankrupt, but he cannot arrange for a compromise of a liability of such third person to creditors of the bankrupt. He does not represent the creditors as to such liability.

To summarize—the court in bankruptcy was without jurisdiction to discharge the individual liability of Raiter and Oleari as general partners except following full administration in bankruptcy or upon composition proceedings which met the statutory requirements. The referee's order was void as a discharge of the individual liability of Raiter and Oleari. It was void as a composition of creditors under § 12 of the Act because it lacked confirmation by a judge. The provision for compromise of controversies does not authorize a discharge of the individual liability of a partner to partnership creditors.

The judgment is reversed.

WARD, J., concurred.

KNIGHT, Justice (dissenting).

I dissent. The respondents Raiter and Oleari, after having been thrown into involuntary bankruptcy, made an offer of composition with creditors whereby they paid $7,500 in cash in full settlement of all creditors' claims against them as individuals and as members of a copartnership; and after several months negotiations the offer and the money were accepted. The trustee to whom the composition money was paid petitioned the bankruptcy court for confirmation, and after a full hearing of which due notice was given the composition was confirmed by the referee; thereupon the money was distributed by the trustee to the creditors, and thereafter the judge of the bankruptcy court granted the discharge in bankruptcy.

Appellant's assignor was one of the creditors of the partnership and was duly scheduled as such, but refrained from proving its claim. Subsequent to the adjudication of bankruptcy and prior to the making of the offer for composition said creditor assigned its claim to appellant, and he brought this action thereon in the superior court against the bankrupt partnership and its individual members. Following the discharge in bankruptcy respondents filed an amended answer wherein they pleaded as a bar to the action the confirmation of the composition and the discharge in bankruptcy. The cause was tried on an agreed statement of facts, and judgment was given for defendants.

In that state of the record it seems clear to me that the reversal of the trial court's judgment not only constitutes a collateral attack upon the final orders and decrees of the bankruptcy court, but is based upon a hypertechnical analysis of the legal forms followed by the trustee and the referee in confirming the composition, for which forms these respondents were in no way responsible, and which reversal results in a manifest injustice to these respondents.

"A composition in bankruptcy is a settlement with creditors, partaking of the nature of a contract. It is a proceeding, voluntary on both sides, by which the debtor, of his own motion, offers to pay his creditors a certain percentage of their claims in exchange for a release from his liabilities; the amount offered may be less or more than would be realized through distribution in bankruptcy by the trustee, and the creditors may accept it or refuse it, though they are treated as a class and the will of the majority is enforced upon the minority provided the decision of the majority is approved by the court. The composition proceeding in a measure supersedes the proceedings in bankruptcy." 6 Am.Jur., p. 776, citing numerous cases. The confirmation of a composition offered by a bankrupt discharges him from all of his debts and reinvests in him the title to his property. 6 Am.Jur., p. 777. Upon signing the order of composition the bankruptcy court loses jurisdiction except to set aside the composition within the time and for the reasons permitted by the statute, and "The discharge effected by confirmation of a composition can not be set aside or annulled by a state court, even for fraud that was not discovered within the statutory time. It enjoys the same immunity from collateral attack that is accorded to an order of discharge granted on application therefor." 6 Am.Jur., p. 779. In this connection it should be here stated that nowhere in the bankruptcy proceedings nor in the trial of the present case was there any charge of fraud.

It is held that "A composition in a bankruptcy proceeding against a partnership discharges the partners as to their liability both as partners and as individuals for the firm debts." 6 Am.Jur., p. 778. In the present case the offer of composition was made by respondents through a bank. It was in writing, and as follows: "Enclosed herewith is our cashier's check in the sum of $7500.00, dated June 28, 1938, numbered 7794 and payable to you as trustee of the estate of Elba Oil Company, bankrupt. This check is delivered to you for the sole and exclusive purpose of using the same and the proceeds thereof for effecting, completing, and paying a composition of creditors of said Elba Oil Company, No. 32287-Y, of the District Court of the United States, Southern District, Central Division, according to the terms and conditions of offer heretofore made or hereafter to be made by our clients, Frank E. Raiter and Louis G. Oleari, as copartners of said Elba

Oil Company. We are advised that the terms and conditions of said offer are or will be as follows: (1) that all secured creditors of said Elba Oil Company shall take and accept all properties described in their respective securities in full satisfaction and discharge of the debts secured thereby; (2) *that all unsecured creditors and all trustees' fees, attorneys' fees, receivers' fees, costs, etc., shall be fully satisfied and paid out of said sum of $7500;* and (3) *that each creditor of said Elba Oil Company shall execute in writing a full and complete release and discharge of our clients, Frank E. Raiter and Louis G. Oleari, of and from any and all individual liability to each of said creditors.* If you effect, complete, and obtain confirmation of a composition of creditors upon such terms and conditions, you are authorized to use the proceeds of said check for payment of said fees, costs, claims of unsecured creditors, etc., but for no other purpose, and in the event that you are unable to effect, complete, and obtain confirmation of such composition within three months from the date hereof, you shall return said sum of $7500.00 to us without deduction of any kind whatsoever. *Until and unless said composition shall be so effected, completed, and confirmation thereof obtained, said sum of $7500 shall be and remain the property of the undersigned."* (Italics ours.)

In the trustee's petition for the confirmation of the composition it was alleged that the petitioner recommended that if the sum of $7,500 was paid over to the trustee "in full and complete settlement, release, and discharge of the individual liability of said Frank E. Raiter and Louis G. Oleari," said trustee would petition for a confirmation thereof; that after receipt of said sum numerous conferences were had between the trustees, his attorneys and the attorneys for various creditors, and a basis of compromise was arrived at "between all of the parties to the litigation hereinabove set forth," the basis of which was as follows: "That in consideration of an order being made and entered herein, wherein and whereby Frank E. Raiter and Louis G. Oleari are fully and completely released and discharged of and from any and all individual liabilities to each and every one of the creditors who have filed claims in the above entitled bankruptcy proceedings, being the Elba Oil Company, a copartnership, the said Frank E. Raiter and Louis G. Oleari will, through the Monterey County Trust and Savings Bank, pay to the Trustee herein the sum of $7500.00." The trustee then went on to allege that he believed it was for the best interests of the creditors of the estate that the compromise be approved, for the reason that it was doubtful that the estate could realize any greater sum from any order that might be made directing them to turn over their assets to the trustee, and that the acceptance of the compromise would eliminate costly and long drawn out litigation and would redound to the benefit of the creditors of the estate. Thereafter the petition came on for hearing before the referee, and the composition was confirmed, the referee having recited in his order of confirmation "that all of the allegations and recitals of said petition were true." The order of confirmation was dated February 20, 1939, and on March 6, 1939, the judge of the bankruptcy court granted the discharge of said copartnership and the individual members thereof "from all debts and claims which are made provable by said Acts [of bankruptcy] against its estate, and which existed on the 31st day of December, A.D. 1937, on which day the petition for adjudication was filed against it." At no time during the bankruptcy proceedings nor subsequent to the granting of the discharge did the appellant or his assignor or any other creditor or person interested in the bankruptcy proceeding challenge the validity of or object to any of the proceedings which were being had therein, and as above stated no question of fraud has ever been raised. To the contrary, so far as the record herein shows, the respondents and the trustee acted honestly and in good faith and to the best interests of all parties concerned.

As will be noted from the majority opinion, the attack made upon the bankruptcy proceeding is founded mainly on two grounds: first, several technical errors or mistakes made, apparently inadvertently, by the trustee and the referee in the wording of the petitions, notices, and orders leading up to the confirmation of the composition; secondly, because the order confirming the composition was made by the referee and not by the judge of the bankruptcy court. It is my view that the errors or mistakes adverted to fall far short of being of such substantial character as to justify a state court in repudiating the bankruptcy proceeding. And for two reasons I disagree with the conclusion that the confirmation of the composition was void because the order was made by the referee. In the first place, the bankruptcy law was extensively revised in 1938, the amendments becoming effective in September, 1938. By section 38 of the 1938 law, 11 U.S.C.A. § 66, jurisdiction was expressly conferred on referees to confirm or refuse to confirm "arrangements" which superseded "compositions." Here the petition for confirmation was filed in January, 1939; and the hearing was had and the composition confirmed in February, 1939. It is true that the 1938 law does not apply to composition proceedings which are pending on the effective date of said law; but I am not convinced that the exemption applies to the vast additional authority conferred upon referees by the new act. However, even assuming that it does, the discharge in bankruptcy, granted by the judge of the court approximately two weeks after the referee had confirmed the composition, in my opinion in itself operated not only as a confirmation of the composition, but also of all acts of the referee performed by him prior to the granting of the discharge. In other words, the act itself provides that upon the confirmation of a composition the consideration given by the bankrupt is distributed according to the direction of the judge and the case is dismissed. Sec. 12, sub. e, 11 U.S.C.A. § 30, sub. e; 6 Am.Jur., p. 779. The discharge in bankruptcy was therefore in effect a dismissal of the bankruptcy proceeding.

As stated in the majority opinion, the debt appellant sued upon was admittedly a partnership debt. It was scheduled as such, and thereafter the notice to creditors and the other notices were properly sent to this creditor; consequently the fact that he did not choose to prove his claim does not exempt him from the binding effect of the bankruptcy proceedings, for as held in the following cases a composition binds creditors with scheduled claims although they do not prove their claims. Nassau Smelting & Refining Works v. Brightwood Bronze F. Co., 265 U.S. 269, 44 S.Ct. 506, 68 L.Ed. 1013, 1015; Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684. It has even been held that the bankruptcy court has the discretion to pass upon a composition offer although a claim has been omitted from the schedules. In re Spiller, D. C., 230 F. 490. Nor is appellant in a position to claim that he was denied the right to participate in the composition fund because he could have done so if he had proved his claim.

Even assuming, however, that as the majority opinion holds, the confirmation of the composition is void because the order was made by the referee rather than by the judge, appellant is in no better position to maintain his action against the partnership and its individual members because by virtue of the bankruptcy act "Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided." Sec. 12, sub. e. In other words, by virtue of the adjudication of involuntary bankruptcy the bankruptcy court through the trustee took possession of the estate of the involuntary bankrupts. It would follow, therefore, that if the composition is void the discharge in bankruptcy is likewise void, and the estate has not yet been administered and the involuntary bankrupts are still immune from actions brought by their creditors. Practically the same situation arose in the case of Joseph v. Rowell, 9 Cir., 108 F.2d 592. There it was claimed that an adjudication of bankruptcy was void because made by a referee instead of the court; also that an order confirming sale of property was void for the same reason. It was held in effect that even though the referee may have exceeded his authority in making the orders complained of, such fact did not divest the bankruptcy court of its jurisdiction over the debtor's property.

For the reasons stated the trial court's judgment in my opinion should be affirmed.

51 Cal.App.2d 69

OAKLAND SCAVENGER CO. et al. v. GANDI.

Civ. 11885.

District Court of Appeal, First District, Division 1, California.

April 2, 1942.

Hearing Denied May 28, 1942.

1. Corporations 🔑298(7)

The inability to produce original minute book of a corporation written in Italian and the omission from book containing English translation thereof of minutes of director's meeting at which allegedly was adopted a resolution, an unsigned typewritten copy of which was clipped to page containing English translation of minutes of meeting at a later date, did not establish conclusively that no such meeting was had and no resolution adopted in view of testimony of those who were officers and directors at the time as to passage of the resolution.

2. Corporations 🔑113

Where original minute book of corporation written in Italian could not be found and typewritten English copy of resolution, which purported to give directors power over the transfer of stock held by a deceased stockholder only in the case of accidental death, was so ineptly written as to be ambiguous if not meaningless, oral testimony of directors and officers, in the absence of any reason why power should have been restricted thus, warranted interpretation of resolution so as to grant such power whatever the cause of death.

3. Corporations 🔑113

Evidence sustained finding that deceased stockholder assented to resolution requiring each stockholder to indorse and deliver to corporation his certificate of stock and authorizing corporation upon death of a stockholder to transfer stock to his son if qualified and capable of filling vacancy or sell it to some other person thus qualified where there was no dissenting vote to resolution and deceased stockholder thereafter indorsed his stock pursuant thereto.

4. Corporations 🔑113

Evidence sustained findings that resolution requiring each stockholder to indorse and deliver certificate of stock owned by him to corporation and authorizing the corporation upon death of stockholder to transfer his stock to son if qualified and capable of filling vacancy created by stockholder's death, or to some other person thus qualified, was adopted by directors and stockholders and assented to by deceased stockholder who had indorsed his stock pursuant thereto.

5. Appeal and error 🔑1010(1)

District Court of Appeal had no power to disturb judgment based upon findings of fact supported by substantial evidence and inferences therefrom.

6. Wills 🔑91

Indorsement and delivery of certificate of stock to issuing corporation pursuant to resolution authorizing corporation upon stockholder's death to transfer stock to his son if qualified and capable of filling vacancy created by stockholder's death, or, if not, to some other person thus qualified, would be a "testamentary transfer" ineffective to transfer to corporation any rights in the stock unless executed in compliance with formalities prescribed for wills, unless a trust in stock was thereby created.

See Words and Phrases, Permanent Edition, for all other definitions of "Testamentary Transfer".

7. Trusts 🔑14

Indorsement and delivery of certificate of stock to issuing corporation is ineffective to create a trust in stock unless an interest presently passes to the corporation as trustee.

8. Trusts 🔑14

A transfer to trustee need not be of a present interest in order to create a valid trust, but may be of a future interest, provided the interest presently passes to the trustee.

9. Trusts 🔑14

Where stockholder indorsed and delivered certificate of stock to issuing corporation pursuant to resolution authorizing corporation upon stockholder's death to transfer stock to his son or some other person qualified to fill vacancy, retention by stockholder of right to sell stock during his lifetime would not prevent transaction from being a "present transfer" of interest in stock creating a trust therein.

See Words and Phrases, Permanent Edition, for all other definitions of "Present Transfer".

10. Corporations 🔑113

Where stockholder indorsed and delivered certificate of stock to issuing corporation pursuant to resolution authorizing corporation upon stockholder's death to transfer stock to his son or some other person qualified to fill vacancy, it was not necessary to transfer of an interest to the corporation as trustee that the corporation's rights be shown on its stock transfer book.

11. Trusts 🔑30½(1)

Transfer of stock pursuant to resolution requiring each stockholder to indorse and deliver to corporation certificate of stock owned by him, and authorizing corporation upon stockholder's death to transfer stock to his son or some other person qualified to fill vacancy, created a "trust" in stock, regardless of whether stockholders understood the legal nature of their acts.

See Words and Phrases, Permanent Edition, for all other definitions of "Trust".

12. Trusts 🔑14

Where stockholders indorsed and delivered certificate of stock to issuing corporation pursuant to resolution requiring such transfer and authorizing corporation upon stockholder's death to transfer stock to his son, or some other person qualified to fill vacancy, whether stockholders intended presently to transfer an interest in stock so as to create a trust rather than attempt to make a testamentary disposition of stock depended on the whole context of resolution interpreted in the light of surrounding circumstances.

13. Corporations 🔑113

Trusts created by transfer of all capital stock in a corporation to the corporation pursuant to resolution requiring such transfer and authorizing corporation upon the death of a stockholder to transfer stock to his son or some other person qualified to fill vacancy was not invalid as unreasonably restraining the stockholder's right of alienation.

14. Corporations 🔑56

A by-law adopted by a majority vote binds stockholders who did not assent.

15. Corporations 🔑57

An invalid by-law may operate as a binding agreement upon those who assent to it, if not opposed to public policy as a contract.

16. Trusts 🔑46

An agreement assented to by all stockholders to transfer their stock in corporation to the corporation in trust to be transferred upon the death of a stockholder to his son or some other person qualified to fill vacancy would not be opposed to "public policy".

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

17. Corporations 🔑113

A trust created by transfer of all stock in a corporation to the corporation to be transferred upon the death of a stockholder to his son or some other person qualified to fill vacancy was not invalid because its object was to give the corporation some control of its stockholder personnel.

18. Corporations 🔑113

Provisions restraining a stockholder's right to transfer stock are strictly construed.

19. Corporations 🔑113

Where resolution required each stockholder to transfer stock to issuing corporation and authorized corporation upon stockholder's death to transfer stock to his son, if a son survived whom directors deemed capable of assuming vacancy created by stockholder's death, otherwise to sell stock at best price obtainable from a person qualified to assume vacancy, the discretion vested in directors was not to be exercised arbitrarily and the rejection of a higher bid by one capable of filling vacancy would warrant recourse to courts.

20. Corporations 🔑113

A resolution requiring each stockholder to transfer to corporation his stock therein and authorizing corporation upon stockholder's death to transfer stock to stockholder's son if in opinion of directors he was qualified and capable of assuming vacancy created by father's death was not void for uncertainty but impliedly authorized selection of son deemed best qualified.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action for declaratory relief by the Oakland Scavenger Company, a corporation, and others against John Gandi, as executor of the estate of Giacomo Gandi, deceased, to obtain a determination of company's right in 100 shares of stock of the company issued in the name of deceased, wherein executor by answer and cross-complaint prayed for a decree quieting title. From an adverse judgment, defendant appeals.

Judgment affirmed.

Hearing denied; CURTIS, J., dissenting.

Cross & Brandt, of San Francisco, for appellant.

Decoto & Hardin and J. Meredity Wortz, all of Oakland, for respondents.

PETERS, Presiding Justice.

Plaintiff Oakland Scavenger Company brought this action for declaratory relief against John Gandi, executor of the estate of Giacomo Gandi, to obtain a determination of its rights in 100 shares of stock of the company issued in the name of deceased. Thomas Ferro, president of the company, joined as plaintiff, suing individually and on behalf of other stockholders. The defendant appeals from the judgment by which it was decreed that the company held the stock in trust, to sell it at the best price obtainable from a person qualified and capable of assuming the vacancy caused by the death of Gandi and to deliver the proceeds to defendant as executor. The judgment is based on a resolution adopted by the board of directors and thereafter by the stockholders. It further provided for payment to defendant executor of dividends and profits in the sum of $912, declared on the stock to August 31, 1939, and of dividends and profits which should be declared to the date of sale and transfer. Defendant executor claims the stock free of any rights in the corporation or stockholders. By answer and cross-complaint he prayed for a decree quieting title.

The company has 183 stockholders, each owning 100 shares. All stockholders work for the company. At the end of each month it is determined how much shall be paid to stockholders, each receiving the same amount, less individual deductions at a fixed rate per day for working days missed. The figure is such that a balance remains due notwithstanding a worker has been absent a full month, or has died, as in the case of defendant's testate. The company is not incorporated under the provision for organization of cooperative corporations. Section 653.1 et seq., Civil Code. The articles of incorporation and by-laws did not provide that each stockholder should work for the company, nor for uniform stock holdings and payments. The practice apparently rests on long established custom.

The contentions of appellant may be divided into two groups. First, defendant contends that it is extremely doubtful whether any resolution of this character was passed at all; that if a resolution was passed it appears as a matter of law that it was not the resolution found by the court; that the resolution was not binding on defendant's testate because it does not appear that he voted for it or endorsed and delivered his stock to the corporation pursuant to the resolution. A second group of contentions concerns the validity and effectiveness of the resolution found by the court, assuming that deceased endorsed his stock pursuant thereto. It is contended that the resolution is void as an unreasonable restraint on a stockholder's right of alienation; that there was no intent to create a trust and that the resolution is too uncertain to create an enforceable trust. The basic question here presented is whether a trust was created. If no title to the stock vested in the corporation as trustee it was a mere agent whose rights would not survive death of the stockholder.

The company was incorporated in 1920. In 1926 it changed its name from United Oakland Garbage Company to Oakland Scavenger Company by court decree. Thereafter new certificates were issued to show the changed name. The stockholders left their new certificates in possession of the corporation to guard against loss. The resolution which gives rise to this action was passed by the board of directors on March 12, 1930, and by the stockholders on March 15, 1930. Thereafter all stockholders endorsed their certificates and the company continued in possession.

The complaint as originally filed set forth the resolution as follows:

"Resolved:—That, all stockholders endorse and return Certificates of stock to the Corporation and that in case one of the stockholders meets with an accident and death befalls him, the Heir of Stock transfers certificate of stock in name of son providing therefore that the Corporation find the son capable to fulfill the Vacancy of the Deceased member, and Whereby if heir of stock has no son then the Corporation has an authority to sell stock at valued price on the date of Deceased member, thereupon the corporation delivering money to the heir of Stock."

The defendant's testate died on May 7, 1938. He did not die an accidental death. He left a widow, but no sons, nor any daughters so far at the record shows. In terms the resolution set forth above applies only in case a stockholder "meets with an accident and death befalls him." In his opening statement counsel for plaintiffs stated that it had been discovered that the resolution as set forth in the complaint did not correctly portray the corporate action, that it was to apply in the event of death from any cause. Thereafter the complaint was amended to set forth the resolution as follows:

"Resolved: That each of the stockholders endorse and deliver to the Oakland Scavenger Company the Certificate of Stock owned by him, and that in case of the death of any stockholder the Oakland Scavenger Company, be and it is hereby authorized and directed to transfer said Certificate of Stock to the son of the deceased person, if in the opinion of the Board of Directors of said Oakland Scavenger Company, the said son is qualified and capable of assuming the vacancy created by the decease of the father, and if said deceased stockholder leaves no surviving son, or if the said son, in the opinion of the Board of Directors of the Oakland Scavenger Company be not qualified and capable of assuming said vacancy, then the Oakland Scavenger Company, be and it is hereby authorized and directed to sell the said Certificate of Stock, and the shares represented thereby, at the best price obtainable from a person qualified and capable of assuming said vacancy, delivering the money so received from such sale to the surviving wife of said deceased stockholder, or if he leaves no surviving wife, to his heirs at law."

The resolution as found by the court differs from that set forth in the amended complaint in that it provides for delivery of the proceeds of sale "to the duly appointed representative of the estate of the deceased stockholder." This is in accord with the allegations of defendant's answer that if plaintiff corporation has the right to sell the stock it is required to pay proceeds to defendant to be administered in the estate of the deceased.

All proceedings of the company were conducted in Italian. There was introduced in evidence a minute book in English, showing minutes of the board of directors from December 26, 1925, to June 28, 1933. During this period until sometime in 1933 the witness D. Rossi was secretary. He testified that he took notes in Italian at the meetings and thereafter wrote up complete minutes in Italian. The English minute book was a translation of the Italian, made by the bookkeeper, Amelia Rettagliatta, who was with the company until May 1, 1935. She customarily wrote the translation in longhand in the English minute book and Rossi signed the minutes of each meeting as thus translated. Rossi testified that she could read Italian "pretty well", that when she didn't understand she called him.

Attached by gem clip to page 84, on which appear minutes of a meeting of the board of directors held on March 26, 1930, is a sheet of paper with typewriting. It reads: "At the meeting of the Board of Directors on March 12th, 1930, it was read as follows: [here the resolution as set forth in the original complaint appears]." On the same page there follows this statement: "At the general meeting of the Stockholders of the Corporation on the date of March 15th, 1930, the foregoing resolution was read before all stockholders: [here also is the resolution as set forth in the complaint as first filed].

"This resolution was passed by Mr. Francesco Piombo, and seconded by Mr. Louis Re, and unanimously accepted by our Stockholders of the Corporation." The page is unsigned.

The corporation was unable to produce the minute book kept in Italian by Rossi or his roll call book. He testified that when his term as secretary ended he placed his books in a box and turned them over to the new secretary, Ben Cerruti. Cerruti testified that the box had been left in an upstairs room in the office of the company, but was no longer there. He and Ferro, president, had searched for it, but had been unable to find either the box or the Italian minute book. The English minute book was kept by the bookkeeper in the office safe.

Appellant suggests that there is "some question" as to whether any resolution at all was passed, although we do not understand him to contend that as a matter of law the evidence is insufficient in this respect. He observes that the minutes were generally written in longhand and signed by the secretary, and that no space was left in the minute book between the longhand minutes of the directors' meeting of February 26, 1930, on page 83, and those on the following page for the meeting of March 26, 1930. The typed matter on the sheet clipped to page 84 obviously does not set forth complete minutes of either the directors' meeting of March 12, or the stockholders' meeting of March 15. In fact the book contained only minutes of the directors' meetings and of the annual stockholders' meetings at which directors were elected, although the Italian minute book, according to Rossi, included minutes of all stockholders' meetings, held regularly once a month. It would have been a departure from practice, therefore, for the minutes of the stockholders' meeting of March 15 to have been included.

[1] Why the minutes of the directors' meeting of March 12, 1930, were not set forth in the usual form is not explained, but their absence and the inability to produce the Italian minute book do not establish conclusively that no meeting was held and no resolution passed, in view of the testimony of those who were officers and directors at the time as to the passage of the resolution. An examination of the minute book reveals other resolutions in typewriting, pasted rather than clipped to the book, which are not shown by the longhand English minutes. Pasted to page 100 are minutes of a board of directors' meeting held on January 28, 1931, showing passage of a resolution amending the provision of the Articles of Incorporation setting forth the purposes of the corporation. Longhand minutes of the same meeting, on page 100, contain no reference to this resolution.

Pasted to page 101 is a typed page setting forth, but not in complete minutes, a resolution in regard to compensation insurance of the company passed at a directors' meeting on January 7, 1931. There are no longhand minutes for this meeting.

Pasted to page 103, again not included in complete minutes, is a lengthy resolution passed at a directors' meeting on February 4, 1931, providing for the purchase by the company of all outstanding capital stock of the Contra Costa Hog Company and of certain contracts at a purchase price of $75,000 to plaintiff corporation. There are no longhand minutes for this meeting.

The typed resolution changing the articles, pasted to page 100 above other longhand minutes, is not signed by the secretary. The other two resolutions noted above are signed. In the circumstances it is readily apparent that great significance cannot be attached to the omission from the book of complete longhand minutes of a directors' meeting held on March 12, 1930, as giving rise to a suspicion that no resolution at all was passed on that date.

For the plaintiff corporation the following witnesses testified as to the contents of the resolution of March, 1930: Ben Cerruti, director in March, 1930, who thereafter succeeded Rossi as secretary; F. Martino, a director in March, 1930; Louis Re, vice-president of the company at the time of trial, a director in 1930; Dominic Rossi, a director and secretary in 1930. The only witnesses called by defendant were Cerruti, called under section 2055, Code of Civil Procedure, and defendant himself, who did not testify as to the terms of the resolution. Plaintiff Ferro, president of the company, was absent in Europe at the time of trial.

[2] The several witnesses for the company all testified that the resolution was to apply whatever the cause of a stockholders' death. The entire lack of reason for invoking the resolution only when a stockholder died an accidental death in itself strongly supports this testimony. The resolution as phrased on the typed sheet attached to the minute book is so ineptly worded, obviously by one not familiar with English, as to be ambiguous, if not meaningless. As written it requires explanation and interpretation. Appellant does not contend that corporate minutes are more than prima facie evidence of corporate action. In view of the absence of any reason to confine the resolution to cases where a stockholder died accidentally it may be doubted whether the record would support any other conclusion than that based on the testimony of plaintiffs' witnesses that it was to apply whatever the cause of death.

[3] The further contentions that the evidence is insufficient as a matter of law to show that decedent assented to the resolution, or that he endorsed and delivered his stock pursuant to it, cannot be upheld. The question of decedent's assent to the resolution is of major importance if the resolution is sustained on the theory that it operated as an agreement between the stockholders themselves and between them and the company, as will be pointed out hereafter. There was testimony that decedent was present at the meeting, that all stockholders were present. Absence from monthly meetings was punishable by fine and attendance was regularly so large that a hall was rented. The vote on the resolution was by show of hands. There were no dissenting votes. All stockholders there-

after endorsed their stock. Appellant argues that the testimony is consistent with deceased not having voted at all. A failure to vote under such circumstances indicates assent where a stockholder subsequently endorses his stock and leaves it with the corporation, as provided by the resolution.

Appellant's further contention that it does not appear that the stock was endorsed pursuant to the resolution cannot be sustained. The only reasonable inference to be drawn from his endorsement in the circumstances is that it was pursuant to the resolution. The deposit of the stock, unendorsed, to guard against its loss, had been made several years previously. Even had decedent not been present at the meeting or had not taken part in the vote, his act of endorsing the stock pursuant to the resolution would indicate his assent and purpose to be bound by it.

[4, 5] On this branch of the case the problems presented are all factual. The testimony of the witnesses does show contradictions, which respondents explain as due to their difficulty with the English language. It cannot be held as a matter of law that the evidence is insufficient to support the findings. There being substantial evidence and inferences therefrom to support the findings, this court has no power to disturb the judgment based thereon.

[6, 7] The next question presented is whether the endorsement and deposit of the stock with the corporation pursuant to the resolution was effective to create a trust in the stock. Unless an interest presently passed to the corporation as trustee when the defendant's testator endorsed the certificate and left it with the corporation, the arrangement was ineffective to create a trust. Cohn v. Klein, 209 Cal. 421, 287 P. 459; Nichols v. Emery, 109 Cal. 323, 41 P. 1089, 50 Am.St.Rep. 43; Tennant v. John Tennant Memorial Home, 167 Cal. 570, 140 P. 242; Niccolls v. Niccolls, 168 Cal. 444, 143 P. 712. That is, if title does not pass until death, the transfer is testamentary, and must comply with the formalities prescribed for wills. If no interest passed in the present case until death of the stockholder, or if the arrangement was a mere agency which was revoked by death of the stockholder, then plaintiff corporation and its stockholders have no rights by virtue of the resolution and acts done pursuant thereto.

[8] In order to create a valid trust the transfer to the trustee need not be of a present interest, but may be of a future interest. All that is required is that an interest presently pass to the trustee. In Tennant v. John Tennant Memorial Home, supra, a grantor executed and delivered a deed absolute in which she reserved a life estate, power to revoke and power to sell. The court held that the same rules applied as to the case of a similar grant to a trustee, that an interest presently passed which saved the grant from being testamentary, notwithstanding the power of revocation and power of sale reserved. This case has been cited with approval in Gordon v. Barr, 13 Cal.2d 596, 91 P.2d 101, and American Bible Society v. Mortgage Guarantee Co., 217 Cal. 9, 17 P.2d 105. See notes, 73 A.L.R. 209; 11 A.L.R. 23.

In Nichols v. Emery, supra, a father executed a deed to his son as trustee, with instructions in the deed to sell within ten months of the grantor's death and to divide the proceeds in a certain manner. A power of revocation was reserved and no disposition was made of the estate intervening between the date of the deed and the death of the trustor. The court held that there was a present transfer of interest which was operative and absolute until revoked by the grantor, that there remained in him a life estate.

[9] In the case herein the resolution does not purport to restrict a stockholder's right to sell the stock during his lifetime. There is evidence that it was the practice to make no sale without the approval of the company. However, under the rule of the Tennant case, the retention of the right of the stockholder to sell the stock during his lifetime would not prevent the resolution and acts done under it from being a present transfer.

[10] It was not necessary to the transfer of an interest to the corporation as trustee that the corporation's rights be shown on its stock transfer book. The transfer was not the usual transfer of stock ownership. The corporation apparently acted without legal advice and it is, therefore, understandable that these special transfers should not be registered on its books.

[11] Appellant objects that no intent to create a trust was shown here. The purpose to be accomplished appears beyond

dispute—that if the stockholder left no capable son the company was to have the right to sell the stock, but that it should have no beneficial interest in the proceeds. To the accomplishment of this purpose it was necessary that a legal interest pass to the company before the death of the stockholder. The endorsement and delivery of the stock was an appropriate means of making such a transfer. That is, the stockholders intended to accomplish their purpose by the means adopted. The trial court, therefore, properly held that their intent was to create a trust although the stockholders doubtless did not fully understand the legal nature of their acts.

As indicating that there was no intent to transfer legal title by means of the endorsement and delivery of the stock, appellant relies strongly on a stipulation made by respondent's counsel during the trial. The following occurred:

"The Court: As I understand the testimony of the previous witnesses—I don't know but maybe you will stipulate to it, to save time—that the certificate of stock of the deceased was kept in the possession of the Corporation, and no transfer was made of it to the Corporation, nor did the Corporation claim any title to that certificate of stock by reason of its endorsement in blank, or otherwise, isn't that the situation?

"Mr. Decoto [respondents' counsel]: That is the stipulation, and I will make that stipulation, if the Court please.

"Mr. Brandt [appellant's counsel]: And that the endorsement and leaving of the stock with the Company was not intended to be, and did not transfer any legal or beneficial interest in the stock, or title to it?

"Mr. Decoto: I am willing to make the stipulation as recited by the Judge, and I think that covers it fully.

"Mr. Brandt: Well, I don't know that the Company doesn't claim any title to the stock.

"The Court: In itself?

"Mr. Brandt: In itself.

"Mr. Decoto: We have stipulated to that.

"Mr. Brandt: Well, possibly it covers the matter. In other words, Mr. Decoto, so that we can save time, the stock was merely left in the possession and custody of the Oakland Scavenger Company?

"Mr. Decoto: Well, when you go into that, I would have to add to that, for certain purposes.

"The Court: Well, I presume it is your contention that the stock was left with the Company, and was endorsed in blank, so that, in case of the death of one of the members, if there were no son to qualify to carry on, that the Corporation could then sell the stock? I presume that is your contention?

"Mr. Decoto: That is our contention.

"The Court: That is the only purpose for which it was endorsed in blank and left with the Company?

"Mr. Decoto: Yes. The Corporation claims no title in itself to the stock."

These remarks, when the record is read as a whole, do not amount to a stipulation that no trust was created. When the circumstances under which this stipulation was made are considered, it is clear that it should be given no broader meaning than that the company had no beneficial title, that it had no title or interest in the stock in the sense that it was without right to the proceeds from the sale of the stock, that its title was only in aid of a right to sell the stock. This is made clear by the fact that prior to the institution of this action respondents' counsel had taken the position that under the resolution the corporation itself became absolute owner upon the death of a stockholder, with the obligation only to pay a price therefor. The stipulation made it plain that he no longer adhered to this position. It was thereafter brought out during the trial that if the corporation was to succeed it must be on the theory of a trust.

[12] As indicating that there was no intent presently to transfer a legal interest by the endorsement of the stock, appellant also refers to a provision contained in new by-laws adopted after this controversy arose. The by-law reads: *"Upon the death of the stockholder,* full ownership and title to his stock certificate, and the shares of stock represented thereby *shall pass to and become vested* in the Board of Directors of the Oakland Scavenger Company, for the purposes set forth in this Article." (Italics supplied.) Since the new by-law provision was intended to make more certain the accomplishment of the object of the earlier resolution, and in appellant's analysis under the new provision no interest passed until the death of the stockholder, he argues that it cannot be presumed that the intent under the early resolution was any broader than the by-law. But use of such language as that contained

in the by-law is not conclusive as to when an interest passes. The question depends on the whole context, interpreted in the light of surrounding circumstances. Cohn v. Klein, 209 Cal. 421, 287 P. 459; Randall v. Bank of America, 48 Cal.App.2d 249, 119 P.2d 754.

[13-16] Appellant's further contention that if a trust was created it was invalid because the effect is unreasonably to restrain a stockholder's right of alienation, cannot be sustained. It is not necessary here to consider whether the restriction would be valid as a by-law. A by-law adopted by majority vote binds stockholders who do not assent. Even a by-law, if invalid, may operate as a binding agreement on those who assent to it, if not opposed to public policy as a contract. Vannucci v. Pedrini, 217 Cal. 138, 143, 17 P.2d 706; People's Home Savings Bank v. Sadler, 1 Cal.App. 189, 81 P. 1029; Jennings v. Bank of California, 79 Cal. 323, 21 P. 852, 5 L.R.A. 233, 12 Am.St.Rep. 145; 6A Cal.Jur. 327. The resolution herein was not adopted as a by-law. All stockholders in general and Gandi in particular assented to it and endorsed their stock and permitted it to remain with the company as contemplated by the resolution. As an agreement it is not opposed to public policy. By the resolution each stockholder surrendered his right to make testamentary disposition of his stock, although not of the proceeds from its sale. But this results in any case where the owner of property creates a trust without reserving a right to revoke. The situation insofar as the question of the restraint on the owner's right of alienation is concerned is no different where the subject of the trust is stock than where it is other personal property or real property.

[17] The trust is not invalid by reason of the fact that its object was to give the corporation some control of its stockholder personnel. The reason for such control in a corporation operated as was respondent is apparent. This purpose is frequently accomplished by agreements which provide that before a stockholder sells his stock he must first give the corporation or other stockholders an option to buy it. Such agreements are generally sustained. Baumohl v. Goldstein, 95 N.J.Eq. 597, 124 A. 118; Nicholson v. Franklin Brewing Co., 82 Ohio St. 94, 91 N.E. 991, 137 Am.St.Rep. 764, 19 Ann.Cas. 699; 8 Fletcher, Cyclopedia Corporations, Rev. and Perm. Ed., p. 786; notes, 117 A.L.R. 1359; 65 A.L.R. 1168, 1183, citing numerous cases. In this state it has been held that although a provision giving other stockholders an option to purchase is valid as an agreement, an option to the corporation to purchase itself violated section 309, Civil Code, as it then stood. Mancini v. Patrizi, 87 Cal.App. 435, 262 P. 375; Mancini v. Patrizi, 110 Cal. App. 42, 293 P. 828; Vannucci v. Pedrini, supra. The section prohibited the dividing, withdrawing or paying to the stockholders, or any of them, any part of the capital stock of the corporation except such as remained after payment of its debts on dissolution. The arrangement in the present case is no more objectionable than the option plan insofar as the perpetuation of control by existing stockholders or directors is concerned.

In Krauss v. Kuechler, 300 Mass. 346, 15 N.E.2d 207, 117 A.L.R. 1355, the court upheld the validity of an agreement by which it was provided that at the death of a stockholder his shares of common stock should automatically become the property of the corporation by paying to the estate of the deceased a sum agreed upon by the remaining stockholders. In Searles v. Bar Harbor Banking & Trust Co., 128 Me. 34, 145 A. 391, 392, 65 A.L.R. 1154, the court upheld an agreement between stockholders as follows: "Any person acquiring through will, or descent, or by conveyance to take effect at death, any stock of this corporation issued after the passage of this by-law shall be bound to offer the same for sale and transfer to any party appointed by the Trust Company Directors at a fair value of such stock as determined by said Directors, or if said value is not satisfactory to the estate; at the fair value of said stock as determined by three appraisers, one to be chosen by the estate, one chosen by the Directors and one chosen by those two, but any and all appraisers must be chosen from and be when chosen, stockholders in said Trust Company."

[18] The resolution in the present case applies only in the event of the death of a stockholder. It does not purport to restrict his right of alienation during his lifetime. Provisions restraining a stockholder's right of transfer are strictly construed. 18 C.J.S., Corporations, § 391, p. 921. Under the rule of the Tennant case, supra, a transfer does not become testamentary because the transferrer reserves the absolute power of sale during his lifetime. Witnesses herein testified to a practice of not

selling without receiving the approval of the company, but appellant himself contends that it was not shown that there was a binding agreement to that effect. However this may be, the present action concerns the effect of the resolution which expressly was made to apply only in the event of a stockholder's death. We are not here concerned with what restrictions during the lifetime of a stockholder will operate as an unreasonable restraint on alienation.

[19] It is also objected that the resolution is ineffective because the phrase "qualified and capable of assuming the said vacancy" is too uncertain; that it in effect enables the company to sell at a low price to one whom it prefers for some reason, while rejecting the higher bid of another who is qualified and capable. Appellant contends that this is just what the company is attempting to do in this instance. The trial court made it plain in his remarks during the trial that he did not so construe the resolution; that the discretion vested in the directors was not to be exercised arbitrarily or in bad faith; that if the company rejected the higher bid of one who was capable the defendant would have recourse to the courts. See Krauss v. Kuechler, 300 Mass. 346, 15 N.E.2d 207, 117 A.L.R. 1355. The judgment as originally signed provided that the company should sell the shares "at the best price obtainable from a person *in the opinion of the Board of Directors of Oakland Scavenger Company,* qualified and capable of assuming the vacancy created by the death of Giacomo Gandi." When the italicized phrase was called to the court's attention on motion for new trial it was deleted.

[20] Appellant makes the further contention that the resolution is void for uncertainty in that it does not provide expressly for the contingency of a stockholder having two or more sons, all of them capable to assume the vacancy in the company. The reasonable implication is that in such event the company shall select the son whom it deems best qualified and most capable. In view of the long standing scheme for uniform stock holdings of 100 shares, with payment of the same wages or dividends to each stockholder, it cannot be held to have been within the contemplation of the parties that a deceased owner's shares should be divided between his several sons. The arrangement results in a preference to one son over another. But this was a matter for consideration of the stockholders when they unanimously passed the resolution.

The judgment is affirmed.

GOODELL, J. pro tem., and WARD, J., concurred.

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51 Cal.App.2d 127

ALEXANDER v. SCATTERGOOD et al.

Civ. 12946.

District Court of Appeal, Second District,
Division 1, California.
April 6, 1942.

1. Evidence 🔑83(2)

Presumption existed that official duty was regularly performed in connection with the discharge of municipal employee and that the law governing discharge of civil service employees was observed. Civ.Code, § 1708; Code Civ.Proc. § 1963, subds. 15, 33.

2. Municipal corporations 🔑218(8)

In action by classified civil service employee of city for wrongful discharge, where there was no direct attack made upon order of discharge grounded upon extrinsic fraud in its procurement, presumption existed that charges allegedly made against employee were true and that the order discharging her was determined by duly constituted authorities to be just and proper. Civ.Code, § 1708; Code Civ.Proc. § 1963, subds. 15, 33.

3. Municipal corporations 🔑218(10)

If charges contained in order discharging classified civil service employee of city were true and procedure provided for bringing about discharge of employee was adhered to, resulting in an ultimate finding that the employee was discharged for cause, defendants could not be held liable in damages on theory that they unjustifiably procured discharge of the employee. Civ.Code, § 1708; Code Civ.Proc. § 1963, subds. 15, 33.

4. Municipal corporations 🔑218(10)

Cause of action of classified civil service employee of city was based upon right derived solely from city charter and therefore complaint was required to allege compliance with charter requirements in order to state a cause of action on theory that discharge was unjustifiably procured by defendants. Civ.Code, § 1708; Code Civ.Proc. § 1963, subds. 15, 33.

5. Municipal corporations ⚿218(10)

In action by classified civil service employee of city, where employee failed to allege compliance by her, or failure of compliance by defendants with requirements of city charter preventing discharge except for cause, complaint did not allege a cause of action for wrongful discharge. Civ.Code, § 1708; Code Civ.Proc. § 1963, subds. 15, 33.

6. Municipal corporations ⚿218(1)
States ⚿53

Where one accepts and holds an office subject to conditions that are imposed by law of the state or political subdivision whose agent or servant such person is, and if a cause of removal and mode of enforcing it are provided by law, the person is deemed to have accepted his office or employment on condition that he may be removed for that cause and in the manner provided.

7. Municipal corporations ⚿218(1)

Where city charter created a position and employment occupied by plaintiff who sought damages for wrongful discharge, the charter properly provided the manner of eliminating the position or discharging the holder therefrom and the plaintiff took the same subject to the charter conditions.

8. Municipal corporations ⚿218(8)

Where order discharging classified civil service employee was not directly attacked on ground of extrinsic fraud, complaint based on theory that defendants maliciously, and without probable cause charged employee with certain derelictions as result of which the employee was discharged, did not state a cause of action for malicious prosecution, since such theory would amount to a "collateral attack" on the order. Civ.Code, § 1708; Code Civ.Proc. § 1963, subds. 15, 33.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

9. Municipal corporations ⚿218(10)

Where remedies provided by city charter to discharged classified civil service employee are ample and exclusive, a discharged employee is required to pursue and exhaust them and if she fails to do so she is without standing in court in action for damages based on theory of wrongful discharge. Civ. Code, § 1708; Code Civ.Proc. § 1963, subds. 15, 33.

10. Municipal corporations ⚿218(10)

In action by classified civil service employee of city for damages resulting from allegedly wrongful discharge, complaint did not state cause of action against fellow employee who was without power under city charter to discharge the plaintiff employee. Civ.Code, § 1708; Code Civ.Proc. § 1963, subds. 15, 33.

Appeal from Superior Court, Los Angeles County; Ruben F. Schmidt, Judge.

Action by Audrey D. Alexander against Ezra F. Scattergood and others for damages for wrongful discharge. From a judgment of dismissal, plaintiff appeals.

Affirmed.

R. R. Sleeper, of Los Angeles, for appellant.

Nicholas & Davis, of Los Angeles, for respondents.

WHITE, Justice.

This appeal is prosecuted by plaintiff from a judgment of dismissal predicated upon an order sustaining a demurrer to the complaint without leave to amend. Upon the occasion of entering the minute order sustaining the demurrer without leave to amend, the court directed that the signing and filing of a formal judgment be withheld for a period of ten days to afford plaintiff an opportunity to make application to file an amended complaint. When within the specified time no application, motion or request for leave to amend the complaint was made or filed, the court directed the entry of the formal judgment aforesaid.

The complaint, after alleging the corporate status of the city of Los Angeles, set forth that the Department of Water and Power is a department of the city government established in accordance with the city charter. It then alleged that on or about October 23, 1929, the plaintiff, after a competitive civil service examination, was found qualified and placed on the eligible list for employment as a stenographer; that on or about March 3, 1930, plaintiff was, in accordance with the charter of the city of Los Angeles and the rules and regulations of the departments of Water and Power and Civil Service, selected and employed as a senior stenographer, in which capacity she continued to be regularly and continuously employed until September 9, 1937. The complaint alleged that at all times during the period of her employment plaintiff "pursued the duties of her said position in a careful, prudent and efficient manner"; that at the commencement of her employment she received a salary of $125 per month, and that subsequently the amount of such salary was increased to $140 per month, which latter amount was being paid her on September 9, 1937. It was alleged in the complaint that the defendant Ezra F. Scattergood was at all times employed by the Department of Water and Power of said city as the general manager of the Bureau of Power and Light, and that the defendant Lydia Jean Morgan was at all times mentioned in the complaint a senior stenographer of the same grade and classification under civil service rules as was the plaintiff. It was then alleged that while plaintiff was employed as above set forth, the defendants, "with false and untrue accusations against the plaintiff and with threats to discharge her and false allegations that she was 'spying' upon other employees, and by employment of 'stool pigeons' to seek out petty tales against the plaintiff and refusals to investigate the truth or falsity of such petty tales and accusations, sought to harass and oppress the plaintiff, and wrongfully, unlawfully, maliciously, with wanton disregard of the rights of the plaintiff, and solely for personal reasons and in consummation of such trickery, intrigue, and vindictiveness, discharged the plaintiff and removed her from her said position. * * *" Judgment was sought for the sum plaintiff would have received from the time of her discharge up to the date of the commencement of this action, in the sum of $4,168, and for exemplary damages in the sum of $20,000.

This action is founded upon section 1708 of the Civil Code, which prohibits any person from injuring the person or property of another or from infringing upon any of his rights. Assuming the correctness of plaintiff's contention that one who maliciously and without justifiable cause induces an employer to discharge an employee is liable in an action of tort to the employee for the damages thereby sustained (Civ.Code, § 1708; Cooley on Torts, 1932 Ed., vol. II, § 226, ch. 9), we are of the opinion that the complaint herein, as framed, does not state a cause of action under the announced theory.

Plaintiff was a classified civil service employee of the city of Los Angeles, whose employment and dismissal therefrom are governed by the provisions of the city charter. With reference to employment and discharge in the Department of Water and Power, subdivision 2 of section 80 of the charter empowers the general manager (which was the position held by the defendant Scattergood) "to appoint, discharge, suspend, or transfer the employees of the department, other than the secretary of the board and the chief accounting employee of the department, and to issue instructions to said employees, other than the secretary and the chief accounting employee, in the line of their duties, all subject to the Civil Service provisions of the charter; * * *." Section 112a of the charter authorizes any board or officer having the power of appointment of officers, members and employees in any department of the government of the city to remove, discharge or suspend such employee, but provides that such discharge of any classified civil service employee shall be made only for cause; that such cause shall be stated in writing by the board or officer having the power to effect such removal and filed with the Board of Civil Service Commissioners with a certificate that a copy of such statement has been served upon the discharged employee. While the discharge of the employee takes place upon such filing, nevertheless within fifteen days after such statement shall have been filed, the Board of Civil Service Commissioners is empowered upon its own motion, or upon written application of the discharged employee, must, proceed to investigate the grounds for such discharge. The board is authorized, after making such investigation, if it finds that the grounds of discharge were insufficient or not sustained and that the person is a fit and suitable person to fill the position from which he was removed, to order such employee's reinstatement or restoration to duty. The order of the Civil Service Commission affirming or revoking the discharge of an employee is by the charter declared to be final and conclusive. The charter further provides that in the event the Board of Civil Service Commissioners makes an order as aforesaid of restoration, the discharged employee is entitled to receive compensation from the city the same as if he had not been removed or discharged by the appointing board or officer.

[1-3] In view of the fact that the complaint contains no allegation to the contrary, we must presume that official duty was regularly performed in connection with the discharge of plaintiff. (Code Civ.Proc., § 1963, subd. 15), and that the law was observed. Code Civ.Proc., § 1963, subd. 33; Hauser v. Pacific G. & E. Co., 133 Cal.App. 222, 23 P.2d 1068. It must therefore be assumed that at the time her employment with the city was severed plaintiff was served with a notice in writing of her discharge; that such notice, with a certificate of service upon her, was filed with the Board of Civil Service Commissioners; that if the plaintiff filed with said board a written application within five days after service upon her of the statement of the ground of her discharge, that the Board of Civil Service Commissioners, pursuant to the provisions of the charter, proceeded within fifteen days to investigate and did investigate the same, and determined that the grounds stated for such discharge were sufficient. There is no direct attack made upon the order of discharge herein grounded upon extrinsic fraud in its procurement, and therefore the presumption arises that the charges allegedly made by respondents against the plaintiff were true, and that the order discharging her was determined by the duly constituted authorities to be just and proper. Caraker v. Webster, 24 Cal.App.2d 300, 74 P.2d 1048; Roos v. Harris, 203 Cal. 201, 263 P. 225; Fetterley v. Gibson, 210 Cal. 282, 291 P. 411; Plum v. Becket, 120 Cal.App. 507, 7 P.2d 1111. Of necessity it follows that if the charges contained in the order of her discharge were true and that the procedure provided by the charter for bringing about her discharge were adhered to, resulting in an ultimate finding that plaintiff was discharged for cause, then defendants cannot be held liable in damages therefor.

[4-7] In view of the fact that plaintiff's cause of action arises upon a right derived solely from the charter of the city of Los Angeles, her complaint must allege compliance with the requirements of the charter in order to state such a cause of action. Kline v. San Francisco U. School Dist., 40 Cal.App.2d 174, 104 P.2d 661, 105 P.2d 362; Green v. Grimes-Stassforth S. Co., 39 Cal.App.2d 52, 102 P.2d 452; Watts v. Currie, 38 Cal.App.2d 615, 101 P.2d 764. Plaintiff having failed to allege in her complaint compliance by her or failure of compliance by the defendants with the requirements of section 112a of the city charter above set forth, which section prevents her discharge except for cause, such failure is fatal to her alleged cause of action for her claimed wrongful discharge. When one accepts and holds an office subject to certain conditions that are imposed by the laws of the state, county, city or other political subdivision whose agent or servant such person is, and if a cause of removal and a mode of enforcing it are provided by law, then such officer or employee is deemed to have accepted his office or employment on condition that he may be removed for that cause and in the manner provided by the law. Cline v. Superior Court, 184 Cal. 331, 336, 193 P. 929. The charter of the city of Los Angeles having created the position and employment occupied by plaintiff, it was proper to provide in such charter the manner and means of eliminating such position or discharging the holder therefrom, and the holder or incumbent in such office or employment takes the same subject to the charter conditons which accompany it.

[8, 9] Even though we assume that plaintiff has attempted to allege a cause of action for malicious prosecution, and that the basis therefor is that the defendants maliciously, falsely and without probable cause charged plaintiff with certain derelictions of duty in a notice of discharge filed with the city civil service commission, as the result of which plaintiff was discharged from her position, nevertheless a cause of action is not stated. Not setting forth any allegations of extrinsic fraud which was involved in procuring the order of discharge, such a theory would amount to a collateral attack on the order apparently made by the civil service commission ousting plaintiff from her position. Bound as we are to assume either that plaintiff appealed to the civil service commission, which board sustained her discharge, or that she failed to take advantage of the provisions of the charter which entitled her to ask for such a review of the order of the general manager discharging her, and there being no direct attack upon the order of discharge grounded on extrinsic fraud in its procurement from the civil service commission, it must be assumed that the charges allegedly made by defendants were true and that the order of discharge was proper. Caraker v. Webster, supra. Where, as here, the remedies provided by the charter are ample and

exclusive, plaintiff was required to pursue and exhaust them, and having failed to do so, she is without standing in court in an action of the kind attempted to be alleged in the complaint filed herein. Johnson v. City of Glendale, 12 Cal.App.2d 389, 55 P.2d 580; 1 Cal.Jur. 381, 382, § 58, and cases cited.

[10] Concerning the allegations contained in the complaint with reference to the defendant Lydia Jean Morgan, who was a fellow employee of plaintiff, it is at once apparent from a reading of the allegations that defendant Lydia Jean Morgan could not possibly have discharged the plaintiff as she is alleged to have done, because she had no power so to do under the charter of the city of Los Angeles. On that ground, irrespective of other claimed deficiencies in the complaint with reference to defendant Lydia Jean Morgan, it must be held that as to her no cause of action was stated.

For the foregoing reasons, the judgment appealed from is affirmed.

YORK, P. J., and DORAN, J., concurred.

50 Cal.App.2d 750

WEINBERG v. DAYTON STORAGE CO., Inc., et al.

Civ. 11791.

District Court of Appeal, First District, Division 1, California.

March 27, 1942.

Rehearing Denied April 25, 1942.

Hearing Denied May 25, 1942.

1. Warehousemen 🔑25(5)

Where New York moving company estimated household furniture, actually weighing 4,415 pounds, to weigh 3,000 pounds, and contracted with owner to ship furniture to California at fixed charge per hundred pounds and represented to agent California storage company that weight was 7,900 pounds, and California company, upon receipt of the furniture, demanded payment based upon represented weight before delivery of furniture to owner, demand was excessive amounting to a "conversion", notwithstanding that California company acted in good faith.

See Words and Phrases, Permanent Edition, for all other definitions of "Conversion".

2. Principal and agent 🔑159(2)

An agent is guilty of conversion although acting in good faith and in exact accord with the instructions of his principal if the latter is guilty of conversion.

3. Bailment 🔑16

Where a bailee of personal property has come into possession of the owner's property lawfully, a demand for possession by the owner is essential to create a liability for conversion.

4. Warehousemen 🔑25(8)

Where owner of furniture in possession of storage company seeking recovery for the conversion thereof had several times questioned correctness of storage company's charges, and storage company tendered furniture to owner conditional upon payment of charges predicated on claimed weight subsequently proved to be excessive, and manner of tender indicated that a lesser sum than that demanded would not be accepted, owner did not "waive" his objection to the claimed weight of the goods by failure to challenge its correctness at time of tender.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

5. Tender 🔑15(3)

The basis of the rule that objections to a tender not raised are deemed waived is that ordinarily a party who makes an improper tender through no fault of his own should be given an opportunity to correct it.

6. Trover and conversion 🔑9(3)

A demand for delivery of property by the owner thereof as a prerequisite to recover for its conversion is not necessary where the acts of defendant in relation to the property show a conversion, or where, under the facts, a demand would be futile.

7. Warehousemen 🔑25(5)

Where furniture weighing 4,415 pounds was shipped by New York moving company to agent California storage company on representation that weight was 7,900 pounds and storage company tendered furniture to owner conditional upon payment of charges predicated on weight represented to it by moving company, the correctness of which charges was questioned by owner, storage company had duty to ascertain true weight before making demand for payment, violation of which was a "conversion" of the furniture.

8. Warehousemen 🔑25(5)

Where owner of furniture shipped from New York moving company to agent California storage company demanded delivery thereof and tendered payment of less than amount actually due and storage company demanded payment of charges predicated on weights represented to it by moving company amounting to more than was actually due, owner made sufficient "demand" for the goods, and failure to comply therewith constituted a "conversion" by storage company.

See Words and Phrases, Permanent Edition, for all other definitions of "Demand".

9. Pleading 🔑237(1, 8)

Great liberality should be used in permitting the filing of amendments to pleadings to conform to proof where they do not prejudice the opposing party, but such amendments should not be allowed when they raise new issues.

10. Appeal and error 🔑1041(4)

In conversion action, error in permitting plaintiff to add new cause of action for fraud to conform to proof was not prejudicial to defendant where evidence amply supported findings against defendant on conversion issue and findings on fraud issue could be disregarded.

11. Appeal and error 🔑1073(5), 1178(6)

Where defendant, in conversion action in reliance on stipulation that plaintiff would receive back her goods in lieu of recovery for reasonable value thereof and would recover only for consequential damages, cut short proof of value of goods converted, and evidence of value was unsatisfactory, an award of a judgment for damages for conversion was prejudicial error requiring a new trial on the issue of damages.

◆

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by May Weinberg against Dayton Storage Company, Incorporated, and Lyon Storage & Moving Company, for conversion of personal property. From a judgment for plaintiff, defendant Lyon Storage & Moving Company appeals.

Reversed with directions.

Aiken, Kramer & Aiken, of Oakland, for appellant.

Dudley H. Nebeker and Richard H. Klippert, both of Oakland, for respondent.

PETERS, Presiding Judge.

Defendant Lyon Storage and Moving Co. appeals from a judgment awarding plaintiff $1,750 as the reasonable value of certain personal property of plaintiff found to have been converted by defendant, and also awarding plaintiff $750 damages for the loss of use of the property. Dayton Storage Company, Inc., a New York corporation which does not do business in this state, was also named as a defendant, and allegations of the complaint were directed against it, but it was never served, nor did it appear in the action. The deposition of its employee M. H. Richer, however, was read into evidence on behalf of defendant.

The complaint as originally filed states a cause of action for conversion. It avers that on January 5, 1940, plaintiff was the owner and entitled to the possession of certain described personal property; that on that date she served on defendant a written demand for the return of the property; that defendant then and still refuses to return the property to plaintiff; that on that date defendant converted the property to plaintiff's damage in the sum of $5,000. At the trial, after all the evidence was in, plaintiff was permitted to amend the complaint "to conform by proof" by adding a second count charging defendants Dayton Storage Company, Inc., and Lyon Storage and Moving Co. with fraud and deceit.

The evidence shows that in November, 1938, the respondent made arrangements with the Dayton Storage Company, Inc., in New York for the storage of her household furnishings in New York, and for their transportation to California when, and if, she should desire them. The negotiations were had with M. H. Richer, the "estimator" employed by Dayton Storage Company, Inc. The respondent testified that she showed Richer all of the goods to be stored and shipped, and that he told her that packed in a lift van the goods would weigh, "at the most," 3,000 pounds. It is a reasonable interpretation of the evidence that Richer represented that the maximum weight of the goods in a lift van would not be over the above-mentioned weight and that they probably would weigh less. Based on this representation, respondent entered into a written contract with the Dayton Storage Company, Inc., on a form prepared by it, for the transportation of the goods to California when ordered by respondent for $6.50 per one hundred pounds. The agreement provided that the goods should be packed and removed from respondent's New York apartment by the Dayton Storage Company, Inc., and shipped by boat in lift van to Oakland, California, and delivered to, and unpacked in, respondent's residence in Oakland for the above-mentioned rate. In the printed portion of the form appeared the following: "This estimate is approximate only on goods listed above and is not to be considered a definite figure." It was then provided the goods should be stored in New York for one month for $7.25 (and $7.25 for each succeeding month); that the "Estimated Wgt. 3,000 lbs. at $6.50 per cwt." made the shipping charges $195; that the cost of insurance was $8; that the "Total Estimate" was $210.25. Typed on the bottom of the first page appears this statement: "If shipment goes to California, all storage charges and 50% of estimate to be paid before shipping." The agreement was signed by respondent and Richer, and respondent paid $10 on account at that time. Respondent also testified that she was informed by Richer that appellant represented the Dayton Storage Company, Inc., in California, and that when she desired the goods she should call upon that company in this state.

In November, 1939, respondent decided to have the goods shipped to California. She had paid the Dayton Storage Company, Inc., for the storage of the goods except for the first month which was included in the above-mentioned contract. She called upon appellant company in Oakland and talked with Jack Blum, "storage estimator and salesman." Respondent showed the contract to Blum, and asked that the goods be shipped. The appellant communicated with the Dayton Storage Company, Inc., and it was arranged that appellant should act as the agent of the Dayton Storage Company, Inc., in moving the goods from the shipping terminus in Oakland to respondent's residence in that city, and in collecting the amount due from respondent. Appellant was to be paid by the Dayton Storage Company, Inc., for this service at rates fixed by the California Railroad Commission. Respondent paid appellant $105, the same being approximately 50% of the estimate fixed in the contract. Respondent had several conversations with Blum concerning the possibility of shipping the goods by train, but, upon ascertaining the rate, ordered the goods shipped by boat according to the contract.

The Dayton Storage Company, Inc., delivered the goods to a steamship company on November 30, 1939. The goods were consigned to appellant and the bill of lading showed a purported weight of 7,900 pounds. The goods were removed from the boat in Los Angeles due to the shipping strike in San Francisco. They were conveyed by train by the Southern Pacific to San Francisco consigned to appellant, the bill of lading also showing a purported weight of 7,900 pounds.

On December 11, 1939, prior to the arrival of the goods, appellant wrote to respondent advising that the goods had been shipped, that the shipment weighed 7,900 pounds and that she owed a balance of $416.50. On December 27, 1939, respondent paid to appellant an additional $134.19. On January 4, 1940, appellant wrote to respondent informing her that the goods had arrived, and requesting payment of a claimed balance of $282.51, plus an additional $51.75 for railroad freight from Los Angeles. The claimed balance of $282.51 is based on a total charge of $513.50 for 7,900 pounds at $6.50 per one hundred pounds, plus $8 insurance, making a total of $521.50. If payments of $105 and $134.19 be deducted the balance is $282.31. The demand, however, was for $282.51.

Respondent had seriously questioned the correctness of the charges from the moment she was first informed of the total amount claimed. She had communicated that fact on several occasions to appellant. In fact, before the goods were shipped from Los Angeles, appellant and respondent entered into an agreement that by permitting such shipment respondent waived no rights by reason of her claimed overcharges.

After receiving the demand of January 4, 1940, the next day respondent served a written demand on appellant, in which she stated that she had already paid $264.44 for the shipping, which was $54.19 more than the amount called for by the original contract ($210.25); that that demand was made for the return of the overpayment and for immediate delivery of the goods.

It concluded that, unless delivery of the property was made within twenty-four hours of the receipt of the demand, respondent would treat the retention of the property as a conversion. Receiving no response from appellant, eight days later respondent filed her complaint charging appellant and the Dayton Storage Company, Inc., with conversion. The latter company, however, was not served and did not appear.

The case proceeded to trial upon the theory advanced by respondent that under her contract she was liable only for charges predicated on a weight of not to exceed 3,000 pounds. Appellant contended that the contract showed on its face that it was an estimate, and that respondent was liable for 7,900 pounds at $6.50 per one hundred pounds. During the first part of the trial it was assumed that the goods actually weighed 7,900 pounds. The goods were then in the Southern Pacific warehouse consigned to appellant. After appellant had closed its case respondent introduced evidence that she had procured the goods to be weighed at the Southern Pacific warehouse and that the true weight of the goods, plus the weight of the lift van, was 4,415 pounds. Following the introduction of this evidence, which was not contradicted by appellant, and, after the close of all the evidence, respondent was permitted to amend her complaint to conform to proof by adding a second count to her complaint wherein she charged the appellant and the Dayton Storage Company, Inc., with fraud and deceit in misrepresenting the weight of the goods.

On the allegations of the first count the court found that the contract between respondent and the Dayton Storage Company, Inc., was that the company would deliver the goods to respondent at her residence in Oakland for $6.50 per one hundred pounds; that when appellant received the goods it did not deliver the same but demanded as a condition of delivery payment of $334.26, which represented the balance due on a weight of 7,900 pounds plus freight charges from Los Angeles; that the Dayton Storage Company, Inc., represented that the goods would weigh approximately 3,000 pounds; that they actually weighed 4,415 pounds.

Upon the second count the court found that the Dayton Storage Company, Inc., with intent to deceive, represented that the goods would weigh, when packed, 3,000 pounds, which it knew to be false; that respondent entered into the contract in reliance on such representation; that the Dayton Storage Company, Inc., and appellant sought to collect on a basis of 7,900 pounds weight, when the goods actually weighed 4,415 pounds "which was an additional and excessive weight over and above that which the defendants were entitled to charge for of thirty four hundred eighty five pounds (3485), the true facts of which the defendants Dayton Storage Company, Inc., concealed from plaintiff."

It is to be noted that the above findings sustain the right of appellant to charge for 4,415 pounds, rather than 3,000 pounds. It should also be noted that it is not found that appellant misrepresented the weight knowing the true weight. There is no evidence that appellant knew that the true weight was not 7,900 pounds. Appellant had been informed by the Dayton Storage Company, Inc., that the goods weighed 7,900 pounds, and that figure had been given on the two bills of lading. However, the same cannot be said as to appellant's principal, the Dayton Storage Company, Inc. The deposition of Richer, the estimator, for that company, was taken before trial. He testified that he estimated the weight at 3,000 pounds, but that some time after the goods were received by his company they were weighed and the weight was 7,900 pounds. He conceded that in spite of this great variance respondent was not notified of the claimed weight until about the time the goods were shipped.

Although appellant did not know that the weights given on the bills of lading were incorrect, there is some question as to whether, in the exercise of reasonable care, appellant should not have had the goods re-weighed before making the demand upon respondent. Appellant knew of the "estimate" of 3,000 pounds, and knew that respondent seriously questioned the correctness of the charges. Blum testified that, although actual weight frequently varied from estimates to a considerable extent, he had "never seen such a wide variance as this one; I cannot understand it how anyone could say it weighed approximately 3,000 pounds and the shipment could weigh 7,900 pounds * * *." The witness Harvey Lyon testified that he was surprised at the variance between the estimate and the weight shown on the bills of lading. It might well be that good faith, under the circumstances, required appellant to have the goods re-weighed.

[1, 2] However, even if it be conceded that appellant was acting in good faith and in complete accordance with the instructions of its principal, the Dayton Storage Company, Inc., the amount that it demanded as a condition precedent to delivery of the goods was excessive. The law is settled that an agent is guilty of conversion, although acting in good faith and in exact accord with the instructions of his principal, if the latter is guilty of a conversion. Swim v. Wilson, 90 Cal. 126, 27 P. 33, 13 L.R.A. 605, 25 Am.St.Rep. 110. Appellant does not challenge this principle.

The major contentions of appellant are that it is not liable for a conversion because (1) respondent made no proper demand in that she did not tender the amount actually due on 4,415 pounds; and (2) when appellant offered to deliver the goods on payment of the balance due on 7,900 pounds respondent did not challenge the weight given on the bills of lading, but in her demand of January 5, 1940, took the position that regardless of weight she was entitled to the goods on payment of the $210.25.

[3-8] The legal situation is therefore one where the person in possession of the goods demanded, as a condition precedent to delivery, the payment of an excessive sum, while the owner of the goods tendered an amount which, as it subsequently turned out, was too little. Under such circumstances, has a conversion been committed? It is the general rule that where the bailee of personal property has come into possession of the owner's property lawfully, a demand for possession by the owner is essential to create the liability. See cases collected, 24 Cal.Jur., p. 1032, § 10. Appellant urges that, when it tendered the goods on condition that charges predicated on a claimed weight of 7,900 pounds be paid, and respondent did not then challenge the weight, the respondent waived that objection. It relies heavily on the rule that objections to a tender not raised are deemed waived. Kofoed v. Gordon, 122 Cal. 314, 54 P. 1115; Hind v. Oriental Products Co., Inc., 195 Cal. 655, 235 P. 438. The basis of that rule is that, under ordinary circumstances, a party who makes an improper tender through no fault of his own, should be given an opportunity to correct it. That rule, however, is not of inevitable application. It, as well as the rule in reference to the necessity of a demand, is subject to exceptions. It is well settled in this state that there is no necessity for a demand where the acts of the defendant in relation to the property show a conversion, or where, under the facts, a demand would be futile. Mier v. Southern California Ice Co., 56 Cal.App. 512, 206 P. 83; Wood v. McDonald, 66 Cal. 546, 6 P. 452; Lowe v. Ozmun, 3 Cal.App. 387, 86 P. 729; Fiedler v. Allen, 117 Cal. App. 622, 4 P.2d 292; Yamada v. Masue Osawa, 12 Cal.App.2d 133, 54 P.2d 1135; Metzler v. Foster Holding Co., 5 Cal.2d 278, 54 P.2d 447. Each case must turn upon its own facts. In the present case the appellant knew long before the goods arrived that respondent challenged the correctness of the charges. Appellant had seen the contract estimating the weight at 3,000 pounds. Blum testified that, although true weight varied from the estimate, he had never seen a case with a variance such as here is claimed. The question of the weight was several times discussed between appellant and respondent—in fact, appellant wrote to the Dayton Storage Company, Inc., asking that company to ascertain the "exact weight" of the goods before they were shipped. The next day respondent telegraphed to New York informing the Dayton Storage Company, Inc., to ship the goods immediately and to disregard appellant's letter. Respondent testified that this telegram was sent at the suggestion of Blum. When the goods arrived in Los Angeles there was such a dispute over the charges that it was agreed between the appellant and respondent that by agreeing to the shipment by rail respondent would not waive her claim that there was an overcharge. The goods were consigned to the appellant. Under such circumstances, the appellant sent the demand of January 4, 1940, by which it demanded payment based on a claimed weight of 7,900 pounds. Appellant urges respondent was under a duty to demand that the goods be re-weighed. We think that, from all the circumstances, the trial court was justified in holding that with the knowledge of all the above-mentioned facts appellant was under a duty to ascertain the true facts before it made its demand. By electing to go ahead by demanding payment based on a claimed weight of 7,900 pounds it indicated to any reasonable or prudent person that a tender of less would not be accepted. When respondent

made her demand on January 5th certainly the appellant knew that respondent challenged the claimed charges. Although respondent in her letter did not expressly challenge the correctness of the weight, in view of the surrounding circumstances, such a challenge was implicit in the very nature of the demand by her. Under these circumstances, the demand made by respondent was sufficient. The evidence amply supports the finding of the trial court that there was a conversion by appellant.

[9, 10] Appellant next urges that it was error to permit the filing of the first amended complaint. The record shows that the trial court permitted respondent to file an amended complaint after the evidence had been closed. By this pleading the respondent was permitted to add a new cause of action predicated on the theory of fraud. It was filed on the theory that it was an amendment to conform to proof. While it is true that great liberality should be permitted in the filing of amendments where they do not prejudice the opposing party, it is equally true that amendments of pleadings to conform to the proofs should not be allowed when they raise new issues not included in the original pleadings and upon which the adverse party had no opportunity to defend. Richter v. Adams, 19 Cal.App.2d 572, 66 P.2d 226; Rosemead Co. v. Shipley Co., 207 Cal. 414, 278 P. 1038; Lavely v. Nonemaker, 212 Cal. 380, 298 P. 976; Bank of United States v. Foreman, 102 Cal.App. 756, 283 P. 874. However, although it was probably error to permit this pleading to be filed, such error in no way prejudiced appellant. The findings on conversion being amply supported by the evidence, the findings on the fraud issue may be entirely disregarded.

[11] None of the other points urged by appellant need be discussed except its contention that the cause must be reversed for a new trial on the issue of damages. With that contention we agree. In the original complaint respondent prayed for $5,000 for damages for the conversion. Her evidence as to the value of the converted property, and, as to damages for loss of use, was quite sketchy. On direct examination she testified that the reasonable fair value of the converted articles was $5,000, and that the reasonable damage for loss of use of the articles was $200 a month. On cross-examination she not only could not fix the value of many of the articles but clearly indicated that a portion of the value was based on sentimental factors. When the appellant started to put in its case it produced an auctioneer who started to testify as to value when it developed that he had never seen the goods in question. The trial court very properly suggested that the goods should be viewed by the witness, and, perhaps, by an appraiser appointed by the court. The parties then stipulated that the court should first pass on the question of liability without further evidence of value, and then, if the court desired evidence as to value, it might make an order to view the goods and might appoint an appraiser. No further evidence of value was offered. After all the evidence on the question of liability was in, the case went over for some five months during which time several arguments on the law were presented to the trial court. On November 6, 1940, the case was again called for argument. At that time the court asked: "Could that matter of valuation be stipulated to, to clear it up?" The court then stated: "The testimony of the value is very, very meager." Under those circumstances, counsel for respondent replied: "For the purpose of this hearing, if I get your point, your Honor, we will stipulate that the plaintiff may receive back her goods in the condition they were delivered to the principal Dayton Storage Company in lieu of getting a reasonable value for her goods, which she claims to have been worth the sum of $5,000 and then we respectfully submit that she receive the natural and probable consequential damages which flow therefrom, and if your Honor determines there has been a conversion." The judge replied: "All right." Thereafter, the cause was continued from time to time for further argument but no further evidence of value was offered or requested. The conclusions of law as originally prepared obtained a provision that in lieu of damages the appellant could deliver the converted property to respondent, but this provision was deleted by the trial judge. No reason appears or has been suggested as to why this provision was deleted. Under the judgment the respondent was awarded $1,750 as damages for the conversion of the property, and $750 for the loss of use of the property. While it may be true that the proof of value is sufficient to support the finding of value, a point we do not now decide, it is equally clear that appellant cut short its proof of value

in reliance on the stipulation. This was error of a most serious and prejudicial nature. A party cannot be permitted to thus lull his adversary into believing that the issue of value has been removed from the case, and then secure a judgment for the value.

On the new trial the trial court can determine whether respondent agreed to bear the cost of shipping the goods from Los Angeles to Oakland. No finding was made on this issue. There should also be deducted from the amount of respondent's recovery the difference between the cost of shipping 4,415 pounds at $6.50 per one hundred pounds, and the amount paid by respondent to appellant and the Dayton Storage Company, Inc. No useful purpose would be served in again trying the conversion issue. The judgment is reversed and the cause remanded for a new trial on the sole issue of damages. Both sides to bear their own costs on this appeal.

WARD, J., and GOODELL, Justice pro tem., concurred.

51 Cal.App.2d 101

MITCHELL et al. v. ASHTON et al.

Civ. 12008.

District Court of Appeal, First District, Division 2, California.

April 2, 1942.

1. Mines and minerals 🔑81

Oil lessors, asserting in action to quiet title to oil well casing, that seller who was allowed claim in lessee's bankruptcy proceeding, for amount due on conditional sales contract, waived ownership of casing under contract, could not rely on contract, not being parties or privies thereto.

2. Mines and minerals 🔑81

Oil lessors, suing to quiet title to casing, could not assert that conditional seller, knowing that casing was for well, and permitting cementing therein, could not repossess casing on lessee's default, where seller was not destroying well, which had been abandoned.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by James M. Mitchell and another against Harry Ashton, as trustee in bankruptcy, etc., the Howard Supply Company, and others, involving the title to and the right to remove a portion of certain casing now standing cemented in an oil well. From the judgment, the plaintiffs appeal.

Affirmed.

Hanna & Morton, B. W. Burkhead, and Hilton H. McCabe, all of Los Angeles, for appellants.

O. C. Sattinger, of Los Angeles, for respondent.

STURTEVANT, Justice.

This action involves the title to and the right to remove a portion of certain casing now standing cemented in an oil well.

James M. Mitchell and Catherine T. Mitchell, hereinafter referred to as the plaintiffs, were the owners of certain real property situated in the Torrance oil field, Torrance, California. On the 4th day of May, 1938, they executed an oil and gas lease covering said real property, to the Selegna Drilling and Producing Company. Through mesne conveyances said oil and gas lease was thereafter transferred to Kovell Oil Company. The latter company drilled and brought into production an oil and gas well upon the premises known as Kovell No. 1.

While the Kovell No. 1 well was being drilled, and on June 30, 1938, the defendant Howard Supply Company, a corporation, sold 4,850 feet of 6⅝", 26#, Grade C casing to Kovell Oil Company under a conditional sales contract by the terms of which the casing was sold for the purpose of use and operation by Kovell Oil Company, upon the real property involved in this action, and not for any other purpose. Title to said casing was retained by the Howard Supply Company until it had received payment in full therefor.

The casing described in the conditional sales contract was used by Kovell Oil Company in the drilling and production of Kovell No. 1 well and was cemented therein.

The defendant Harry Ashton was appointed trustee in bankruptcy of Kovell Oil Company on or about December 1, 1939.

On January 15, 1940, the defendant Howard Supply Company filed its "Proof of Secured Claim" in the matter of the bankruptcy of the Kovell Oil Company wherein it claimed the sum of $9,186.79, which amount was the full balance then due on the conditional sales contract. The said claim was later allowed in full in the bankruptcy proceedings of the Kovell Oil Company.

On or about March 1, 1940, the defendant, Harry Ashton, as trustee in bankruptcy of Kovell Oil Company, ceased the production of oil and gas from Kovell Well No. 1, removed certain machinery and oil well equipment therefrom, and abandoned the oil and gas lease in April, 1940. No attempt has since been made to produce oil and gas from Kovell Well No. 1. On January 22, 1941, the plaintiffs commenced this action to quiet their title to the real property, to the derrick, and to the casing standing cemented in Kovell Well No. 1.

The casing involved in this action is now standing cemented in Kovell No. 1 well but the State Oil and Gas Supervisor will not consent to the removal of any portion thereof in excess of 650 feet and before said supervisor will consent to the removal of that much of said casing he will require the balance thereof to be permanently and securely plugged, which operation will make it impossible to further use the remaining portion of said casing or to thereafter reopen and further produce said Kovell No. 1 well.

The respondent, Howard Supply Company, has fully complied with the terms of the conditional sales contract but the Kovell Oil Company has failed to make all the payments due thereunder and there is at the present time a balance unpaid on said contract.

The trial court adjudged the plaintiffs to be the owners and entitled to the possession of the real property and the derrick but that the respondent, Howard Supply Company, was the owner and entitled to the possession of all the oil well casing sold to Kovell Oil Company under said conditional sales contract and now standing cemented in Kovell No. 1 well.

The plaintiffs have appealed from that portion of the decree which determined the Howard Supply Company to be the owner of said casing and entitled to the possession thereof. In support of their appeal they have brought up the judgment roll only.

In their complaint the plaintiffs named Harry Ashton, as trustee in bankruptcy of the Kovell Oil Company, Barny Berens, and several fictitious persons, as defendants. Later by amendment Howard Supply Company was named as a defendant claiming it had been sued as "One Doe Corporation." Berens filed an answer. Howard Supply Company filed a separate answer and pleaded the conditional sales contract. There was no allegation in Berens' answer that he was the assignee of any interest in the real estate or any of the property standing on or attached thereto. Nor is there any finding to that effect. Neither Kovell Oil Company nor any one claiming to be its assignee appeared in the action, or participated in the trial.

[1] In their first point the plaintiffs contend Howard Supply Company having filed a claim in the bankruptcy proceedings, which was allowed for the full amount due, waived any claim of ownership by it under the terms of the conditional sales contract. However, as shown by the above facts, the plaintiffs were not parties to said contract, were not privies thereto, and may not rely thereon. Roullard v. Rosenberg Bros. & Co., 193 Cal. 360, 364–366, 224 P. 449.

[2] In their second point they contend that Howard Supply Company having sold the casing to the lessee with knowledge that it was to be used in an oil well, and having permitted it to be permanently cemented therein, cannot repossess it, upon default of the lessee, where to do so would destroy the well to the damage of the lessor. We find no merit in that contention. The action was one to quiet title, not to repossess anything. Furthermore, there are no findings to the effect that Howard Supply Company is doing or will do anything to "* * * destroy the well to the damage of the lessor." Furthermore, the findings show that Kovell Well No. 1 was not at the time this action was commenced a going concern. On the contrary the findings show that the trustee in bankruptcy operated the well from December 1, 1939, until March 1, 1940, and that on said date he abandoned the well, that much of the equipment was detached and taken away, and that there remains on the ground only the derrick and the casing cemented in the well. Assuming that as to a successful development the lessor may, under certain conditions, be entitled to the use of the casing (Meers v. Frick-Reid Supply Corp., Tex.Civ.App., 127 S.W.2d 493), it is clear

that the findings do not show that the instant case comes within such rule.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

51 Cal.App.2d 47

KIESSIG et al. v. SAN DIEGO COUNTY et al.

Civ. 11890.

District Court of Appeal, First District, Division 1, California.

April 1, 1942.

1. Constitutional law 🔑14

Technical words in a constitutional provision are interpreted as usually understood by persons in the profession or business to which they relate unless clearly used in a different sense, and that rule applies also to words not in common use, or having no very definite signification in their ordinary use. Civ.Code, § 1645.

2. Taxation 🔑219

Under constitutional provision exempting from taxation, except for state purposes, vessels of more than 50 tons burden registered at any California port and engaged in transportation of freight or passengers, the words "tons burden" mean net register tonnage, particularly in view of Shipping Act provision requiring net tonnage of every registered vessel to be carved into or otherwise permanently marked on vessel. 46 U.S.C.A. § 77; Const. art. 13, § 4.

See Words and Phrases, Permanent Edition, for all other definitions of "Tons Burden".

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Action by Otto C. Kiessig and others against the County of San Diego and others for the refund of personal property taxes paid under protest. From a judgment for defendants, plaintiffs appeal.

Affirmed.

Sloane & Steiner, of San Diego, for appellants.

James B. Abbey, Dist. Atty., and William A. Glen, Chief Deputy Dist. Atty., of San Diego, for respondents.

GOODELL, Justice pro tem.

On the first Monday in March, 1939, at noon, the appellants owned the "Sportfisher II" and the appellant Otto C. Kiessig owned the "Sportfisher III," both documented vessels registered in the Customs House at San Diego, their home port. As of that time the respondent assessor levied a personal property tax for 1939-1940 against each vessel, $512.24 on one and $596.16 on the other. Appellants paid the taxes under protest and brought this action for their refund. Judgment went in favor of the county and this appeal ensued.

The protests were filed under the claim that each vessel was of more than 50 tons burden and therefore exempt under section 4 of article XIII of the Constitution of this state, which reads: "All vessels of more than fifty (50) tons burden registered at any port in this State and engaged in the transportation of freight or passengers shall be exempt from taxation except for State purposes until and including the first day of January, 1955."

The court found that both vessels were engaged in the transportation of passengers; that as registered the deadweight tonnage of the "Sportfisher II" was in excess of 70 tons, her gross tonnage was 69.43, and her net 40 tons; that the deadweight tonnage of the "Sportfisher III" was in excess of 75 tons, her gross was 73.45, and her net 39 tons. The court then found that the former vessel did not exceed 40, or the latter 39, tons burden, and therefore that neither was exempt. It will be readily seen that if the size of these vessels should be determined by either their deadweight or their gross tonnage they are within the exemption.

The question to be decided is stated by appellants as follows: "* * * was the trial court correct in adopting as the measure of the 'burden' of such vessels the respective 'net tonnages' thereof as registered in the United States Customs Office or should the tons burden thereof be measured in the ordinary sense of their respective 'carrying capacities'?" In contending for a definition of "tons burden" in the ordinary sense the appellants invoke the familiar rule that "* * * the courts will interpret a measure adopted by vote of the people in such manner as to give effect to the intent of the voters adopting it. Cooley on Constitutional Limitations, (5th ed.) § 66." Kaiser v. Hopkins, 6 Cal.2d 537, 58 P. 2d 1278, 1279. In the last-cited case it is further said: "It must be held that the voters judged of the amendment they were adopting by the meaning apparent on its face according to the general use of the words employed. Such is the rule where it does not appear that the words were used in a technical sense. * * * 'Where a word having a technical as well as a popular meaning is used in the Constitution, the courts will accord to it its popular signification, unless the very nature of the subject indicates, or the context suggests, that it is used in its technical sense.'" Have the words "tons burden" a popular and nontechnical meaning? Appellants ask the rhetorical question, "What then is the popular signification of the word 'burden'? In searching for the answer, [they say] no better authority for 'ordinary and popular' meaning can be consulted than the dictionary" and they quote Webster's New International Dictionary as follows: "burden * * * 1. That which is borne or carried; a load; * * * 3. The bearing of loads; as, a ship or beast of burden * * * 6. The capacity of a vessel, for carrying cargo;—also the weight of the cargo; as, a ship of a hundred tons burden * * *." (Other dictionaries quoted are in agreement.) But this inquiry is not confined to the meaning of this word alone. We are concerned with the phrase, "more than fifty (50) tons burden," and if we resort to the dictionary cited by appellants we find that the first definition of the noun "ton" therein is equivocal for it shows (what everybody knows) that there are "long tons" or "gross tons" of 2,240 pounds, and "short tons" of 2,000 pounds, and two other kinds of tons as well. The second definition therein reads: "Naut. & Com. (a) A unit of internal capacity for ships; 100 cubic feet (2.8307 cu. m.);—called specif. *register ton*. See Tonnage, 2. (b) A unit approximately equal to the volume of a long ton weight of sea water, used in reckoning the displacement of vessels, esp. war vessels; 35 cubic feet;—called specif. *displacement ton*. (c) A unit of volume for freight, approximately the volume of a ton weight of the particular commodity;—called specif. *shipping ton*. A ton of merchandise is often reckoned at 40 cu. ft., and a ton of timber at 42 cu. ft." It might be noted, in passing, that the conclusion reached by the trial judge was not inconsistent with the dictionary definition in its nautical sense first quoted above. If, then, the voter, in pondering over the proposed constitutional amendment, had had recourse to his dictionary, the foregoing is what he would have found.

[1] The words "tons burden" are not words in common use by the people generally, or by those who do not deal with ships and shipping. Each of them, taken separately, has its own ordinary meaning, and each is in common, every-day use, but when they are found in this collocation they form a phrase which is decidedly a shipping term. "Technical words are interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense. This rule applies to words which are not in common use or which have no very definite signification in their ordinary use." 23 Cal. Jur. p. 750; 5 Cal.Jur. p. 596; sec. 1645, Civil Code. The Encyclopedia Britannica, 14th ed., vol. 20, pp. 555, 556, title "Shipping: Tonnage Terms," contains an elaborate review of this subject, too lengthy to quote in full. However, the article opens with this statement: "The term 'Tonnage' has a variety of meanings. According to the British Merchant Shipping acts and the Suez and Panama Canal regulations it is a measurement of the capacity or volume of a ship expressed in units of 100 cubic feet—one unit of such volume being termed a ton measurement. The purpose of measuring a ship is twofold—primarily to form a basis for the payment of the various charges which are levied by Port and Harbour authorities, by Lighthouse Boards and for pilotage services; secondly for use in the registration or identification of the ship itself." In discussing gross and net tonnage after the method of measuring a vessel is given, this article says: "The register or net tonnage is now determinable (being the gross tonnage less the deductions permitted as described above), and is *the tonnage which appears on the register of the vessel and on which dues are assessed.*" (Emphasis ours.)

Thus far we have discussed only definitions of the words "ton" and "burden" found in the dictionary cited by appellants, and in the article in the Britannica which we consulted under section 1875, Code of Civil Procedure. From those authorities alone we are satisfied that the phrase "tons burden" is not one which can be said to be understandable without resort to a more technical inquiry than that afforded by the common lexicon.

The method of measuring vessels of American registry to determine their cargo capacity is minutely prescribed in R.S. 4153, codified in U.S.C.A., title 46, "Shipping," section 77 ("Tonnage") which reads in part as follows: "The register tonnage of every vessel built within the United States or owned by a citizen or citizens thereof shall be her entire internal cubical capacity in tons of one hundred cubic feet each, to be ascertained as follows: * * *." Here follows a detailed and technical formula for the measurement of the gross tonnage of a vessel. The statute then provides for the deduction therefrom of the tonnage of spaces or compartments occupied by the crew, by the master, for the working of the helm, the capstan and anchor gear, for charts, signals, instruments, stores; also space occupied by the propelling power and numerous other spaces and areas. It then provides: "And the proper deduction from the gross tonnage having been made, the remainder shall be deemed the net or register tonnage of such vessels." In this legislation Congress has provided for a more or less permanent record of net tonnage to be cut into the ship herself. This important requirement reads: "In every vessel documented as a vessel of the United States the number denoting her *net tonnage shall be deeply carved or otherwise permanently marked on her main beam, and shall be so continued;* * * *." with a penalty for violation. (Emphasis ours). It is significant that this required memorial is of net, and not of gross or of deadweight tons.

It happens that in the instant case the appellants seek exemption on the claim that "tons burden" means gross tons or deadweight tons. If, however, the vessels were to go through the Panama Canal tolls would doubtless be charged on the basis of net register tonnage or its equivalent. See U.S.C.A., title 48, "Insular Possessions," sec. 1315. Likewise pilotage into or out of their home port would undoubtedly be computed on their net register tonnage. Sec. 1376, Harbors and Navigation Code, St. 1937, p. 827.

A concise and informative statement respecting tonnage is found in The Thomas Melville, 5 Cir., 62 F. 749, 751, 10 C.C.A. 619, a case which had to determine whether wharfage charges were to be computed upon gross or upon net tonnage. An ordinance of the city of New Orleans, adopted in 1875 and amended in 1881, levied a charge of twenty cents per ton on vessels of "1,000 tons and under," (and a different rate for larger vessels), without specifying the kind of tons. The Circuit Court of Appeals held that the vessel should pay wharfage on the basis of gross, and not net, tonnage, for the reason that when the ordinance was adopted and amended "the navigation and customs laws of the United States dealt only with gross tonnage; and, at the same time, canal tolls in the state of Louisiana and general charges for towage and dock services were based upon gross tonnage." The court further pointed out that in 1882 the United States departed from its former practice of calculating customs dues upon gross tonnage "and adopted the practice of calculating customs and tonnage dues upon the net tonnage, which was to be determined according to certain rules laid down in the statute, and denominated the 'net register tonnage;' * * *." The court held that this change in federal law did not affect the New Orleans ordinance because nothing had been done locally to conform to the change. The case is not cited here for any bearing it might have as authority (it has none, because in the instant case there was no intervening change in any law) but simply for the following clear definition of the word "ton" by a federal court of high authority passing upon a quasi-maritime question: "2. The word 'ton,' in the ordinance and amendments thereto controlling this case, as applied to the measurement of vessels, has a certain definite meaning, well settled by custom and by the navigation laws of the United States, and it means 100 cubic feet of interior space. The entire cubic contents of the interior space, numbered in tons, is called the 'gross tonnage.' When, from the entire cubic contents of the interior of a vessel, there are deducted the spaces occupied by the crew and by propelling machinery, the remainder, numbered in tons, is called the 'net tonnage.' "

Respondents cite The Craigendoran, D. C., 31 F. 87, 88, where a statute of New York prescribed wharfage charges at one rate for vessels "of two hundred tons burden and under," and a different rate for larger vessels (without specifying the kind of tons). The question (similar to that presented in the Melville case, supra) was whether the tonnage should be ascertained by measuring the vessel as prescribed by federal law in force when the state wharfage statute was enacted, in 1877, or by measuring her as prescribed by federal law in force when she was berthed. The court doubtless had in mind the change in 1882, noted in the Melville case. The district judge said: "This question is not free from difficulty; but on reflection, and upon considering the force of the expression of the supreme court, where it is said, 'Evidently the word "tonnage," in commercial designation, means the number of tons burden the ship will carry as estimated and ascertained by the official admeasurement and computation prescribed by the public authority,' and mindful of the fact that the measuring of a ship for the purpose of fixing her tonnage is required by law to be made by an officer of the United States, and that the method of measuring to be pursued by such officer is prescribed by law, and that the tonnage of the ship must be inserted in her register or enrollment, and the tonnage there stated must be that tonnage, and no other, which is ascertained by the officer, from a measurement made in the manner prescribed by law at the time of her registry or enrollment, and that consequently the only legal tonnage of the ship is the tonnage stated in her registry or enrollment, I am of the opinion that the words 'tons burden,' as used in the wharfage act of 1877, above quoted, should be held to mean the registered tonnage of the ship, and not her gross tonnage. No method by which to ascertain the tonnage of a ship for the purpose of calculating her wharfage is provided by the state statute, and all ships are required by law to carry a register in which the tonnage is stated. The fair presumption is that it was the intention of the statute that reference to the ship's register should be made for the purpose of calculating her wharfage, and not to leave the tonnage to be a matter of private calculation and open to dispute." The reference to the decision of the supreme court is to the State Tonnage Tax Cases, 79 U.S. 204, 12 Wall. 204, 224, 20 L. Ed. 370, 376. The Melville case, supra, refers to The Craigendoran case as having been well decided. In The Antonio Zambrana, D.C., 88 F. 546, 548, the court says, citing The Craigendoran, "It is probable that the rate should be upon the registered, and not gross, tonnage."

In the case of "The Brunel," Law Reports, Probate Division, 1900, p. 24, 48 Weekly Reporter, 243, 81 Law Times Report, 500, the Court of Appeal decided the precise question now presented. The opening sentence in the opinion reads: "The question is, what is the meaning of the words 'not exceeding 15 tons burden'" in the Merchant Shipping Act of 1894. Further, the court says, "In the Court below it was argued that the meaning of tons burden in this section is 'the carrying capacity of the ship.'" The Justice's views are thus stated: "It seems to me that the true construction of this section, dealing with the registration and also with the nonregistration of a ship, is that the words 'tons burden' mean the net tonnage—that is, the gross tonnage after allowing for the deductions, in other words, the register tonnage."

The appellants cite the case of The North and South Shields Ferry Co. v. Barker, Exchequer Reports, Vol. 2, p. 136. This case was decided in 1848, involving a small ferry across the river Tyne. It was decided before steam came into general use, and before the British Merchant Shipping Act of 1894, and it is not mentioned in The Brunel case. This is the only case the appellants cite which lends any support at all to their position.

Attention is called to the case of County of Los Angeles v. Craig, 38 Cal.App.2d 58, 100 P.2d 818, where this same section of the Constitution was before the court and where it was held that the word "registered" should be given its non-technical meaning. There was no question in that case respecting the words "tons burden" for it was conceded that the vessel involved was of approximately 800 tons. The vessel had been "enrolled" as distinguished from "registered" (for the technical distinction between registration and enrollment see The Mohawk, 70 U.S. 566, 3 Wall. 566, 18 L.Ed. 67; Wheaton v. Weston & Co., D.C., 128 F. 151) but the court held that when the word "registered" was used in the constitutional provision it was used in the same sense that it had theretofore been used in several legislative provisions where it was obviously used to include "enrolled" and "licensed."

[2] One of the telling factors in this case is the requirement found in section 77 of the Shipping Act that the net tonnage of every registered vessel be carved into the very structure of the ship or otherwise permanently marked. This is a strong argument on the side of a definite tonnage, fixed and determined for long periods of time if not for the life of the ship, and not

dependent upon how much she is capable of carrying "deadweight" or on how much cargo she carries on one voyage as distinguished from another—lead or feathers, for instance. Moreover, the view taken by the trial court is not at all contrary to the meaning given to "tons burden" when ordinary books of reference are consulted by laymen. They all show that the words "tons burden" when used together have a technical meaning, and connote a measurement peculiar to ships and shipping. We have seen from the statutes and from the cases cited that this meaning is net register tonnage, as the trial court held.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concurred.

MOORE v. STELLA et al.*

Civ. 12730.

District Court of Appeal, Second District, Division 3, California.

March 31, 1942.

Rehearing Granted April 30, 1942.

1. Licenses 🔑39

Where agreement to sell mineral rights standing in the name of corporation was executed in the name of its president and assignment of the rights was executed by president in the name of corporation, both corporation and president were liable for money received therefor with knowledge that mineral rights were worthless and that sales were in violation of Corporate Securities Act and order of the real estate commissioner. Gen.Laws 1937, Act 3814; Act 112, § 20g.

2. Licenses 🔑39

Where worthless stock was sold without a permit to finance oil and gas developments being conducted by holder of stock, both such holder and person who actually made sales were liable for the money received therefor whether saleswoman acted as agent for holder of stock or whether stock was formally transferred to her before transfer to purchasers in the effort to evade permit requirements of Corporate Securities Act. Civ.Code, § 2343, subd. 3; Gen.Laws 1937, Act 3814.

3. Licenses 🔑18½

Mineral rights in 2½-acre tracts in large undeveloped area purchased by individual investors with expectation that development thereof could be accomplished only through large scale operations by others, from which individuals might derive benefits by leasing their tracts, constituted "securities" within meaning of Corporate Securities Act prohibiting sale thereof without permit. Gen. Laws 1937, Act 3814.

See Words and Phrases, Permanent Edition, for all other definitions of "Security".

4. Licenses 🔑18½

In determining whether a given instrument is a "security" within meaning of Corporate Securities Act prohibiting sale thereof without permit, courts invariably look through mere form to substance. Gen.Laws 1937, Act 3814.

5. Licenses 🔑18½

Promotion schemes, which lead investors into enterprises where earnings and profits of business or speculative ventures must come through the management, control, and operations of others, and which, regardless of form, have the characteristics of operations by corporations, joint-stock companies, trusts, and similar business structures, are subject to regulation under the Corporate Securities Act. Gen.Laws 1937, Act 3814.

6. Licenses 🔑39

Evidence that sales of corporate stock standing in the name of woman who actually negotiated sale thereof were actually dispositions of stock for the use and benefit of the corporations themselves, which benefit was derived through use of proceeds from stock sales to finance oil drilling operations, sustained finding that such stock was not personally owned by seller so that sale thereof without permit violated Corporate Securities Act. Gen.Laws 1937, Act 3814.

◆

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Elma I. Moore against E. F. Stella, individually and as trustee, etc., and others, for the return of money paid for mineral rights and shares of stock sold by defendants. From a judgment in favor of plaintiff, defendants appeal.

Judgment affirmed.

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* Subsequent opinion 127 P.2d 300.

Charles I. Rosin, of Los Angeles, for appellants.

Joseph N. Owen, of Los Angeles, for respondent.

PARKER WOOD, Justice.

The complaint, consisting of thirteen causes of action, was for the return of money paid for "mineral rights" and shares of stock, after notice of rescission by plaintiff. The first nine causes of action related to the mineral rights, and the tenth, eleventh and twelfth causes of action related to the shares of stock, and the thirteenth was for money had and received and was based upon the transactions involved in the preceding twelve causes of action. The judgment was for plaintiff against defendants as follows: Stella on all thirteen causes of action for the aggregate sum of $9,775; Stella-Harold Development Company on the seventh cause of action for $2,000; Dallas M. Steele on the tenth, eleventh and twelfth causes of action for $1,225.

The complaint alleged that Stella was a real estate broker; that Stella-Harold Development Company was a corporation and the alter ego of Stella; and as to the first nine causes of action, which related to the "mineral rights," that defendants sold plaintiff mineral rights in various two and one-half acre parcels of land in Tehama County, and plaintiff paid various sums of money therefor to defendants and received from defendants written agreements to deliver to plaintiff an assignment of the mineral rights in each parcel to be selected by Stella from the acreage in certain sections of land; and that in the mineral rights transactions referred to in the first nine causes of action defendants delivered such assignments signed "E. F. Stella, by Dallas M. Steele," except as to the ninth none was delivered, and as to the seventh it was signed "Stella-Harold Development Company by E. F. Stella, President"; that defendants made fraudulent representations as follows: as to the value of the rights; the lands had great potential oil and gas values; that defendants were diligently drilling an oil well near the land which was nearly ready for production and was near a commercially productive gas and oil well. The complaint further alleged that plaintiff was eighty years of age, inexperienced and had no independent advice; that the mineral rights were of no value, and the area had been extensively drilled without recovery of oil or gas in commercial quantities, and the well was not being drilled diligently but wilfully delayed, and that the gas well referred to as "near" had been abandoned four years, and the oil well referred to as "near" was eighteen miles away; that defendants had no permit or broker's license from the Corporation Commissioner to sell the assignments of mineral rights and that the sales were void; that defendants have divided 1546 acres in Tehama County and 5760 acres in Glenn County into parcels of two and one-half acres each, and that defendants are engaged in the general business of selling such assignments and that such method is a scheme to evade the Corporate Securities Act, Gen.Laws 1937, Act 3814; that as to the certain acreage described in the fifth, sixth and seventh causes of action, defendants violated an order of the real estate commissioner, in that, a survey of the land required to be made was not made, and a map required to be recorded was not recorded, and that a copy of the order required to be delivered to purchasers was not delivered to plaintiff; that no surface rights or rights of ingress or egress were given, and adjacent acreage was sold to others; that plaintiff became aware of the facts on November 13, 1938, and served notice of rescission on November 21, 1938.

The complaint alleged as to the tenth, eleventh and twelfth causes of action, which related to the shares of stock, that defendants sold plaintiff shares of stock in three different corporations without having any permit from the Corporation Commissioner so to do, and fraudulently represented that they were reasonably worth the amount plaintiff paid therefor, although in truth they were of no value; that as to one of the corporations the sale was in contravention of an order of the Corporation Commissioner that no sale be made.

The answer of defendants alleged: That Stella received the money for the mineral rights in the sum of $8,550; and that Steele received the money for the shares of stock in the sum of $1,225; and in substance the answer was a denial of the other allegations of the complaint. They alleged that a permit from the Corporation Commissioner was not necessary for the sale of the mineral rights or the stock.

The court found: That Stella-Harold Development Company was the alter ego of Stella; that defendants had no permit or broker's license from the Corporation Commissioner for the sale of the mineral rights or the shares of stock; that the order of the real estate commissioner was violated as to parcels referred to in the fifth, sixth and seventh causes of action; that the survey was not made and no map was recorded; that Stella-Harold Development Company sold rights only as referred to in the seventh cause of action; that the acreage in Tehama County was divided into parcels of two and one-half acres each, and the Glenn County land was divided into parcels of one acre each, and defendants were engaged in a general business of selling the mineral rights to the public, and that such method was a scheme wilfully used to evade the Corporate Securities Act that Steele was involved only in the sale of the shares of stock.

There were no findings of fact as to the eighth cause of action.

The court concluded that the mineral rights and stock were of no value and were sold in violation of the Corporate Securities Act and that the sales referred to in the fifth, sixth and seventh causes of action were in violation of the Real Estate Act, Gen.Laws 1937, Act 112, section 20g thereof; and that plaintiff had rescinded the transactions and was entitled to receive all the money paid.

Soon after the complaint was filed plaintiff caused a writ of attachment to be levied upon property of defendants Stella and Stella-Harold Company. All of the defendants moved to discharge the attachment upon the ground that the action was not such as would support an attachment, in that plaintiff had the assignment of mineral rights and the shares of stock and could not fulfill the requirements that the attaching party must allege and show that plaintiff was not secured by any lien, or if so secured that the security had become valueless through no fault of her own. In plaintiff's affidavit in support of the attachment she stated that the assignment and the issuance of the stock were made without a permit or broker's license first had from the Corporation Commissioner, and she alleged that if she had any such purchaser's lien as that given in sections 1789 and 3050 of the Civil Code that such security had become valueless without her fault.

Defendants' motion for discharge of attachment came on for hearing on January 4, 1939, and counsel for the plaintiff stated that a decision upon the motion, as to whether the sales were in violation of the Corporate Securities Act, would be a decision of the main point in the case. The court stated that such a decision would in effect decide the lawsuit. Counsel for defendants stated: "Well, we can't help that," and "Well, there are many lawsuits that are decided on preliminary motions before it comes to trial," and "That is not an unusual thing," and insisted that the hearing proceed. The hearing proceeded and required seven days for completion. The reporter's transcript on the hearing consists of 469 pages. When the motion was submitted both counsel demanded that findings be made, and on March 14, 1939, the court signed and filed its findings of fact and conclusions of law, and order denying motion for discharge of attachment.

The court found in the proceeding to discharge attachment that: Each and all of the assignments of mineral rights, set forth in the complaint, by which defendants sold to plaintiff and plaintiff purchased from them certain alleged mineral rights in and to certain acreage in Tehama and Glenn Counties are and were securities within the meaning of the Corporate Securities Act, Act 3814, General Laws of California; that defendants, and each of them, had no broker's license nor had they, or either of them, any permit from the Corporation Commissioner for the sale of said securities, and that in making said sales defendants violated sections 3, 4, 6, 7 and 9 of said act; that the parcels sold to plaintiff as described in the fifth, sixth and seventh causes of action lie in the area prohibited from sale by the report or permit of the real estate commissioner and agreed by the defendant Stella not to be sold until such time as the same had been surveyed, the exact area determined, and a map filed and recorded; that no such survey was made nor was any map based on such survey filed or recorded, but notwithstanding the failure of defendants to comply with such requirements, they sold said parcels to plaintiff in said prohibited areas; that said parcels were sold in violation of section 20g of the Real Estate Act, Act 112, General Laws of California; that as to the ninth cause of action no assignment has been delivered to plaintiff; that plaintiff rescinded said transactions and that said transactions are void; that the shares of stock of the Fortuna Holding Corporation, the Summit Holding Corporation and the K-B-P Holding Corporation, sold by defendants Stella and Steele to plaintiff were securities within the meaning of the Corporate Securities Act and that the same were sold without any permit and without any broker's license being first secured from the Corporation Commissioner; that said stock was not the bona fide personally owned stock of said defendants or either of them; that Stella had acquired all the outstanding stock of said corporations prior to the transaction in question and had become the alter ego of said corporations; that for the purpose of evading the Corporate Securities Act he issued new stock in said corporations and caused the same to be sold to the public, including plaintiff, for the benefit of himself as issuer; that the methods used by him in marketing said stocks was an indirect promotion of a scheme with an intent on his part to evade the provisions of said act relative to procuring a permit and broker's license; that said sales of stock are void and plaintiff rescinded the same; that said assignments of mineral rights and said stock of said corporations had, at the times of sales to plaintiff, and now have no value whatever.

From the order denying the motion to discharge the attachment the defendants appealed to the District Court of Appeal. The appeal was dismissed and a rehearing was denied.

The action came on for trial on October 13, 1939, before the judge who had presided at the hearing of the motion to discharge the attachment. A stipulation was proposed by counsel for defendants (appellants) that "the transcript to be prepared of the evidence introduced on the motion to discharge the attachment, and that all of the evidence introduced there may be considered as introduced in this trial at this time." Counsel for plaintiff stated that the stipulation was acceptable, except that the matters set forth in the findings and conclusions and judgment in the attachment matter were res judicata and need not be tried again, but if the court held to the contrary, that the former transcript may be considered as the testimony in the case without the necessity of going over it again. Counsel for defendants so stipulated. Counsel for plaintiff then introduced in evidence certified copies of the minute order of the District Court of appeal granting the motion to dismiss the appeal, and the order of that court denying appellant's petition for a rehearing. The remittitur had not at that time been filed and counsel for plaintiff requested a continuance of the trial until after the remittitur had been received, but this request was denied, and counsel for plaintiff objected to the introduction of evidence upon the ground that the order of the court in the attachment matter was an appealable order, that an appeal was taken and dismissed and a rehearing denied and that the order was a final judgment, and plaintiff should not be compelled to relitigate those matters as to violation of the Corporate Securities Act which were decided in the former order. The matter was submitted for decision, and for ruling upon the objection as to res judicata. Before the signing of the findings of fact and conclusions of law, and after the remittitur had been filed, the court reopened the case and received the remittitur in evidence. Then the case was submitted again.

The ruling upon the objection appears in the document entitled "Findings of Fact and Conclusions of Law" preceding the formal findings of fact and is as follows: "* * * it now overrules the said objections to the introduction of any evidence in the matter, made by the plaintiff on the grounds that the merits of the action have been previously adjudicated and finds that there has been no previous adjudication of the merits of the action."

The findings of fact and conclusions of law in the attachment matter and the order therein were not included as a part of the record on appeal. After this case was placed upon the appeal calendar, respondent made a motion for permission to file certified copies of such findings of fact and conclusions of law and order denying the motion to discharge attachment, upon the ground that said documents were inadvertently omitted and were necessary in the consideration of the contention that there had been an adjudication of the issue as to violation of the Corporate Securities Act. Appellants objected to the motion upon the ground that such documents had no place in the record because no appeal was taken by respondent. That motion has heretofore been granted and in addition thereto this court ordered that the original Notices of Motion to Discharge Attachment and the Amendment thereto, together with the original affidavits in support thereof and in opposition thereto, be transmitted by the County Clerk of Los Angeles County to this court for consideration upon this appeal.

Appellant contends as follows:

1. That the findings are not supported by the evidence;

2. That this being an action for rescission, the court erred in ordering unconditional judgment for repayment of money without providing for restitution by respondent;

3. That the sale of a mineral deed to mineral rights in real property of sufficient area that purchaser may maintain independent drilling operations and development work thereon, and which is not subject to participation in the benefits derived therefrom, or in the property itself, by any other person or under agreement, is not a security within the meaning of the Corporate Securities Act;

4. That changing par value of all shares of stock of a corporation, or increasing or decreasing the number of shares, as a result of amendment to articles of incorporation, where the stock certificates as changed represent the same interest as the stock did before the amendment is not a new issue, and does not require a new permit from the Corporation Commissioner if the original stock had been issued validly under a permit;

5. That as to the Summit Holding Corporation that stock had been issued under a permit and was personally owned by the seller thereof and the owner had the right to sell same without a permit;

6. There was no evidence upon which to base a judgment against Stella-Harold Development Company on the seventh cause of action;

7. There was no evidence upon which to base a judgment against Stella on the tenth, eleventh, or twelfth causes of action.

Respondent contends that the order denying the motion to discharge the attachment is res judicata as to the issues (1) whether the sales of the mineral rights and the shares of stock were in violation of the Corporate Securities Act and void, and (2) whether the said assignments and shares of stock were valueless and there was a failure of consideration in so far as plaintiff was concerned.

This contention must be sustained. In order to decide whether the motion to discharge the attachment should be granted or denied, the court was required to determine whether plaintiff was secured by any lien by reason of the assignments to her of the mineral rights, or by reason of the transfer to her of the certificates of shares of stock.

The direct questions presented, for the decision of the trial court and which were decided, upon the motion were:

1. Were the assignments of the mineral rights and the certificates of shares of stock securities within the meaning of the Corporate Securities Act?

2. If they were such securities, did the defendants have a permit or broker's license from the Corporation Commissioner to make the sales?

3. Were the sales of such assignments and certificates in violation of the act and were the assignments and certificates therefore valueless?

These same questions were the main questions presented upon the trial, for the decision of the court. The parties were the same upon the motion and the trial. The evidence in both proceedings was identical, it having been stipulated that the evidence upon the motion, as shown by the reporter's transcript, might be deemed the evidence upon the trial. It thus appears that the issues determined upon the motion were not incidental and collateral to the main controversy, but were the principal questions to be determined upon the trial and were determined upon the motion upon the identical evidence submitted at the trial.

It further appears that the attorneys for the parties had in mind at the time of the hearing of the motion that a decision upon the motion would be a decision upon the main issues of the action. The attorney for plaintiff objected to proceeding with the hearing upon the ground that such a hearing would be a trial of the case and that the ruling would render substantially all issues res judicata. The attorney for defendants insisted that the hearing proceed.

An appeal lies from an order dissolving or refusing to dissolve an attachment. Sec. 963, Code Civ.Proc. An appeal was taken by defendants from the order denying the motion to discharge the attachment, and the appeal was dismissed and a rehearing was denied. The order became final.

It is not a requirement that an issue be determined in an independent action in order to apply the rule of res judicata. The rule may be applied when the issue is determined upon a motion. In the case of Lake v. Bonynge, 1911, 161 Cal. 120, 129, 118 P. 535, 539, it is stated: "When * * * a substantial right or the merits of the case are involved and determined, the judgment is res adjudicata, notwithstanding the decision is made on an appeal from a motion." In the same case it is also stated (161 Cal. at page 129, 118 P. at page 539): "Freeman on Judgments, § 323, declares: 'The tendency of the recent adjudications is to inquire whether an issue or question has been in fact presented for decision and necessarily decided, and, if so, to treat it as *res adjudicata, though the decision is the determination of a motion or summary proceeding, and not of an independent action.*'" (Emphasis added.) And further in that case (161 Cal. at page 129, 118 P. at page 539), quoting from Commissioners v. McIntosh, 30 Kan. 234, 1 P. 572, it is said: "* * * Now, that the decision of a motion can be preserved in a separate record, and taken up by itself, presupposes a full and careful consideration in both the trial and the appellate courts; and when that is had it would seem that the question thus separately and carefully considered should be finally disposed of, and not be thrown back for further litigation at the mere caprice of either party."

Appellant contends that the matter of res judicata is not properly before the court for three reasons: (1) That there is no record on appeal to indicate res judicata, such as the moving papers, findings, conclusions, and order in the attachment proceeding; (2) there was no plea of res judicata; and (3) that the finding of the trial court was that "there has been no previous adjudication of the merits of the action," and the plaintiff (respondent) did not appeal from this finding, and not having appealed cannot on the appeal of the opposite party challenge the correctness of a finding which is contrary to his contention.

These contentions will be discussed in the order in which they are stated.

As to the first: The motion of respondent to file copies of the Findings of Fact and Conclusions of Law and Order Denying the Motion to Discharge Attachment in the attachment matter has been granted by this Court, and in addition thereto this Court ordered that the original Notices of Motion to Discharge Attachment, the Amendment, and the original affidavits relating thereto, be transmitted to this court for consideration, and thereby the record on appeal has been completed.

As to the second: It was not necessary for plaintiff to plead res judicata for the reason it was relied upon as evidence of an element of the causes of action. "With respect to a plaintiff, it has been said that the rule requiring a former adjudication to be pleaded defensively 'does not apply to the statement of a cause of action,' since in such case it is merely evidence of some ultimate fact which must be pleaded. * * *" 15 Cal.Jur. 209, sec. 230. In the case of Ahlers v. Smiley, 1909, 11 Cal. App. 343, 346, 104 P. 997, 998, it is said: "While as a general rule, in order to render evidence available in support of a defense based upon matters of estoppel, such matters must be pleaded, the rule does not apply to the statement of a cause of action by plaintiff. * * * Nevertheless, the record may be given in evidence with the same conclusive effect as if it had been specially pleaded."

When the complaint was filed in this case, of course, the facts in the attachment proceedings upon which plaintiff now bases the claim of res judicata had not occurred. The transcript reveals that plaintiff claimed res judicata at the beginning of the trial and that it was discussed extensively by counsel for the parties and by the court. The question of res judicata was properly before the court. Counsel for plaintiff offered "the pleadings and findings and judgment in the attachment matter" in evidence. Counsel for defendants said: "I don't think it is necessary. The whole matter is a matter of record in the case." Counsel for plaintiff then said: "Of course, the question of res adjudicata should be pleaded or raised by evidence, and that was my thought. It is not pled because there was no chance of pleading it; and secondly, if there is any question about the evidence, it is before the court." The court said: "Well, that is satisfactory."

In Beckjord v. Traeger, 1934, 3 Cal.App. 2d 385, 387, 39 P.2d 523, 524, it is said: "It may be admitted that estoppel must ordinarily be pleaded, but an inspection of the transcript reveals the fact that estoppel was discussed in the opening discussion of the case and in the testimony that followed and was in effect carried into the findings. In such circumstances it became an issue of the case as effectively as though it had been pleaded."

As to the third: The objection made by plaintiff that the order on the motion was res judicata had been submitted to the court for a ruling on the objection, and the court announced its ruling on the objection (overruling the objection) in the recitals immediately preceding the formal Findings of Fact. The fact that the court adopted this method of stating the ruling does not alter the fact that it was only a ruling upon an objection, and did not make the ruling an appealable order. The so-called finding that "there has been no previous adjudication of the merits of the action" also appeared preceding the formal Findings of Fact and was an explanation of the ruling upon the objection and a conclusion of the court.

It is true, as claimed by appellants, that the respondent cannot on the appeal of the opposite party ask a court of review to consider any errors against her. The respondent, however, may ask that the judgment in her favor be sustained irrespective of any erroneous rulings against her on objections made during the trial. Respondent had no right to appeal from an adverse ruling upon an objection, and there was no reason why she should appeal. The judgment was in her favor for the amount prayed for and she was not aggrieved. "No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." Rapp v. Southern Service Co., 1931, 116 Cal.App. 699, 706, 4 P.2d 195, 197.

An additional issue at the trial was the alleged fraudulent representations, but no additional evidence was offered in support thereof, and counsel for plaintiff stated that "if the court holds with me in this matter [referring to Corporate Securities Act violation] I would not push the representations as to fraud," (referring to the general allegations of fraud) and "those allegations of the complaint I would not attempt at this time to prove." Under these circumstances the findings to the effect that the general allegations of fraud in the complaint are true cannot be sustained.

Another issue at the trial was whether the Stella-Harold Development Company was the alter ego of Stella. The court found that the allegations of paragraph II of the complaint were true, and by such reference, therefore, found: "* * * that said Stella is the owner of a majority of the shares of said corporation, that he controls and dominates said corporation and its acts, and that in truth and fact it is his alter ego." In an express finding (not by reference) the court found: "* * * that it is true that defendant Stella was an officer, to wit, president, thereof and that he controls and dominates it and is in fact its alter ego." Appellant contends that such findings are not supported by the evidence. Stella testified that he "owns" no stock in the corporation; that Mrs. Grace Harold owns all the stock; that he is president of the company; that he was one of the original organizers of the company. There was no testimony that he did not own stock at the time of the transactions involved herein. Stella received the money paid for the mineral rights. In appellants' opening brief it is stated: "In proximity to the development work [referring to two prospective oil wells] that he [Stella] was doing, he acquired, by mineral deed, considerable acreage, taken in the name of Stella-Harold Development Company, giving him the right to explore for oil or gas, with right of ingress and egress to the property. * * * Appellant Stella divided this acreage in parcels of two and a half acres each and sold the same to the public, giving an assignment of all his right, title and interest in and to the mineral rights in and to the said property." Mrs. Harold was a real estate broker in Stella's office, and he paid her a commission when she made sales. When Stella was asked who pays the office rent and for the telephone he said: "I pay it and Mrs. Harold is paying it." The "Agreement" delivered to plaintiff provided thereon as follows: "If official acknowledgment of this agreement or any future payments is not received by purchaser within 5 days from date thereto, notify E. F. Stella, 831 West Second Street, Los Angeles, California." "(Make all checks, drafts or money orders payable to E. F. Stella, Trustee.)" "Notice: E. F. Stella will not be responsible for payments made with currency unless said currency has actually been received by him."

The "Agreement" as to the sale of mineral rights described in the seventh cause of action was signed "E. F. Stella By Dallas M. Steele" and Stella states that he received the money paid for the rights; but the "Assignment" as to those mineral rights was signed "Stella-Harold Development Company, by E. F. Stella, president." Stella admits that he received the money from all sales of mineral rights described in the nine causes of action. His plan was to make the sale in his name and then as president of the Stella-Harold Development Company execute an assignment of the rights, so sold, to himself as an individual, and then as an individual to execute as assignment to the plaintiff.

[1] It is not necessary to decide in this action whether the company was the alter ego of Stella. The judgment was against both of them on the seventh cause of action. They both participated in the sales of the mineral rights and both are charged with the knowledge that the sales were in violation of the Corporate Securities Act and in violation of the order of the real estate commissioner that sales in that section be not made until a survey was made and a map recorded, and that the sales were void and the rights were valueless. Stella acted for himself individually in the signing of the agreement, and as president of the company acted for the company in signing the assignment. A wrong was committed and both participants are liable. The judgment against both Stella and Stella-Harold Development Company on the seventh cause of action was proper.

As to the sales of the stock referred to in the tenth, eleventh and twelfth causes of action, judgment was against Stella and Dallas M. Steele. Mrs. Steele was a saleswoman in Stella's office. She made all of the sales of the mineral rights and shares of stock to plaintiff. The tenth cause of action relates to the sales of 38 shares of stock of Fortuna Holding Corporation for $100. The eleventh cause of action relates to the sale of 10 shares of Summit Holding Corporation for $125. The twelfth cause of action relates to the sale of 10 shares of K. B. P. Holding Corporation for $1,000. Stella acquired all of the stock in the three corporations referred to in these three causes of action. A brief history of these corporations is stated in order that the relationship of Stella and Steele to the stock transactions may be more clearly presented. The Fortuna Holding Corporation was originally known as the R. & B. Knitting Mills, Inc. After he acquired all of the stock of the company he changed the name to Fortuna Holding Corporation and changed the capital structure. The original structure was 2500 shares of the par value of $10 each, and this was changed to 4500 shares of no par value, and new certificates of stock were issued and a permit for the new issue was not obtained. The Summit Holding Corporation was incorporated October 27, 1931, for 50,000 shares. On December 9, 1931, a permit was issued authorizing the issuance of 25,000 shares and said permit expired on June 9, 1932. The application for the permit stated in part: "* * * the applicant does not request, nor will it require, the permission to sell or dispose of any of its capital stock to the public, * * *." The sale of Summit stock to plaintiff was on April 18, 1938. The K. B. P. Holding Corporation was originally known as the Montroy Electric Co., and on July 15, 1937, a permit was issued allowing the issuance of 7800 shares. After Stella acquired all of the stock in the company he changed the name to K. B. P. Holding Corporation, and changed the capital structure from 25,000 shares of the par value of $1 to 4800 shares of no par value, and issued new certificates of stock and did not obtain a permit for the new issue.

The situation is that Stella acquired all of the stock of the three corporations, and as to the companies now known as the Fortuna Holding Corporation and the K. B. P. Holding Corporation he changed the names and the capital structure and issued new shares instead of the outstanding old shares. As to the Summit Holding Corporation there was no change in name or capital structure, and the permit expired on June 9, 1932, and the application for the permit stated in substance that the stock was not to be sold to the public.

Defendant Steele testified that she bought the Fortuna and Summit stock from Stella and some of it was as a bonus for work, and that he gave her the stock in the K. B. P. Company as a bonus for work and to make up for a $150 loss resulting to her from a deal she had with Stella regarding an oil lease; that she did not know how much of the stock she bought or the total amount she had paid or agreed to pay for it; that she endorsed the three checks for $100, $125 and $1,000, which she received from plaintiff for the stock in the three companies and delivered the checks to Stella to apply as payments for mineral deeds which she had received from Stella before she had paid for the deeds; that when she delivered the checks to Stella she did not know the number of acres in which she had purchased mineral rights or how much she had agreed to pay for the rights or how much was still due Stella; that she did not keep accounts of her transactions with Stella.

Appellants contend that the shares of stock sold by Steele to plaintiff were shares of stock personally owned by Steele and that a permit to sell the stock was not necessary and that the sales were not in violation of the Corporate Securities Act. As shown above, however, it was adjudicated in the attachment proceeding that the sales of stock were in violation of the Corporate Securities Act. And further, as above shown in the findings in the attachment proceeding, the court found that the stock was not the bona fide personally owned stock of Steele or Stella. The evidence supports this finding.

Appellants further contend that even if there is a liability to plaintiff by reason of the sales of the stock that a judgment against both Stella and Steele is not proper. The contention is that if she sold her own stock Stella would not be liable, and if she sold it as the agent of Stella she would not be liable.

[2] It will not be necessary to determine in this proceeding whether the relationship of principal and agent existed between Stella and Steele in the stock sales to plaintiff. As above shown the issue as to whether the stock was the personally owned stock of Steele or Stella is res judicata. If the relationship of principal and agent did exist, it is clear that Steele is charged with knowledge that the sales were wrongful in nature and therefore, she would be liable. Sec. 2343, Subdiv. 3, Civil Code. Furthermore, even if an agency relationship did not exist there was a joint participation by Stella and Steele in these wrongful stock transactions, with knowledge of their wrongful nature. The judgment against both Stella and Steele on the tenth, eleventh and twelfth causes of action was proper.

There were no findings of fact upon the eighth cause of action which related to the sale of mineral rights to plaintiff on September 15, 1938, for $350. The thirteenth cause of action was for money had and received and was based upon the transactions involved in the preceding twelve causes of action which, of course, included the transaction involved in the eighth cause of action. There were findings upon the thirteenth cause of action and therein it was found that Stella received from plaintiff for the use and benefit of plaintiff on September 15, 1938, the sum of $350. Although there were no findings on the eighth cause of action the $350 involved therein should not be deducted from the judgment since that item is included in the findings and judgment on the thirteenth cause of action.

Appellants contend further that the judgment, being based upon rescission, was erroneous in that it did not require plaintiff to return to defendants the consideration alleged to have been received by plaintiff, that is, to assign to defendant Stella the mineral rights and the certificates of stock. It having been adjudged that the assignments of the mineral rights and the certificates of stock were void and valueless in that they were sold in violation of the Corporate Securities Act, there was nothing to return. As a practical matter it perhaps would be of convenience to Stella if plaintiff were to execute an assignment of the alleged mineral rights to Stella, however, it would not be proper for the court to direct that plaintiff execute such assignments, or that the same be executed at all, for the reason such assignments have been adjudged to be in violation of the Corporate Securities Act.

The judgment is affirmed.

SHINN, Justice (concurring in the judgment).

I concur in the judgment of affirmance.

I cannot agree with the opinion of Mr. Justice WOOD in its application of the doctrine of res judicata. The point is not necessary to a disposition of the appeal.

[3] The evidence adduced at the trial, which was the same as that given at the hearing of the motion to dissolve the attachment, was, I think, sufficient to support the findings. The findings and conclusions with reference to the first nine causes of action were to the effect that the assignments or transfers of mineral rights were securities and were subject to the provisions of the Corporate Securities Act. Defendant Stella acquired mineral rights in lands situated in Tehama and Glenn Counties. These were subdivided into 2½-acre parcels and were sold to the public. Stella had been sales manager of El Claro Oil and Gas Company, a corporation, which in 1932 was engaged in selling interests in oil leases in Glenn County under a scheme which was denounced by a decision of the District Court of Appeal in El Claro Oil, etc., Co. v. Daugherty, 1936, 11 Cal.App. 2d 274, 53 P.2d 1028, 55 P.2d 488, as in violation of the Corporate Securities Act. Stella's operations which are involved in

the instant case were a continuation of the same general promotional activities in different properties under a slightly different scheme. However, the one here under review, I think failed as the one denounced in the El Claro case did, to successfully circumvent the provisions of the Corporate Securities Act. The mineral deeds, upon the record before us, constituted securities and they were sold without a permit. The property which was acquired by the investors consisted of a right to extract oil, gas, and other mineral substances from the parcels of land conveyed and, it may be assumed for the purposes of this decision, such surface rights as would have been necessary in order to carry on exploratory and development work for the production of oil, gas, and other minerals. The question before the trial court was whether the scheme under which these deeds were given was one which in practical effect contemplated and involved participation by the investors in an enterprise or business conducted by others for earnings and profit, or more specifically, whether investors were not led to part with their money in the expectation and upon the promise that they would be able at some future time to lease their interests to some oil company upon a royalty basis and whether this expectation, though not expressed, was in reality the main inducement for the making of the investment. If the correct answer to this question is in the affirmative then the deeds in question partook of the very essence of those types of investment contracts which throughout the history of legislation on the subject in this state have been deemed to be proper subjects for regulatory supervision. It is not necessary to assume, and is not assumed, that a conveyance of mineral rights in a parcel of land comprising 2½ acres is necessarily a security within the meaning of the Corporate Securities Act. It may or may not be a security. The determination of that question depends upon a great deal more than the mere fact of the conveyance. What is to be said on that subject herein relates exclusively to the facts of the instant case.

[4] In deciding whether a given instrument is a security the courts have invariably looked through mere form to substance. People v. McCalla, 1923, 63 Cal.App. 783, 791, 220 P. 436; People v. Eiseman, 1926, 78 Cal.App. 223, 241, 248 P. 716; People v. Smith, 1931, 111 Cal.App. 177, 186, 295 P. 105; People v. Ratliff, 1933, 131 Cal.App. 763, 772, 22 P.2d 245; People v. Reese, 1934, 136 Cal.App. 657, 672, 29 P.2d 450; El Claro Oil, etc., Co. v. Daugherty, 1936, 11 Cal.App.2d 274, 281, 53 P.2d 1028, 55 P.2d 488; People v. Yant, 1938, 26 Cal.App.2d 725, 735, 80 P.2d 506. For the following discussion we have accepted as a basis of fact certain inferences which we believe were necessary to be drawn by the trial court in order to support the findings and which could be properly drawn from the evidence. They relate, as will be seen, to ultimate and controlling facts with reference to the nature of the rights acquired by the purchasers of "mineral rights," to the reasonable possibilities of the realization of returns in the way of oil or gas production, and to the practical and not merely the theoretical positions they occupied as owners of mineral rights in small parcels of land in a wilderness of undeveloped and unproven acreage. We assume that the trial court believed that it was highly improbable that these parcels could be developed for oil or that either the defendants or the purchasers expected that they would be so developed unless they should be grouped into tracts of sufficient size to justify expensive exploratory drilling. Our statements are to be understood as being predicated in part upon the inferences mentioned.

In the case of the El Claro Oil Company, in connection with purchases of mineral rights, investors had executed transfers of the same in order that they could be leased under community oil leases. By reason of this fact the transfers were held to be securities. In the instant case no such transfers or leases were made, but from the nature of the transactions and the surrounding circumstances it is clear that such leases were contemplated and in a practical sense that they would become necessary in order to accomplish the exploration and development of the land for oil. The lands were located in unproven territory. There was a well producing gas which was under the control of Stella, who was financing the drilling of another well in the same locality. The cost of the latter well, if it should be drilled without mechanical trouble, was estimated by Stella at $75,000. There is no pretense that any of the investors would ever be able to drill oil wells themselves or that they had any intention of doing so. In a letter to the real estate commissioner dated June 21, 1937, Stella said in part, referring to the well he was drilling: "I should complete it within a short period of time providing I am able to meet the financial requirements for the carrying on of the uninterrupted drilling. I find however that since the permit was granted my volume of sales has been very disappointing due to the fact that I am compelled to sell two and a half acre drill sites and must require down payments of not less than $25 and $25 monthly payments thereafter. I know of a good many worthy people who hold fairly good positions and have been steadily employed for many years and have been steadily employed by the same people for whom they are working who are really desirous of acquiring one of these drill sites, but the payment of $25 per month is more than they can possibly stand, and therefore they have to forego the opportunity of purchasing same." The letter was written as a request that the sale of drill sites of one acre each without change of existing prices might be authorized. Of course each owner of a drill site would have the right to drill a well on it or to lease it separately for the drilling of a well (assuming that he also held the necessary surface rights), but the scheme of the promotion cannot be given a pattern drawn on this fantastic possibility. In his testimony defendant Stella frequently referred to sales and leases of small tracts of land in proven oil fields as justifying the prices he was receiving from investors in his own promotional schemes, and the inference is inescapable that these same arguments must have been a part of the stock in trade of the defendants and their salesmen. In theory an oil field might be developed of such great value that each investor would be able to lease each drill site he owned separately and without joining with other owners in a community lease. It is a matter of common knowledge, however, that exploration for new oil fields is carried on under leases embracing large areas and that it is only in proven oil fields which have first been developed by those holding large acreage that further development is carried on under leases of smaller tracts, that the instances are yet more rare in which the development goes into closely subdivided areas under community leases, and that in yet rarer instances small parcels in well proven fields become the subject of independent development. The trial judge was fully justified in believing that the defendants in this case and the investors to whom they were selling the so-called mineral rights had in mind that eventually oil development could only be extended to the lands of the investors through the meduim of community leases and that the scheme was in its essentials no different from the one denounced in the El Claro case, the only difference in form being that under the latter scheme community leases were executed in connection with the original sale of mineral rights, whereas under the scheme involved in the instant case the actual execution of community leases, while essential to the exploration of the lands of the investors, was deferred to some indefinite future time when conditions might warrant the leasing of the land by oil-producing companies financially able to conduct oil development in a normal and businesslike manner. Undoubtedly the trial court was justified in concluding that the sale of the mineral rights involved would be valueless in the hands of the investors and in a practical sense incapable of development except in the event and by means of operations conducted by others in which the several investors, as lessors, would be given the right to share ratably in landowners' royalties.

[5] The case furnishes only another example of the almost infinite number of ingenious devices conjured up by wily promoters designed to give them freedom to operate without regulation by law through the Department of Corporations. Such schemes, however, inexorably fall within the ban of the Corporate Securities Act wherever their essential purposes, regardless of the mere forms of procedure employed, lead investors into enterprises where the earnings and profits of business or speculative ventures must come through the management, control, and operations of others and which, regardless of form, have the characteristics of operations by corporations, joint stock companies, trusts, and similar business structures. The reasoning in People v. Jackson, 1937, 24 Cal. App.2d 182, 74 P.2d 1085, and the cases therein cited has direct application to the facts of the instant case and fully supports the conclusion of the trial court that the mineral deeds herein involved were "securities."

[6] The finding of the trial court that the stocks purchased as alleged in the tenth, eleventh and twelfth causes of action were securities and were illegally sold to plaintiff without a permit is, I believe, likewise supported by the evidence. The stock stood in the name of defendant Dallas M. Steele and was sold by her to plaintiff. All of the sums received by Mrs. Steele were immediately paid over to defendant Stella. The latter was financing the drilling of oil wells on lands and under leases in which the three corporations, Fortuna Holding Corporation, Summit Holding Corporation, and KBP Holding Corporation, were interested and in the returns from which they would share in the event of successful development. He was using the money derived from the sale of mineral rights to finance these oil drilling operations. As stated in the opinion of Mr. Justice Wood, Stella had acquired all of the stock of these three corporations, which stock appears to have been issued under permits of the Department of Corporations. It may be conceded that this personally owned stock could lawfully have been sold by Stella. In this connection no consideration will be given to any questions which may arise from the fact that while he was the sole stockholder Stella caused the capital structure of one of the corporations to be altered so as to provide for a greater number of shares of capital stock and that no permit was obtained for the sale of those shares. In some fashion or other, Mrs. Steele acquired from Stella the stock which she later sold to plaintiff. The sums which plaintiff paid therefor, when they were paid by Mrs. Steele to Stella, were credited by the latter upon alleged purchases by Mrs. Steele from Stella of the same type of mineral rights as those sold to plaintiff. Both Mrs. Steele and Stella testified that Mrs. Steele owned the stock and that she had acquired some of it for cash consideration, some of it in exchange for interests she held in the El Claro Oil Company, and other shares as bonuses in connection with the promotional enterprises in which defendants were engaged. The inquiry into the transactions between Mrs. Steele and Stella relating to her alleged purchases of mineral rights and her acquisition of the stocks was exhaustive and, as an effort to learn the truth of the situation, was far from fruitful. The testimony of both defendants on these subjects was contradictory, evasive in the extreme, and disclosed an intention to conceal important facts. Mrs. Steele was utterly unable to tell when she had purchased mineral rights, how many parcels she had purchased, what acreage was embraced in the purchases, how much she had ever owned at any one time, how much she owned at the time of trial, how much she ever agreed to pay Stella for the conveyances, how much she had paid him, or how much she owed him, if anything. Defendant Stella produced some cards which purported to record purchases of mineral rights by Mrs. Steele, but the latter had no knowledge of these records and no records of her own. Equally unsatisfactory was the testimony of these witnesses with reference to the shares of stock supposedly acquired by Mrs. Steele, portions of which were later sold to plaintiff. No records of these transactions were kept by either party, there was no tangible or satisfactory evidence that Mrs. Steele had acquired any of the stock in bona fide business transactions, and the trial court was fully justified in concluding that the shares standing in the name of Mrs. Steele were held for defendant Stella and were to be disposed of for his benefit. It was reasonably to be inferred that the stock was actually sold to plaintiff for the benefit of defendant Stella and that the alleged sales of mineral rights by the latter to Mrs. Steele were but a device set up to justify the payment to Stella of the proceeds from the stock sales. The three corporations whose stock was sold to plaintiff held mineral rights or leases or interests in production and part of the stock of some of the corporations was owned by the other corporations. It was largely to their use and for their benefit that defendant Stella was financing the drilling of the several oil wells. The trial court was justified in drawing an inference that the stock transactions between defendants Stella and Steele on the one side and plaintiff on the other were not bona fide dealings in personally owned stock but were dispositions of the stock for the use and benefit of the corporations themselves, which benefit was received through the use of the proceeds from stock sales to finance the oil drilling operations on behalf or in the interests of the corporations. The plan of the defendants in the larger view was to carry on oil development to attract purchasers of the mineral rights, and to use the money received on sales of mineral rights to carry on the development work and for the purchase of additional mineral

rights. By devious means defendants sought to accomplish the same purposes that would have been accomplished in a lawful and legitimate manner by the authorized sale of stock of a corporation holding title to the mineral rights and engaged in developing them with the proceeds of stock sold to investors and for the benefit of stockholders. In other words, defendants had a lawful purpose, which they chose for reasons which we do not know and which are unimportant, to accomplish in an illegal manner. If perchance the conclusions of the trial court, with which we believe we must agree, were reached without complete knowledge of the business transactions between defendants Steele and Stella, the responsibility must rest upon those defendants. Their methods of operations, intricate, devious, and fraught with uncertainty as they were, coupled with the obvious unwillingness of the two defendants to disclose the entire truth, presented to the trial court questions of great difficulty and, unfortunately, left to inference important questions of fact which perhaps could have been decided with more assurance and certainty had the court received the benefit of a greater measure of cooperation from the defendants. An extensive consideration of the record discloses no reason for disturbance of the findings or conclusions of the trial court.

On the questions of liability of the several defendants I agree with the conclusions stated in the opinion of Mr. Justice WOOD.

SCHAUER, Presiding Justice (concurring in the judgment).

I concur in the judgment of affirmance and in the conclusion reached by Mr. Justice SHINN that the substantially identical evidence adduced both on the motion to discharge the attachment and at the trial was sufficient to support all essential findings. I do not hold that the doctrine of res judicata has no applicability here but since the judgment must be sustained regardless of such doctrine it seems preferable to dispose of this appeal on consideration of its claimed merits rather than by application of a technical proposition of law. I therefore express no opinion as to the applicability of such doctrine and except as otherwise herein indicated concur in the opinion of Mr. Justice SHINN.

51 Cal.App.2d 61

LINCOLN et al. v. SUPERIOR COURT OF MADERA COUNTY et al.

Civ. 6758.

District Court of Appeal, Third District, California.

April 1, 1942.

Hearing Denied May 28, 1942.

1. Pleading 🔑8(9)

The statement in complaint, seeking to have four Massachusetts trusts dissolved and trustees of each, after an accounting, discharged, and to compel trustees to reconvey property to grantors from whom they received property, that by reason of filing of a petition for order confirming the trustees, consent of beneficiaries to the confirmation and order confirming trustees, the court had acquired exclusive jurisdiction over trust properties, etc., was a mere "conclusion of law" and would be disregarded.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion of Law".

2. Injunction 🔑26(1)

The word "injunction", as used in statute providing that an injunction cannot be granted to stay judicial proceedings pending at commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings, is intended to apply to restraining orders as well as to injunctions. Civ Code, § 3423.

See Words and Phrases, Permanent Edition, for all other definitions of "Injunction".

3. Injunction 🔑132

If a restraint imposed by order of court is "until the further order of the court", it is a "preliminary injunction", regardless of what the order is called by the court issuing it.

See Words and Phrases, Permanent Edition, for all other definitions of "Preliminary Injunction".

4. Injunction 🔑26(1), 132

In suit to dissolve four Massachusetts trusts and to revest trust property in persons entitled thereto, an order purporting to restrain defendants from further prosecution of any of actions described in complaint or filing any other actions affecting the trusts until further order of court was a "preliminary injunction", and, hence, statute providing that injunction cannot be granted to stay a judicial proceeding pending at commencement of action in which injunction is granted unless such restraint is necessary to prevent a multiplicity of such proceedings was applicable. Civ.Code, § 3423.

5. Joint-stock companies and business trusts ⚷1

A "joint stock company", of which a "Massachusetts trust" is one form, is in effect a "copartnership".

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Stock Company", "Massachusetts Trust" and "Copartnership".

6. Injunction ⚷26(4)

In suit to dissolve four Massachusetts trusts and to revest trust property in persons entitled thereto, where the four trusts were in reality but one partnership doing business under four different names, and it appeared that four separate actions had been filed against partners for legal services rendered in formation of each of trusts, the entry of an order temporarily restraining pending suits, for purpose of keeping partnership property intact until dissolution could be effected, was proper under the statute on ground that the pending suits constituted a "multiplicity of proceedings". Civ. Code, § 3423.

See Words and Phrases, Permanent Edition, for all other definitions of "Multiplicity of Proceedings".

Original proceeding in prohibition by Walter Gould Lincoln and another against the Superior Court of Madera County and another, to prohibit respondents from continuing in force a restraining order.

Alternative writ of prohibition heretofore issued discharged, and peremptory writ denied.

Walter Gould Lincoln, of Los Angeles, in pro. per., for petitioners.

Newby & Newby, of Los Angeles, David E. Peckinpah, of Fresno, Neice & Crane, of Los Angeles, and David P. Barcroft, of Madera, for respondents.

CURLER, Justice pro tem.

This is an application for a writ of prohibition to prohibit the Superior Court of the County of Madera, from continuing in force a restraining order which prohibited the petitioners, Walter Gould Lincoln and M. W. Beale, from prosecuting or taking any further steps for the prosecution of certain actions pending in the Superior Court of Los Angeles County, and in the Municipal Court of the City and County of Los Angeles, until the trial of a certain action in the Superior Court of Madera County, numbered 5992, had been completed, or until the further order of said Madera County court.

The complaint filed in the Superior Court of Madera County which formed the basis for the restraining order issued by that court, alleged in brief, as follows:

That Roger Averill was the owner of certain farming lands situate in Madera County, California, and that there were associated with him in his farming enterprises carried on upon said lands, Paris A. Davis and Jesse F. Lincoln. That upon the advice of Walter Gould Lincoln, attorney at law, who was sole legal adviser and confidential agent of Roger Averill, the said lands and personal property used in farming the same were formed into four Massachusetts trusts. That these trusts were created in the State of Nevada, and that the first trustees of all of said trusts were Nevada residents. That the beneficial interest in each trust was divided into one hundred units. That ten units of each trust were turned over to Jesse F. Lincoln, ten of the units of each trust were turned over to Paris A. Davis, and eighty units of each trust were retained by Roger Averill. That Roger Averill, desiring to secure Walter Gould Lincoln for any attorney fees that might be coming to him as attorney for Averill for any services to be rendered in the probating of Averill's estate, offered to issue to Walter Gould Lincoln an authorization for ten units of each trust, said authorization not to be used until the death of Averill, and only then in case Lincoln had anything coming to him for legal services rendered as above stated. That upon the advice of Walter Gould Lincoln, the authorization was issued in the name of M. W. Beale, Lincoln's secretary, in whose name, Lincoln stated, all of his personal property was held. That contrary to instructions, Walter Gould Lincoln and M. W. Beale had ten units in each trust issued in the name of M. W. Beale. That M. W. Beale is a trustee of each of the four trusts, and refuses to cooperate with the other trustees of said trusts in signing papers necessary to borrow money for the operation of the farming properties. That Roger Averill finds that he cannot efficiently operate the farms under the trusts, and that he no longer has control over the same, because control is vested in the trustees. That each of the trusts is qualified under the laws of California, to do business in this state; and that declarations of all of the trusts were recorded in Madera County. That advice given by Walter Gould Lincoln as to the advantages of putting the farm properties into trusts, was knowingly false and made with the intent of complicating the affairs of Roger Averill and of making business for himself as an attorney. That in the month of December, 1938, Walter Gould Lincoln filed petitions in the Superior Court of Madera County for orders confirming and appointing the then trustees of the three trusts which held the real estate; and that orders were received from said court confirming the trustees of said trusts. That M. W. Beale, on January 25, 1939, by Walter Gould Lincoln, as her attorney, filed in the Superior Court of the State of California, in and for the County of Los Angeles, action numbered 435987, against Katherine Averill Bridges, for the purpose of having Katherine Averill Bridges removed by the court as a trustee of Lincoln Ranch Company trust, and having the court select and appoint another trustee in her place—also in said action, M. W. Beale asked the court to nullify the removal of herself as a trustee of said trust and to reinstate her as such trustee. That M. W. Beale, on May 20, 1941, on the advice of Walter Gould Lincoln, caused to be filed in the Superior Court of Los Angeles County, action numbered 464355, wherein said M. W. Beale, as trustee of one of the trusts, to-wit: Roger Averill and Associates, is plaintiff, and Katherine Averill Bridges, as trustee of the said trust, is defendant. That Walter Gould Lincoln is attorney in said action; and that the complaint prays for an accounting and certain other relief, including attorney fees for the said Walter Gould Lincoln. That said action was brought to harass and interfere with the management of the said trust and its business, and is still pending, being set for trial on October 6, 1941. That M. W. Beale, as trustee of said trust, also commenced action numbered 467192 in the Superior Court of Los Angeles County against her co-trustee Katherine A. Bridges, and the San Joaquin Cotton Oil Company for the removal of Katherine A. Bridges as trustee of said trust. Walter Gould Lincoln is attorney for plaintiff in said action, and asks for a reasonable attorney fee either from Katherine A. Bridges or from the trust's properties. Said action has not been set for trial. That Walter Gould Lincoln commenced, in the Municipal Court of Los Angeles, County of Los Angeles, State of California, on December 31, 1940, action numbered 569221 against the Lincoln Ranch Company, a voluntary trust, for the recovery of attorney's fees in the sum of $2,000; and on the 31st day of December, 1940, commenced, in the Municipal Court of Los Angeles, action numbered 569222 against the Davis Ranch Company, a voluntary trust, for the sum of $2,000 attorney fees; and on the 24th day of January, 1941, commenced action numbered 571512 in the Municipal Court of Los Angeles County against Averill Ranch Company, a voluntary trust, for the sum of $2,000 attorney fees; and on the 24th day of March, 1941, commenced action numbered 571513 in the Municipal Court of Los Angeles against Roger Averill and Associates, a voluntary trust, for the sum of $2,000 for an attorney fee. The complaint further alleged that Walter Gould Lincoln has threatened to bring, or cause to be brought, other actions against plaintiff and other trustees of said four trusts, and unless restrained, will file other actions against said plaintiffs and against the trustees of said trust. In the complaint it is alleged that all actions affecting the said four trusts, or affecting the trustees or beneficiaries thereof, or to recover compensation for legal services, or for an accounting by said trustees, should be heard in one action in order to avoid multiplicity of suits; and that all actions, other than the one filed in Madera County, upon which the restraining order was issued, should be enjoined. Plaintiffs, constituting part of the trustees of each of said four trusts, desire to terminate the trusts, and liquidate their affairs, and due to differences arising between beneficiaries named in the trusts, desires a declaration of their rights in the County of Madera.

In the prayer for relief, plaintiff in the Madera County action asked that the four trusts be dissolved and the trustees of each, after an accounting, be discharged; that the trustees be required to transfer to the grantors and transferors from whom they received the legal title, the trusts' property; that defendants, Walter Gould Lincoln and M. W. Beale, be enjoined from further prosecution of any of the actions described in the complaint, or from filing or prosecuting any other actions affecting the trusts, until the further order of the court; that defendants Walter Gould Lincoln and M. W. Beale be required to seek any and all relief against said trusts in this action, and not otherwise; that the certificates for ten beneficial interests in each of said four trusts issued to M. W. Beale be declared to be void and of no effect, and be delivered to the court for cancellation; and that the terms upon which the trusts may be dissolved, and the property held by the trustees reconveyed and transferred to the person or persons entitled thereto, be determined.

Upon the complaint being filed, the Superior Court of the State of California, in and for the County of Madera, issued an order restraining defendants M. W. Beale and Walter Gould Lincoln from further proceeding with any of the cases mentioned in the complaint, and further restrained them from further prosecuting any other actions affecting the trusts, until the further order of the court.

M. W. Beale and Walter Gould Lincoln petitioned this court for an alternative writ of prohibition, and the same has issued. The question here involved is the validity of the restraining order of the Superior Court of Madera County.

Since the argument on the application for an alternative writ of prohibition, Walter Gould Lincoln and M. W. Beale have moved to extend the record by adding thereto three exhibits, consisting of (A) a copy of the petition filed in the Superior Court of Madera County for confirmation of the trustees of the Lincoln Ranch Company, a voluntary trust, (B) consent of the beneficiaries of the Lincoln Ranch Company, a voluntary trust, to the confirmation of the trustees of that trust, and (C) judgment of the Superior Court of Madera County, appointing and confirming any previous appointment of J. F. Lincoln, F. K. Averill, and M. W. Beale as trustees of Lincoln Ranch Company, a voluntary trust.

[1] In the complaint filed in the Superior Court of Madera County, there is an attempt to state the contents of the petition for confirmation of trustees, and the consent of the beneficiaries to the confirmation. There is also a statement that the court made an order confirming the trustees, and that by reason of these proceedings, the Superior Court of Madera County acquired exclusive jurisdiction over the trust properties, etc. The conclusion of the pleader, that by reason of the filing of a petition, the consent of the beneficiaries to the confirmation of the trustees, and the order confirming the trustees, the court acquired exclusive jurisdiction over the trust properties, etc., is a mere conclusion of law and will be disregarded by this court. Union Bank & Trust Co. v. Los Angeles County, 2 Cal.App.2d 600, 38 P.2d 442. Taking this view of the pleading, we see no useful purpose to be served by permitting an extension of the record, and the motion for the same is denied.

If section 3423 of the Civil Code applies in this case, then there are only two questions involved, i. e., (A) Is there a multiplicity of proceedings involved or threatened? (B) Do the petitioners have a plain, speedy and adequate remedy at law in the action brought in Madera County? Section 3423 of the Civil Code, so far as it applies to this case, reads as follows: "An injunction cannot be granted: First—To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings."

[2-4] Although the order of the Superior Court of Madera County was designated as a restraining order, and although the language of the above section only applies to injunctions, it is clear that the use of the word "injunction" in the section is intended to apply to restraining orders as well as to injunctions; because, unless a preliminary injunction could follow the restraining order, the latter would be without purpose. Furthermore, in the body of the order issued by the Madera County Superior Court, it refers to its order as an injunction. In addition, the order restrains the acts not only until the hearing on the preliminary restraining order, but also restrains the acts "until the further order of this court." It is the law in this state that regardless of what an order is called by the court issuing it, that if the restraint is "until the further order of the court," that it is a preliminary injunction. Neumann v. Moretti, 146 Cal. 31, 79 P. 512. It is, therefore, our opinion that section 3423 of the Civil Code is controlling in this case.

[5] Before determining whether there is a multiplicity of proceedings involved, it will be necessary to determine the status

of a Massachusetts trust in this state. Regardless of what conflict of opinion might have heretofore prevailed, it has been settled in the case of Old River Farms Co. v. Roscoe Haegelin Co., 98 Cal.App. 331, 276 P. 1047, that a joint stock company (of which a Massachusetts trust is one form) is in effect a copartnership. The Massachusetts trusts here involved are really copartnerships, with the partnership property vested in trustees.

Turning now to the suit filed in Madera County, it appears that the real object was to dissolve the partnership and to revest the partnership property, which had been held in trust, in the persons entitled thereto. The purpose of the temporary restraining order or preliminary injunction, which followed the filing of the suit in Madera County, was to keep the partnership property intact until the dissolution of the partnership could be effected.

Although the partnership business was conducted under four different names, i. e., Lincoln Ranch Company, a voluntary trust, Davis Ranch Company, a voluntary trust, Averill Ranch Company, a voluntary trust, and Roger Averill and Associates, a voluntary trust, P. A. Davis and wife owned ten per cent of each trust in which the partnership property was held, J. F. Lincoln and wife owned ten per cent, Roger Averill owned seventy per cent, and M. W. Beale owned ten per cent. In other words, there were four partners doing business under four different names, but in reality it was just one partnership. The object of the four suits filed in the municipal court of Los Angeles by Walter Gould Lincoln, was to collect an attorney fee from each of the four trusts for legal services rendered in the formation of said trusts. However, the four trusts were formed at the same time—the legal services were rendered for the same parties, and the partners were equally benefited, whether legal services were rendered to one trust, to two, or to all. To permit four different actions to be brought against the partners because they conducted their business under four separate names would amount to the same as permitting an attorney who had rendered legal services to a partnership over a period of several years, to bring a separate suit for services against the partners for each separate piece of legal work rendered. In each of the three suits filed in the Superior Court of the State of California, in and for the County of Los Angeles, M. W. Beale, as trustee of one of the trusts, is plaintiff, and Katherine Averill Bridges, as a trustee of one of the trusts, is defendant. In one suit, an accounting is sought from the co-trustee of Roger Averill and Associates trust, together with an attorney fee; in another suit, the removal of the co-trustee of Roger Averill and Associates trust, and the appointment of another, is sought; and in the third suit, the removal of the co-trustee of Lincoln Ranch Company trust, and the reappointment of M. W. Beale, as trustee, is sought. Although each suit is filed against Katherine Averill Bridges, instead of against the partnership doing business under one of its four fictitious names, the trustees are simply the names under which the partnership assets are held, and the real purpose of these actions directly affect the partnership. Although there seems to be no California decision covering a definition of the term "multiplicity of proceedings," there are decisions in other states defining "multiplicity of suits." In the case of Illinois Steel Company v. Schroeder, 133 Wis. 561, 113 N. W. 51, 55, 14 L.R.A.,N.S., 239, 126 Am.St. Rep. 977, the Wisconsin court states that the term applies "where one party may be sued several times in relation to the same subject-matter in its entirety, or in respect to some element or elements thereof."

[6] It is therefore our conclusion that a "multiplicity of proceedings" are involved, and that the Madera County Superior Court properly exercised its power in restraining the suits filed in Los Angeles. Having arrived at the conclusion that there is a "multiplicity of proceedings" involved, it is unnecessary to consider whether petitioners have a plain, speedy, and adequate remedy at law in the action brought in Madera County.

It is hereby ordered that the alternative writ of prohibition issued out of this court be discharged, and that the peremptory writ be denied.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

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PACIFIC STATES SAVINGS & LOAN CO. v. PEREZ et al.

Civ. 11820.

District Court of Appeal, First District, Division 2, California.

April 2, 1942.

Rehearing Denied May 2, 1942.

Hearing Denied May 28, 1942.

1. Appeal and error 🔑110

An order denying defendant's motion for new trial was not appealable. Code Civ. Proc. § 963.

2. Municipal corporations 🔑579

In action to quiet title by purchaser upon foreclosure of street improvement lien, holding absolute title under statute authorizing the improvement, complaint was not insufficient on the ground that complainant's title was equitable. Gen.Laws 1937, Act 8199, § 75.

3. Evidence 🔑366(11)

In action to quiet title by purchaser upon foreclosure of street improvement liens, city treasurer's deeds were admissible for plaintiff as against contention no proper foundation was laid, under statute providing that a treasurer's deed is "primary evidence" of the regularity of proceedings theretofore had, since quoted phrase means "prima facie evidence". Gen.Laws 1937, Act 8199, § 75.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Evidence" and "Primary Evidence".

4. Municipal corporations 🔑579

In action to quiet title by purchaser at foreclosure of street improvement liens against former owners, with defense of fraud of street commissioner in initiating the improvement proceedings, statement of district attorney setting forth the circumstances of commissioner's conviction of conspiracy to commit bribery was inadmissible. Gen.Laws 1937, Act 8199; Pen.Code, § 1192a.

5. Municipal corporations 🔑488(5)

City treasurer's tax deeds to purchaser upon foreclosure of street improvement liens were not void on ground the tax was confiscatory, in view of failure of property owners to take advantage of statutory provision for appearance before council to protest the contemplated improvement. Gen.Laws 1937, Act 8199, § 6.

6. Municipal corporations 🔑579

In action to quiet title by purchaser upon foreclosure of street improvement liens with defense of fraudulent instigation of proceeding authorizing the improvement, evidence was insufficient to sustain claim of fraud.

7. Municipal corporations 🔑579

In action to quiet title by purchaser upon foreclosure of street improvement liens, evidence was sufficient to establish that property owners had been given due notice of assessment and sale of their property. Gen.Laws 1937, Act 8199.

8. Municipal corporations 🔑551

Under statute requiring city treasurer to sell property securing street improvement liens whenever bonds evidencing same were in default and bondholders so demanded in writing, a demand by a corporate bondholder on its letterhead was sufficient notwithstanding individual signature thereto by manager of bondholder's bond department and hence purchaser at sale to satisfy such lien obtained good title against the former property owners. Gen.Laws 1937, Act 8199.

9. Municipal corporations 🔑577

Certificates of sale of property sold to enforce street improvement liens otherwise complying with the statute were not defective because of failure to set out the preliminary proceedings, the fact of default, and the making of a demand to sell. Gen.Laws 1937, Act 8199, § 72.

10. Municipal corporations 🔑577

"Sale No. 611" appearing in the caption of a certificate of sale to foreclose a street improvement lien was a sufficient designation of the number of certificate as against claim the caption was no part of the certificate, and hence purchaser thereunder acquired title against the former owner. Gen. Laws 1937, Act 8199, § 72.

11. Municipal corporations 🔑989(5)

The prescribed mode of procedure must be followed in the sale of land for delinquent municipal taxes so far as that procedure is specific and of possible benefit to the owner.

12. Municipal corporations 🔑577

Where property sold to satisfy a street improvement lien had at all times appeared on city treasurer's records as owned by certain named owners, and statute authorizing street improvements did not require certificates of sale to enforce lien therefor to include property owners' names, certificates reciting property sold had been assessed to unknown owners were not void, since the recitals regarding ownership were superfluous. Gen.Laws 1937, Act 8199, § 72.

13. Municipal corporations ⚷577

Where certificates of sale of property sold to enforce a street improvement lien recited the property was sold for a specified sum while in fact purchaser had delivered improvement bonds secured by the liens to city treasurer for most of the purchase price, certificates were not void on the ground city treasurer was authorized to accept cash only and that the recitals were false.

14. Municipal corporations ⚷581

Where statute required a notice to redeem property sold to enforce street improvement liens to be served upon the owners before application for a deed, a notice omitting the names of the property owners but including all matters required by the statute was not defective. Gen.Laws 1937, Act 8199, § 74.

15. Municipal corporations ⚷581

Where statute provided a notice to redeem property sold to satisfy a street improvement lien should state the date of expiration of "right" of redemption and that property so sold could be redeemed at any time before deed was applied for, a notice to redeem giving the date the "time" of redemption would expire and stating the purchaser was the Pacific States Savings and Loan Company, the application being made two days later for a deed to the Pacific States Savings and Loan Company of San Francisco was a substantial compliance with the statute and hence was sufficient. Gen. Laws 1937, Act 8199, §§ 73, 74.

16. Municipal corporations ⚷581

Where notice to redeem property sold to enforce street improvement liens stated purchaser would apply for a deed October 4, but deed was not applied for until October 6, property owner could have applied for a deed on October 4 and was not prejudiced because he was given two days longer to redeem than the law required. Gen.Laws 1937, Act 8199, § 73.

17. Municipal corporations ⚷579

A city treasurer's deed to purchaser of property at sale to enforce street improvement liens was not insufficient on ground that affidavits of posting of notice to redeem failing to show the year that the notices were posted, but showing date and year of execution and reciting notices were posted a specified time next preceding a definite date, were defective. Gen.Laws 1937, Act 8199.

18. Municipal corporations ⚷579

Where demand for sale and deed of property sold to enforce street improvement liens complied with all the statutory requirements, purchaser's title was not defective on the ground that the demand and deed omitted certain matters not required by statute. Gen.Laws 1937, Act 8199.

19. Appeal and error ⚷931(4)

In action to quiet title to property purchased at sale to enforce street improvement liens, where property owners defended on ground that the improvement had been fraudulently instigated and that the taxes were confiscatory, findings that defendants' claims were without right and that defendants had no interest in the property were sufficient to support judgment for plaintiff notwithstanding absence of finding on issues of fraud and confiscation. Gen.Laws 1937, Act 8199.

20. Appeal and error ⚷931(3)

Where an omitted finding must be inferred from a consideration of the findings actually made, appellate court will recognize the inference and consider the finding as having in effect been made.

21. Municipal corporations ⚷579

In action to quiet title to property purchased at sale to enforce delinquent street improvement liens, where statute authorizing the improvement did not require action for collection of the assessments to be brought against the owners and all persons having an interest in the property, judgment for plaintiff was not defective on ground that certain defendants were sued by fictitious names and were neither served nor dismissed. Gen.Laws 1937, Act 8199.

◆

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action by Pacific States Savings and Loan Company against L. Perez, and others, to quiet title, wherein defendants filed a cross-complaint. From a judgment for plaintiff and order denying a motion for new trial, defendants appeal.

Judgment affirmed. Purported appeal from order denying a new trial dismissed.

Geo. Ingraham, of Oakland, for appellants.

Roy D. Reese and James E. Burns, both of San Francisco, for respondent.

McWILLIAMS, Justice pro tem.

[1] Defendants have appealed from a judgment rendered in favor of plaintiff. The notice of appeal also attacks the order of the lower court denying their motion for a new trial. The latter order is not appealable and therefore the appeal therefrom must be dismissed. See Code Civ.Proc., § 963.

Plaintiff sued to quiet title to certain real property of which it claimed ownership. Defendants filed an answer denying plaintiff's ownership of the property. They also filed a cross-complaint in which they alleged that plaintiff claimed to have acquired title to the property by purchase at a foreclosure sale held to satisfy a lien on the property which lien was evidenced by certain street improvement bonds. According to defendants' cross-complaint the proceedings incident to that sale were fatally defective and as a result plaintiff did not acquire title to the property.

[2] Defendants also make the preliminary contention that the complaint of plaintiff contained but the general allegations ordinarily found in a complaint to quiet title and that such general allegations are insufficient to oust the holder of the legal title. This claim assumes that plaintiff's title was but an equitable one. It overlooks the fact that under section 75 of the Improvement Act of 1911, Gen.Laws 1937, Act 8199, under the provisions of which act the bonds had been issued, the deed of the city treasurer conveys to a grantee "the absolute title" to the lands described therein.

[3] Upon the trial of the case plaintiff offered in evidence the three deeds issued to it by the city treasurer of Oakland. Defendants contend that no sufficient foundation was shown for their introduction. We cannot agree with this contention. Section 75 of the act provides that the treasurer's deed, when duly acknowledged or proved, "is primary evidence of the regularity of all proceedings theretofore had, and conveys to the grantee the absolute title to the lands described therein, as of the date of the expiration of the period for redemption, free of all encumbrances, except the lien for State, county and municipal taxes.". The phrase "primary evidence" appears in section 3786 of the Political Code in reference to the evidentiary value of the tax deed, and as there used has been held to mean prima facie evidence. Boyer v. Gelhaus, 19 Cal.App. 320, 322, 125 P. 916. Obviously the same meaning should be given to the phrase in construing the act with which we are here concerned.

[4] The next contention of defendants is that plaintiff acquired no title to the property in controversy by reason of the alleged fraud of a former commissioner of streets of the city of Oakland which fraud is claimed to have vitiated the proceedings upon which the deeds to plaintiff are based. Evidence was offered and admitted on behalf of defendants to the effect that the commissioner referred to had initiated the proceedings in the city council and had voted for the resolution which resulted in the improvement of the property in controversy. Defendants claim that at the time this improvement was authorized the commissioner mentioned was engaged in the business of accepting bribes for street work. In support of this contention defendants offered in evidence the testimony of the district attorney of Alameda county to the effect that not long after the initiation of the street improvement on the property in question, the commissioner of streets mentioned had been convicted of conspiracy to commit bribery. In support of their claim of fraud defendants also offered in evidence the statement of the district attorney prepared under the provisions of section 1192a of the Penal Code in which were set forth the circumstances of the offense charged. The objection of the plaintiff to the introduction of the statement referred to was sustained by the trial court. We find no error in this ruling. The trial court properly held that if the proceedings underlying the foreclosure suit were vitiated by fraud, as claimed by defendants, they might offer evidence of that fact, but that the statement offered by them was not competent evidence of such fraud.

[5, 6] Defendants also contend that since neither the assessed nor the market value of the property in question at any time exceeded $100 per lot, and since the street assessments for which the lots were sold far exceeded that sum, the property of defendants has been confiscated. But under the terms of the Improvement Act involved, the property owners could have appeared before the council to present

their protest against the contemplated improvement. The act (§ 6) makes the action of the council on such protest final and conclusive. It is true that certain objections of a property owner such as those of fraud are not finally disposed of by the ruling of a city council. But fraud when claimed must be proved by competent evidence. The lower court held that no sufficient showing of fraud was made by defendants and in that holding we concur.

[7] We may add that in their closing brief counsel for defendants for the first time argue in support of a point made but not argued in their opening brief to the effect that defendants were given no notice of the proceedings in connection with the assessment and sale of their property. As pointed out above the deeds to plaintiff under the terms of the act constituted prima facie evidence of the regularity of all proceedings antedating their execution. In view of the tenuous character of the testimony of the one defendant who testified on this point, we cannot hold that the lower court erred in deciding that due notice was given to defendants.

[8] The demands made upon the city treasurer to sell the property in satisfaction of the lien of the outstanding bonds are claimed to be defective in form by reason of the omission therefrom of certain provisions that defendants claim were essential. One such contention is predicated upon the fact that the official signature of plaintiff does not appear at the end of the demands. The demands appear to have been on the letterhead of plaintiff and to have been signed, "C. F. Lewis, Manager Bond Department." They included requests to the city treasurer to "Please advise us as to the date of advertisement." We are of the opinion that the demands complied with the statutory requirement that the city treasurer sell the property whenever the bonds were in default "and the holder of the bonds demands in writing" that he advertise and sell. Without enumerating all the various alleged omissions from the demands that are complained of it is sufficient to say that in our opinion the demands contained all of the matters that are required by the act.

[9] The certificates of sale issued pursuant to the provisions of section 72 of the act are claimed to be defective by reason of their failure to set out certain matters including the preliminary proceedings, the fact of default, and the making of the demands to sell. The statute makes no such requirement. It merely provides that the certificates shall recite the date, number, and series of the bonds under which the sales were made, describing the land sold and giving the date of sale, the purchaser's name, the amount paid, and the numbers of the certificates. The certificates set out all the matters required with one possible exception.

[10] That exception relates to the numbers of the certificates. One of the three certificates of sale that had been executed was read into the record, it being stipulated that the other two were similar in form. It reads in part as follows: "Sale No. 611, Certificate of Sale of Property pursuant to the provisions of Improvement Act of 1911 and amendments thereto, sold for nonpayment of principal and interest of bond issued to represent assessment. * * * This instrument is to certify that on the 10th day of May, 1934 * * *." The lower court evidently held, and properly so in our opinion, that the portion reading "Sale No. 611" constituted the number of the certificate of sale within the requirement of the act. Appellants insist, however, that the number appears in the caption of the certificate and that the caption is no part of the certificate, citing Preston v. Hirsch, 5 Cal. App. 485, 90 P. 965, in support of their contention. In that case the court held that the caption of a certificate of sale could not be considered in aid of the certificate for the purpose of determining the year of the assessment when that fact was not recited in the body of the certificate. The application of the doctrine there laid down that a caption is no part of a certificate must vary with the circumstances and with the precise question presented. A person who read such a certificate of sale would not normally expect to find in the caption a recital of the year for which the taxes involved had been assessed, whereas he would normally examine the caption for the number of the certificate itself.

[11] It is true that, as the supreme court of this state has held, the prescribed mode of procedure must be followed in the sale of land for delinquent taxes so far as that procedure is specific and of possible benefit to the owner. Chapman v. Jocelyn, 182 Cal. 294, 298, 187 P. 962. But we cannot see how the defendants could have been possibly benefited by the

inclusion of the numbers of the certificates in the body of the certificates rather than in the caption thereto.

[12] The certificates are also claimed to be defective in that they falsely recite that the property sold had been assessed to unknown owners, whereas, according to the testimony of the city treasurer, the property at all times appeared on his records as being owned by certain named owners. Defendants contend that this discrepancy renders the sales void. In support of this contention they cite the case of Hinds v. Clark, 173 Cal. 49, 159 P. 153. That case involved the provisions of an ordinance of the city of Bakersfield which required that certificates of sale should specify the date upon which the city would be entitled to a deed to property sold to it. The certificate considered by the court in that case did not correctly specify that date and it was therefore held void. The act of 1911 under which the street improvements involved in this case were made includes no requirement that certificates of sale shall include the name of the person whose property is sold. The recitals in the certificates received in evidence in this case to the effect that the property sold had been assessed to unknown owners, were superfluous and of no legal effect. See Campbell v. Shafer, 162 Cal. 206, 210, 121 P. 737.

[13] Defendants next contend that the certificates recite that the three parcels of property in question were sold for $935.80, $1,121.09, and $841.82, respectively, whereas the recitals to that effect are false, the purchaser having merely delivered up to the city treasurer the improvement bonds held by it in payment of substantially all of the purchase price. The testimony of the city treasurer as to the form in which the payments for the property sold were made was allowed in evidence over the objection of defendants They contend that the city treasurer was not authorized to accept bonds in lieu of cash and that in any event if the bonds might be accepted the certificates should have recited such acceptance. We are of the opinion that the contention is without merit. It may be that the city treasurer could have refused to accept the improvement bonds and could properly have insisted on the payment of the purchase price in cash. See Kelly v. Barnet, 24 Cal.App. 119, 140 P. 605. A contention similar to the one here made by defendants was made by a party whose property had been sold on execution. In passing upon his contention the court said: "Accepting the appellant's contention that the statute contemplates that payment should be made in cash, this does not exclude a manner of payment which substantially amounts to the same thing." Mitchell v. Alpha Hardware, etc., Co., 7 Cal. App.2d 52, 58, 45 P.2d 442, 445. The court in that case quotes from an earlier decision of the supreme court of this state, Moore v. Martin, 38 Cal. 428, to the effect that "To pay money to the Sheriff merely to have it returned would be an idle ceremony." The reasoning of the court in the Mitchell case, supra, is applicable to the contention made by defendants in this case.

[14, 15] The notice to redeem is claimed by defendants to be defective in that the names of the owners whose property was sold do not appear therein. Defendants argue that there is nothing in the statute which provides that the owner's name may be omitted. Suffice it to say in response that there is nothing in the statute requiring that the names of the owners shall appear. The act merely provides (§ 74) that such notice to redeem must be served upon the owner or his agent thirty days before application is made for a deed. The notice includes all of the matters required by the act. The point is made by defendants that the notice states "that the time of redemption" of the property will expire on a certain specified date, whereas under the act the notice should have stated the date when the "right of redemption" would expire. Substantial compliance with the statute in this respect is sufficient and in our opinion it was substantially complied with. Reed v. Lyon, 96 Cal. 501, 503, 31 P. 619; see, also, 2 Page & Jones on Taxation by Assessment, p. 1877.

[16] The notice to redeem states that unless the property was redeemed plaintiff would, on October 4, 1937, apply for a deed, whereas, say defendants, plaintiff did not apply for a deed until October 6. Under section 73 of the act property sold may be redeemed at any time before application is made for a deed. Concededly defendants could properly have applied for a deed on October 4. We fail to see how defendants have been prejudiced because they were given two days longer to redeem than the law required.

Complaint is made of the fact that the treasurer's deed to the property ran to Pacific States Savings and Loan Company of San Francisco, whereas the notices to redeem stated that Pacific States Savings and Loan Company was the purchaser. No claim is made that defendants were misled by the variance in the names, conceding that such variance exists. We are of the opinion that the notices were substantially correct which, as pointed out above, is all that the law requires with respect to notices to redeem.

[17] Two of the affidavits of the posting of the notice to redeem are claimed to be defective. Those affidavits state that "on the 3rd of September" affiant posted the notice to redeem without stating the year in which this was done. The affidavits appear to have been executed on September 4, 1937. Moreover they recite that the affiant posted true copies of the notice to redeem the property in controversy. The original notice to redeem appears to have been executed on September 1, 1937. The affidavits recite that the notices were posted "more than thirty days next immediately preceding" the fourth of October, 1937. Hence under a reasonable construction of the affidavits the posting of the copies could only have been done on the third of September in the year 1937.

[18] The demand for the sale of the property of defendants and the deed given to plaintiff are complained of as defective in form. We are of the opinion that both documents comply with all statutory requirements. The omissions complained of by defendants refer to matters that the act does not require to be included.

[19, 20] The findings are in our opinion sufficient to support the judgment. The recitals in the deeds that were introduced in evidence and which were found by the lower court to have been duly and regularly issued, were sufficient under section 75 of the act to indicate that the bonds were delinquent, that the property was duly advertised and sold, and that plaintiff acquired title to the property at the sale. In response to the claim that there is no finding on the issues of fraud and confiscation, it is sufficient to call attention to the finding of the lower court that the claims of defendants to the property are without right and that they have no interest in the property. Where an omitted finding must be inferred from a consideration of the findings actually made, an appellate court will recognize the necessary inference and consider the finding in question as having in effect been made. Reiniger v. Hassell, 216 Cal. 209, 211, 13 P.2d 737; Publishers Distributing Service v. Southern California School Book Depository, 14 Cal.App.2d 448, 58 P.2d 401.

[21] Defendants claim that the judgment is defective in that certain of the defendants who were sued by fictitious names were neither served nor dismissed. In support of their claim that such omission constitutes reversible error they cite Diggins v. Reay, 54 Cal. 525. The statute involved in that case provided that actions for the collection of delinquent street assessments must be brought "against the owners and all persons having any interest therein." Cal.Stats. 1869–70, pp. 890, 898, § 13. No such requirement is to be found in the act with which we are here concerned.

The judgment appealed from is affirmed and the purported appeal from the order denying a new trial is dismissed.

NOURSE, P. J., and SPENCE, J., concurred.

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51 Cal.App.2d 775

PEOPLE v. POTTER.

Cr. 1798.

District Court of Appeal, Third District, California.

April 6, 1942.

Criminal law ⚿1182

Where transcript on appeal from judgment on conviction of felony was filed in District Court of Appeal on March 4, 1942, no brief was filed in appellant's behalf, cause was regularly placed on calendar for oral argument on April 6, 1942, and no appearance was made for appellant when case was called for hearing, judgment must be affirmed. Pen.Code, § 1253.

◆

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Burton O. Potter was convicted of grand theft, and he appeals.

Affirmed.

S. E. Metzler, of Eureka, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

PER CURIAM.

The appellant was convicted in the Superior Court of Humboldt County of the crime of grand theft, a felony.

The transcript on appeal was filed in this court March 4, 1942. No brief has been filed in behalf of appellant. The cause was regularly placed on the calendar for oral argument on April 6, 1942. No appearance was made for appellant at the time the case was called for hearing.

Pursuant to the provisions of section 1253 of the Penal Code the judgment and the order are affirmed.

51 Cal.App.2d 54

STANISLAUS LUMBER CO. v. PIKE et al.

Civ. 6643.

District Court of Appeal, Third District, California.

April 1, 1942.

Hearing Denied May 28, 1942.

1. Time 🔑10(9)

Where time to file notice of appeal normally would have expired July 2, a Sunday, and governor had declared July 3 a legal holiday, and under the statutes designating as holidays Sundays, the Fourth of July, and days appointed by the governor as such, and excluding from the time within which any act provided by law is to be done, the last day, when it falls on a holiday, a notice of appeal filed on July 5 was within the statutory time. Code Civ.Proc. §§ 939; Pol. Code, §§ 10, 12.

2. Holidays 🔑1

Where the governor set apart a day as a legal holiday with a request that it should be observed by all people generally together with the Fourth of July as Independence Day and Democracy Day in California it was a "general holiday" and not a mere "special or limited holiday". Pol.Code, § 10.

See Words and Phrases, Permanent Edition, for all other definitions of "General Holiday" and "Special or Limited Holiday".

3. Evidence 🔑46

The court takes judicial notice of proclamations of the chief executive of the state designating holidays. Code Civ.Proc. § 1875, subd. 3.

4. Mechanics' liens 🔑132(1)

In suit to foreclose mechanics' lien, judgment denying the validity of the lien was supported by finding that plaintiff waived his right to a mechanics' lien by failing to file in the recorder's office a claim of lien within the statutory time. Code Civ Proc. § 1187.

5. Appeal and error 🔑907(3)

On an appeal on the judgment roll only, the evidence is not before the appellate court, and it must assume the findings to be adequately supported by the testimony adduced at the trial.

6. Mechanics' liens 🔑132(6)

Where work had ceased on a house for more than 30 days and materialman who had not been paid in full for materials furnished permitted more than 90 days to elapse after the expiration of such 30-day period without filing notice of lien, he "waived" his right to a lien. Code Civ.Proc. § 1187.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

7. Mechanics' liens 🔑132(6)

Where vendor who was indebted to materialman had ceased work on house for over 30 days although house was not completed and subsequently sold property to purchasers who had no knowledge of the previous indebtedness, the statutory limitation of time within which the materialman's lien was required to be filed was not extended, notwithstanding that purchasers afterwards bought and paid for other lumber with which they completed the house. Code Civ.Proc. § 1187.

8. Mechanics' liens 🔑1

"Mechanics' liens" are creatures of statute which are dependent for their existence and enforcement upon substantial compliance with the letter of the law. Code Civ. Proc. § 1187.

See Words and Phrases, Permanent Edition, for all other definitions of "Mechanics' Lien".

9. Mechanics' liens ⚷132(8)

Where purchasers of a building on which there has been a cessation of work for over four months had no notice of vendor's debt for materials or a claim of lien by the materialman, their subsequent purchase of lumber from the materialman created an "implied contract" to pay for it separate from the obligation of the vendor which was not revived notwithstanding the subsequent completion of the structure by the purchaser. Code Civ.Proc. § 1187.

See Words and Phrases, Permanent Edition, for all other definitions of "Implied Contract".

10. Mechanics' liens ⚷132(8)

Where there has been cessation of work on a structure for more than 30 days the resumption of work does not operate to extend the time to file mechanics' liens to 90 days from the actual completion of the building when the owner fails to file his notice of completion. Code Civ.Proc. § 1187.

11. Mechanics' liens ⚷132(7)

The provision prescribing the time within which mechanics' liens may be filed declaring that "cessation from labor for 30 days" shall be the equivalent to the actual completion of the work means that cessation from work for a period of 30 days starts the running of the statute of limitations in the same manner as the actual completion of the structure. Code Civ.Proc. § 1187.

See Words and Phrases, Permanent Edition, for all other definitions of "Cessation from Labor for 30 Days".

12. Mechanics' liens ⚷132(7)

The time for filing a claim for mechanics' lien commences to run exactly as though the work or improvement under construction were actually completed upon the occupation or use of the building by the owner, actual acceptance of the building by the owner, cessation from labor for 30 days upon such building, or the filing of notice of completion by the owner. Code Civ.Proc. § 1187.

◆

Appeal from Superior Court, Stanislaus County; Roy B. Maxey, Judge.

Suit by the Stanislaus Lumber Company against Arthur B. Pike and others to foreclose a mechanics' lien to secure the unpaid portion of a bill for lumber. From that portion of the judgment which denied the validity of the mechanics' lien, plaintiff appeals.

Affirmed.

Edward T. Taylor, of Modesto, for appellant.

T. B. Scott, of Modesto, for respondents.

THOMPSON, Acting Presiding Justice.

The plaintiff has appealed from that portion of a judgment which denies the validity of an alleged mechanic's lien to secure the unpaid portion of a bill for lumber furnished for construction of a dwelling house. It was held that the lien was void for the reason that plaintiff failed to file its claim therefor within the time allowed by the provisions of section 1187 of the Code of Civil Procedure. The appeal is presented on the judgment roll only. The evidence is not before us.

The respondent moved to dismiss the appeal on the ground that the notice thereof was not filed within the time allowed by law.

[1-3] The motion to dismiss the action on the ground that the notice of appeal was not filed within sixty days of the entry of judgment as required by section 939 of the Code of Civil Procedure, is denied. The judgment was entered May 4, 1939. Sixty days for filing the notice would have normally expired July 2d, which was Sunday. The following day was declared a legal holiday by proclamation of the Governor. It became a general holiday and not a mere special holiday, for the Govenor declared that it was set apart "as a legal holiday in the State of California" with a request that it should be observed by "all people generally," together with the Fourth of July, "as Independence days and Democracy days in California." The courts take judicial notice of such proclamations of the chief executive of the state. § 1875, subd. 3, Code Civ.Proc.; 23 C. J. 101, § 1900; 20 Am.Jur. 67, § 44. Sundays, the Fourth of July and "every day appointed * * * by the Governor of this State for a public fast, thanksgiving *or holiday,*" (emphasis added) are declared to be holidays. § 10, Pol. Code. The same section does provide that "all courts, public schools and public offices of this State and of any

city, county," etc., "shall be open and shall function in their normal and usual manner" on all *special or limited* holidays which are set apart by proclamation of the governor. This section, however, defines a special or limited holiday as follows:

"A special or limited holiday is hereby defined as a holiday applying only to a special class or classes of business, or a special class or classes of persons, and not appointed to be generally observed throughout the State by all classes of business and all classes of persons."

Since the proclamation in question set apart July 3d to be observed "as a legal holiday * * * (by) all people generally * * * in California," under the preceding definition, it must be considered a general holiday and not a mere special or limited holiday. It follows that the requirement that all public and county offices shall remain open and shall function in the usual manner on *special and limited* holidays has no application to the situation which is presented on this case. In computing the time within which the notice of appeal in this case was required to be filed, it becomes necessary to exclude, pursuant to section 12 of the Political Code, the three days of that period, Sunday, July 2d; Monday, July 3d, and Tuesday, July 4th, as holidays. The notice of appeal, which was filed on July 5th, was therefore within the sixty days prescribed by section 939, Code of Civil Procedure.

The defendants, A. Yates and Florence, his wife owned a lot in Modesto containing a small cottage in which they resided, but upon which lot they proposed to construct a new dwelling house. The building was commenced May 24, 1937. It was constructed with the aid of a carpenter by means of day labor. The materials were purchased from plaintiff, all of which were paid for except the sum of $298.97, which has not been satisfied. It appears that the house was not entirely completed. A small amount of lumber, which was purchased for that purpose, remained on hand. For a consideration of $2,350, the property was sold and conveyed to the defendants, Arthur B. and Emma D. Pike, November 2, 1937. The grantees had no knowledge of the fact that the grantors were indebted to plaintiff for any materials which were furnished for the construction of the house. They were informed by the grantors that all materials had been fully paid for and that no work had been performed thereon since June 30, 1937. They relied on a certificate of title to the property issued by the Modesto Title Company which showed that no lien had been filed against it. With the knowledge of plaintiff, the defendants, Arthur B. and Emma D. Pike took possession of the property November 2, 1937, and thereafter purchased and paid for some lumber from plaintiff with which they completed the house on December 23, 1937. The plaintiff thereafter filed for record a notice of lien on January 11, 1938, to secure payment of said sum of $298.97.

The court found that the former owners, A. Yates and Florence Yates, his wife, were indebted to plaintiff for materials furnished for construction of their house in the sum of $298.97, together with interest thereon from June 30, 1937. Judgment was accordingly rendered against them for that sum. The court further found that, in consideration of the sum of $2,350, the property was sold and conveyed to the defendants Arthur B. and Emma D. Pike, on November 2, 1937; that "on June 30, 1937, said improvement, consisting of house in the course of construction remained incompleted," but that "there was a cessation of labor on said house from June 30, 1937 to November 8, 1937," and that "no work of any kind had been done on said house or improvement since June 30, 1937." It was held plaintiff waived its claim for mechanic's lien by failing to file a notice of lien within the time allowed by section 1187 of the Code of Civil Procedure.

[4-6] We are of the opinion the judgment is supported in every respect by the findings and that the plaintiff waived its right to a mechanic's lien by failing to file in the recorder's office a claim of lien within the statutory time allowed by the provisions of section 1187 of the Code of Civil Procedure. The court found that work on the dwelling house in question ceased for a period of over four months, from June 30th to November 8, 1937, and that plaintiff's claim of lien was not filed until January 11, 1938. Since the evidence is not before us we must assume those findings are adequately supported by the testimony adduced at the trial. The last paragraph of the previously mentioned section provides that when owners of property fail to file their notice of completion of the work or contract, as therein authorized, "all persons claiming the benefit of this chapter shall have ninety days after the completion of said work of improvement within which

to file their claims of lien." No notice of completion was filed in the present case. Assuming that the work ceased on June 30th, for a period of more than thirty days, as the court found that it did, the plaintiff would then be required to file its notice of lien on or before October 30th of that year in order to secure its right of lien. Having failed to file the notice of lien within the time allowed by law, we are impelled to hold plaintiff thereby waived its right to a lien.

[7, 8] It is immaterial that the purchasers of the property afterwards bought and paid for other lumber with which they completed the structure. They had no knowledge of the previous indebtedness. The statutory limitation of time within which the lien was required to be filed would not have been thereby extended even if they had possessed that knowledge. Mechanic's liens are creatures of statute which are dependent for their existence and enforcement upon substantial compliance with the letter of the law. Holm v. Bramwell, 20 Cal.App.2d 332, 67 P.2d 114; 17 Cal.Jur. 81, § 50.

In the case of Hubbard v. Jurian, 35 Cal.App. 757, 170 P. 1093, it was held that subsequent completion of a building by the owner, after a lien had been lost by failure to file a notice of lien within the time allowed by law, on account of cessation of labor for more than thirty days, does not have the effect of reviving the lien. It is said on page 765 of that opinion 35 Cal. App., on page 1096 of 170 P., in that regard:

"In response to this contention, it will suffice to say that it has been held that a subsequent completion of the building by the owner after a 30 days' cessation from labor thereon by the contractor does not operate as an extension of time for the filing of liens claimed under and created by the original contract. Johnson v. La Grave, 102 Cal. 324, 36 P. 651."

[9] In the present case the subsequent purchase of lumber by Mr. and Mrs. Pike, created a new implied contract to pay for it, separate and distinct from the obligation of the former owners of the property. The principle determined by the Hubbard case applies with greater force when the work ceases for a period of over four months, and the property is thereafter sold and conveyed for a valuable consideration without notice of the previous debt or claim of lien, even though the purchaser subsequently performs the labor of completing the structure.

[10] The appellant contends that since the statute grants one who has furnished labor or material for the construction of a building, a period of thirty days "after the completion of such work of improvement, as a *whole*," within which to file his lien, that the mere cessation of work on the structure, for any period of time, does not have the effect of forfeiting the right to a lien provided the work thereon is subsequently resumed. In other words, it is asserted a laborer or materialman is allowed by statute thirty days after the actual completion of the entire proposed structure or improvement, regardless of intervening periods during which all work thereon ceases to be performed, within which to file his notice of lien, and that the actual time to file liens is extended to ninety days from actual completion of the building or improvement when the owner fails to file his notice of completion, regardless of any intervening cessation of work. We are of the opinion the section is not susceptible of that construction.

[11] The statute not only provides that every person, other than the original contractor, may file his claim of lien for labor or material furnished at any time "until thirty days after the completion of such work of improvement, as a whole," but it also specifically declares that "cessation from labor for thirty days" shall be equivalent to the actual completion of the work or improvement. This last mentioned statement clearly means that when work on the structure or improvement has ceased for a period of thirty days, the statutory limitation of time within which the claim of lien may be filed, begins to run. It means that after cessation of work for thirty days, a claimant for labor performed or materials furnished, must file his lien within thirty days thereafter exactly as he is required to do *"after the completion* of such work of improvement," except that when the owner fails to file his notice of completion the time to file the lien is extended to ninety days from the expiration of the thirty-day period of cessation of work. In other words, cessation from work for a period of thirty days has the effect of starting the running of the statute of limitations just as actual completion of the structure or improvement sets it in motion.

[12] The latter portion of the first paragraph of section 1187 specifies four separate conditions, each of which is declared to constitute a situation, with respect to the enforcement of that statute, exactly the same as though the work or improvement under construction were actually completed. These conditions are, (1) occupation or use of the building or improvement by the owner, (2) actual acceptance of the building or structure by the owner, (3) "cessation from labor for thirty days upon any * * * building, improvement or structure," and (4) filing of the notice of completion by the owner.

In the present case work on the dwelling house ceased for more than four months during which time not a thing was done toward the construction. In fact the work was never resumed by the former owners. On the contrary, without further performance, they sold and conveyed the property to the co-defendants, Mr. and Mrs. Pike, who had no knowledge of the existing indebtedness or of the alleged claim of lien. We are satisfied the plaintiff waived its right of lien on the real property by failing to file a notice of claim for a period of over five months after cessation of the work.

The judgment is affirmed.

TUTTLE, J., concurred.

51 Cal.App.2d 1

HOUSING AUTHORITY OF CITY OF OAKLAND v. FORBES et al.

Civ. 11786.

District Court of Appeal, First District, Division 1, California.

March 31, 1942.

Hearing Denied May 28, 1942.

1. Eminent domain 🔑66

It is for the Legislature in the first instance to determine whether the use for which property may be taken is a public one.

2. Eminent domain 🔑169

Under the Housing Authorities Law, before private property can be taken by eminent domain for a housing project, the governing body of the city or county involved by resolution must declare that there is a need for an authority to function in such city or county upon finding that certain conditions exist, and the authority must adopt a resolution declaring that the acquisition sought is necessary for its purposes. Gen.Laws Supp.1939, Act 3483, § 4.

3. Eminent domain 🔑17
Municipal corporations 🔑861

Under Housing Authorities Law and statute extending right of eminent domain to provide proper living accommodations for low-income families and resolution of Oakland Council finding need for a housing authority, the selection of an area by the Oakland Housing Authority for a housing project was for a "public use" for which public money could be expended and private property acquired. Gen.Laws Supp.1939, Act 3483, §§ 2(c), 8(d), 12; Code Civ.Proc. § 1238, subd. 21; § 1241, subds. 1, 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Use".

4. Eminent domain 🔑196

Evidence established that Oakland City Council and Oakland Housing Authority complied with the statutory prerequisite to the seizure of private property by eminent domain for low-rent housing purposes. Gen. Laws Supp.1939, Act 3483, §§ 2(c), 4, 8(d), 12.

5. Eminent domain 🔑67

The unequivocal declaration of the Legislature that the acquisition of land for low-rent housing projects was in the public use would not be disturbed on appeal in an eminent domain proceeding by a housing authority in the absence of anything in the record indicating that the Legislature erred in such declaration. Gen.Laws Supp.1939, Act 3483; Code Civ.Proc. § 1238, subd. 21.

6. Eminent domain 🔑57

Under the Housing Authorities Act, the Oakland Housing Authority was empowered to select the location most desirable for a housing project, and was not limited to the area vacated under the slum clearance provisions of the act. Gen.Laws Supp.1939, Act 3483.

7. Eminent domain 🔑57

The condemning party is vested with wide discretion in the selection of a location.

8. Eminent domain 🔑196

Whether the selection by the Oakland Housing Authority of a location for a housing project was compatible with the greatest public good and the least private injury must be determined in the light of evidence of the deliberations with which the selection was made, and the number of families it would affect. Code Civ.Proc. § 1242.

9. Eminent domain 🔑221

In condemnation proceedings for the erection of a low-rent housing project, testimony on the issue of the value of the parcels of land involved was for the jury.

10. Eminent domain 🔑221

In condemnation proceeding for the erection of a low-rent housing project, testimony on the issue of the necessity for the taking and of compatibility of the greatest public good and the least private injury was for the trial judge alone.

11. Eminent domain 🔑196

Evidence sustained finding that selection of site by Oakland Housing Authority for low-rent housing project was of public use and necessity and was compatible with the greatest public and the least private injury. Gen.Laws Supp.1939, Act 3483; Code Civ.Proc. § 1238, subd. 21; § 1241, subds. 1, 2.

12. Evidence 🔑83(1)

It is presumed that public officers will carry out their functions and exercise their powers in accordance with the law.

13. Eminent domain 🔑169

The failure of the Oakland Housing Authority, seeking to condemn land for a low-rent housing project, to prove the recordation of a lis pendens, did not affect the jurisdiction of the Superior Court to try the action, notwithstanding a statutory provision for the recordation of a lis pendens upon the institution of such an action. Code Civ.Proc. § 1243.

14. Eminent domain 🔑169

The owner of land sought to be condemned for a low-rent housing project was not prejudiced by the failure of the Oakland Housing Authority to file a "lis pendens", the effect of which omission was to relieve innocent third parties from the operation of a judgment affecting the land in dispute. Code Civ.Proc. § 1243.

See Words and Phrases, Permanent Edition, for all other definitions of "Lis Pendens".

15. Eminent domain 🔑262(5)

An instruction, in condemnation proceedings, permitting jury to reject testimony of any witness expressing opinion of value, if jury did not believe that such opinion was based on full knowledge of circumstances relating to property, when read in the light of other instructions, was harmless error.

Appeals from Superior Court, Alameda County; Leon E. Gray, Judge.

Eminent domain proceedings by the Housing Authority of the City of Oakland against James Walter Forbes and others. From judgments for the plaintiff, defendants appeal.

Affirmed.

See, also, Cal.App., 117 P.2d 722.

Alfred Nelson, of Oakland, for appellants.

James R. Agee, Bernard J. Abrott, and James M. Carl, all of Oakland, for respondent.

GOODELL, Justice pro tem.

Fifteen proceedings in eminent domain were brought to condemn residential property in West Oakland for a low-rent housing project known as Peralta Village. The project itself (officially called Cal. 3–1) embraces seven city blocks lying between 8th and 12th, Cypress and Union Streets, and contains 171 parcels. Of these 171 parcels, only 17 are involved in this litigation and they are found in different parts of the area; they are not all contiguous. The cases were consolidated and tried together. There were fifteen separate verdicts aggregating $60,225, upon which judgments of condemnation were entered. The money awarded by the jury was paid into court for the owners (and in a few cases for lien claimants where there were any) and thereupon final orders of condemnation were entered. By stipulation, all fifteen cases are presented on one record, entitled as above.

On this appeal the adequacy of the awards is not questioned. The principal points raised are (1) that the plaintiff failed to offer any proof of public use or necessity, and (2) that the instructions were erroneous and prejudicial.

The legislation under which these condemnations were carried on was enacted in 1938 and is known as the "Housing

Authorities Law" Stats.Ex.Sess. 1938, Ch. 4, p. 9, Deering's 1939 Supp., Act 3483. Its "legislative background" is reviewed at length in Housing Authority v. Dockweiler, 14 Cal.2d 437, 94 P.2d 794, which case held the law constitutional (see, Riggin v. Dockweiler, 15 Cal.2d 651, 104 P.2d 367; Housing Authority v. Superior Court, 18 Cal.2d 336, 115 P.2d 468; Kleiber v. City and County of San Francisco, 18 Cal.2d 718, 117 P.2d 657, and further held the purposes of the act to be public uses and purposes.

Section 1241, Code Civ.Proc. provides that "Before property can be taken, it must appear: 1. * * * That the use to which it is to be applied is a use authorized by law; 2. * * * That the taking is necessary to such use * * *."

[1] The first inquiry is whether this housing project is a public use. It is settled that in the first instance "it is for the legislature to determine whether the use for which property may be taken is a public one." 10 Cal.Jur., p. 290; City of Pasadena v. Stimson, 91 Cal. 238, 253, 27 P. 604; Kern County, etc., Dist. v. McDonald, 180 Cal. 7, 13, 179 P. 180; Kleiber v. City and County of San Francisco, supra. The legislature spoke directly upon this subject at the extra session of 1938 in chapter 3 (Stats.Ex.Sess. 1938, p. 6) when it amended section 1238, Code of Civil Procedure, by adding subdivision 21, extending the right of eminent domain "* * * to provide dwellings, apartments or other living accommodations for persons or families who lack the amount of income which is necessary (as determined by the body engaging in said work or undertaking) to enable them to live in decent, safe and sanitary dwellings without overcrowding." The section declares all the uses embraced within it to be public uses. On the same day the Legislature enacted the "Housing Authorities Law" (chap. 4, p. 9, Id.), section 2 of which declares "* * * (c) that the clearance, replanning and reconstruction of the areas in which insanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired and are governmental functions of state concern * * *." In section 8, subdivision (d) of the same act there is expressly granted, among others, the power "to acquire by the exercise of the power of eminent domain any real property." Section 12 repeats, with more elaboration, the investment of this power as follows: "Eminent Domain. An authority shall have the right to acquire by the exercise of the power of eminent domain any real property which it may deem necessary for its purposes under this act after the adoption by it of a resolution declaring that the acquisition of the real property described therein is necessary for such purposes. * * *"

In Housing Authority v. Dockweiler, supra, 14 Cal.2d at page 449, 94 P.2d at page 801, the Supreme Court recognized that among the questions there presented "the one of fundamental importance, and upon the determination of which several of the lesser and incidental issues will turn, is whether slum clearance and public housing projects for low-income families are public uses and purposes for which public money may be expended and private property acquired." After remarking that the federal and state statutes are premised upon the expressly declared policy that these are "public uses and purposes" the court continues: "While such a declaration of policy by the legislative branch of the government is not necessarily binding or conclusive upon the courts, it is entitled to great weight and it is not the duty or prerogative of the courts to interfere with such legislative finding unless it clearly appears to be erroneous and without reasonable foundation. [Citing cases.]"

[2] Under the act, however, certain steps must be taken before private property can be taken by eminent domain. Section 4 of the act provides that before any housing authority shall exercise its powers the governing body of the city or county by resolution must declare "that there is need for an authority to function in such city or county" if it finds certain conditions to exist. See Dockweiler case, supra, 14 Cal.2d at page 443, 94 P.2d 794. And section 12 of the act, quoted above, imposes the condition that the authority must adopt a resolution declaring that the acquisition sought is necessary for its purposes.

[3-5] The record shows a resolution of the Oakland City Council based upon a report of the city planning commission finding, in substantially the statutory language of section 4, supra, that "(1) Insanitary and unsafe inhabited dwelling accommoda-

tions exist in the City of Oakland; (2) There is a shortage of safe or sanitary dwelling accommodations in the City of Oakland available to persons of low income at rentals they can afford;" and declaring that "there is need for a Housing Authority" therein. A copy of this resolution was attached to the complaint. This was followed in evidence by a certificate of the appointment of the five commissioners, and by notice to the mayor that the resolution had been adopted by the council declaring the need for a housing authority. There was then offered documentary evidence showing that the five commissioners had qualified. Then there was offered in evidence a resolution approving the final plans and specifications for this project ("Cal. 3–1") which had been prepared by the board of architects. The plans and specifications themselves had already been introduced. It was stipulated that identical resolutions and acts applied to each of the parcels under condemnation. The plaintiff then offered in evidence a resolution (required by section 12 of the act) adopted by the Housing Authority on December 1, 1939, authorizing the acquisition of certain land by eminent domain proceedings required for Low Rent Housing Project Cal. 3–1, and directing the filing of condemnation proceedings. A copy of this resolution was attached to the complaint. It was stipulated that a similar resolution was adopted with respect to each parcel involved herein. A comparison of the requirements of the statute with these several pieces of evidence shows that there was full compliance with them. The appellants make no claim to the contrary. On the first question, that of public use, we are satisfied that there was a full and satisfactory showing, and that there can be no question (see the decision in the first Dockweiler case) that the Legislature has unequivocally declared that a housing project such as this, is a public use. There is nothing in this record to indicate that such legislative determination is erroneous.

As to the question of necessity: The chairman of the board of architects of the Oakland Housing Authority, an architect of twenty-five years' experience, identified the plans and specifications for the housing units here involved, which were thereupon admitted in evidence without objection. He described the "layout," testifying as to the boundaries of the site; that there were thirty-nine buildings in it, that there were seven parking areas provided between a row of two-story flat buildings and that there were walks and drives, play areas, clothes drying yards, disposal facilities, a service yard, and an administration building. When asked respecting garden space he answered that "the entire buildings are fronted alongside by a front yard and in the back by a backyard and the tenants maintain garden areas." He was then asked whether, in his opinion, in order to secure a proper layout for the proposed buildings, "that area sought to be acquired is necessary for the buildings and the auxiliary uses" to which he had referred, and he responded that "The entire area is necessary in order to accommodate the number of units which apparently is the maximum that could be placed upon that given ground area and still allow adequate room for front and backyards, parking areas, light and that sort of thing." He was not cross-examined.

[6] From the foregoing it appears that the respondent, acting through its officers, agents and advisers, selected the seven-block area (within which are the homes of the appellants) as the most desirable for this particular project. There is not the faintest suggestion that the area was selected under the slum clearance provisions of the law; it was selected because it was the most available and desirable site for the new project. It is suggested—and no more than suggested—by the appellants that the act contemplates that the new housing project shall be built upon an area which has been vacated under the slum clearance provisions of the law. But that this is not so is definitely decided in Riggin v. Dockweiler, supra. The language of the act is in the alternative; the new project may be built upon the cleared area, but it need not be. The appellants are tax-paying, law-abiding residents who are content where they are, and desire to be undisturbed. Similar situations are presented in most condemnation cases but it must be remembered that the appellants are individual owners within this seven-block project and that the selection of this particular site for the project is the responsibility of the Housing Authority.

[7-10] In the selection of a location the condemning party is vested with wide discretion. City of Pasadena v. Stimson, 91 Cal. 238, 257, 27 P. 604; Vallejo, etc., R. Co. v. Home Sav. Bank, 24 Cal.App. 166, 170, 140 P. 974; Tuolumne Water, etc., Co. v.

Frederick, 13 Cal.App. 498, 110 P. 134. Section 1242, Code Civ.Proc. gives the condemning party the right to locate land required for public use but "it must be located in the manner which will be most compatible with the greatest public good and the least private injury." There was every opportunity in this case for the appellants to develop their claim with respect to incompatibility. They did not cross-examine the witness Warnecke at all. They cross-examined the witness Bells at some length. He had given considerable testimony for the plaintiff, after having qualified as a real estate operator and appraiser of twenty-two years' experience in Oakland; he was a director of the Oakland Real Estate Board and had been a member of the City Planning Commission for about eight years and was then its chairman. He was questioned with respect to values. On cross-examination he was first questioned with respect to the way in which the "Peralta Village" area had been selected as against other locations. He testified that the Planning Commission had conducted a city-wide survey about 1936, to determine housing conditions in Oakland, under the direction of the Commission's engineer. That survey was reviewed by the Housing Authority to arrive at "the most logical place for a housing project." According to his testimony, it was the recommendation of the Planning Commission's engineer to the Housing Authority "that decided the location for West Oakland." The witness had made an investigation of this property about a year and a half before the trial with another appraiser, who came from Washington, with a view to ascertaining "the probable cost estimate of the land in the area." The second part of the cross-examination had to do with the condition of the houses of the appellants, the evident purpose of the questions being to develop the fact that they were structurally sound, habitable, and in good condition despite their age, and that they were sanitary, and were not of the type needing "clearance" under the act. The third division of the examination was designed to show the accessibility of this area to transportation and its proximity to largely traveled arteries. The last part of the cross-examination dealt with values; first, with those in the area generally, and then, with values of specific parcels. The witness testified that this West Oakland project had been under consideration for about two years, and that within that time values had somewhat enhanced, whether because of the project or not the witness did not say. From this it will be seen that the location of the project was chosen with deliberation and apparently after a broad and comprehensive inquiry into the whole housing problem in Oakland before it ever got into the official stage of resolutions of intention, declarations of necessity, the preparation of plans and specifications and such matters. It must also be borne in mind throughout this discussion that the parcels under condemnation belonging to these fifteen owners are only parts of a large area—the cross-examination of the witness Bells having developed the fact that in the two projects—this and another—two hundred and twenty-five or two hundred and thirty families were moving off the area, and it was suggested by counsel that approximately five hundred families were to be housed when the two projects were completed. All this testimony, and all these factor, developed by the appellants on the cross-examination of the witness Bells must be taken into consideration in connection with the claim now made that there was no showing of compatibility of greatest public good and least private injury. Some of this testimony was of course for the jury to consider on the question, solely theirs (Vallejo, etc., R. Co. v. Reed Orchard Co., 169 Cal. 545, 147 P. 238), of the value of the several parcels, and some of it was for the Judge alone on the issue of the necessity for the taking and on the question of least private injury or compatibility (Reed Orchard case, supra). By this witness who, although not connected with the Housing Authority, had been familiar with the project from its inception, and who knew how the choice of sites had been made, the appellants had ample opportunity to develop, if they could, that there were more desirable or available locations, or that there would be less private injury if the project had been located elsewhere or that the end sought was for private, not public purposes. County of San Mateo v. Coburn, 130 Cal. 631, 634, 63 P. 78, 621. The Stimson case, 91 Cal. at page 255, 27 P. at page 608, furnishes this conclusive answer to the argument on claimed incompatibility: "And we think that when an attempt is made to show that the location made is unnecessarily injurious the proof ought to be clear and convincing, for otherwise no location could ever be made. If the first selection made on behalf of the public could be set aside on slight or doubtful proof, a second selection would be set aside in the same manner, and so ad infinitum. The improvement could never be secured, because, whatever location was proposed, it could be defeated by showing another just as good."

[11] It must be concluded that there was ample proof of public use and necessity, and no proof at all of incompatibility.

The case of City of Santa Ana v. Gildmacher, 133 Cal. 395, 65 P. 883, 885, is relied upon by the appellants as holding that "the question of necessity is one of fact, to be determined by the jury in view of all the evidence in the case." The Reed Orchard case, supra, 169 Cal. at page 557, 147 P. at page 244, deals at some length with the Gildmacher case, and concludes as follows: "The case cannot be regarded as a decision that the owner is entitled as of right to a jury trial upon all the issues that may be presented in an action of condemnation. It does not purport to decide that question. If it so held we should feel obliged to overrule the decision as contrary to the statutory law on the subject."

[12] The appellants express the fear that their property may be taken for one purpose and thereafter used for another. There is a ready answer to this. There is a presumption, well recognized by the cases, that public officers will carry out their functions and exercise their powers in accordance with the law. People v. Globe Grain & Milling Co., 211 Cal. 121, 128, 294 P. 3; Ellis Landing & Dock Co. v. City of Richmond, 70 Cal.App. 720, 723, 234 P. 336.

[13, 14] Section 1243, Code Civ.Proc. contains, among others, the following provision: "A lis pendens shall be filed at the time of the commencement of the action in every county in which any of the property to be affected shall be located." Appellants point out that no proof of the recordation of any lis pendens was ever made, and the transcript is silent on that point. They argue that § 1243 refers to the jurisdiction of the Superior Court to try a condemnation action. The head-note of the section, punctuated into four parts, reads as follows: "Jurisdiction and venue: Proceedings commenced, how: Change of place of trial: Lis pendens." It would seem, off-hand, to deal with four distinct subjects. No case is cited by appellants to the effect that the function of a lis pendens is any different in a condemnation case than it is in any other piece of litigation affecting real property. That function is described in Lee v. Silva, 197 Cal. 364, 373, 240 P. 1015, and at more length in Blackburn v. Bucksport, etc., R. R. Co., 7 Cal.App. 649, 653, 95 P. 668, 670. In the latter case it is said, "* * * the legislation does not * * * affect in the slightest degree the question of the court's jurisdiction of the subject-matter of the suit or of the persons of the parties thereto." See, also, 16 Cal.Jur., 644. Here, as in the Blackburn case, the record is silent as to the filing of a lis pendens; it does not affirmatively show that none was filed. But as said in the Blackburn case, where the situation was the same, "even if there was a failure to file a lis pendens, the appellant [s] could not be prejudiced thereby, for the only effect of an omission to so record such notice would be to relieve innocent third parties (purchasers or incumbrancers) from the operation of a judgment" affecting the land in dispute.

[15] An instruction was given to the jury with respect to the testimony of witnesses on value, concluding as follows: "and you may, in your discretion, reject the testimony of any witness who has expressed such an opinion if it appears to your satisfaction that such an opinion is not based on such thorough knowledge of all the facts and circumstances relating to the property itself as to enable him or her to express a true opinion as to its market value." This, appellants say, "was in effect an instruction that they could utterly disregard the testimony of any witness they desired" and they urge it as prejudicial error, citing Hirshfeld v. Dana, 193 Cal. 142, 223 P. 451, and Pearson v. Crabtree, 70 Cal.App. 52, 232 P. 715.

In the case of Los Angeles City High School District v. Schumann, 78 Cal.App. 353, 248 P. 737, 740, an instruction which contained almost identical language was given. On appeal the giving of such instruction was urged as error but the judgment was affirmed. After a petition for rehearing had been denied there was a petition for hearing in the Supreme Court. In denying the petition the Supreme Court withheld its approval of the part of the instruction which was criticized, but added "We do not, however, deem the above portion of the instruction, when read in the light of the other instructions given by the court, to be sufficiently prejudicial to justify a reversal of the case." In view of this comment the instruction cannot be approved, but we are satisfied that when read with the other instructions in the instant case and in connection with all the evidence in the case touching the question of value, that there was no prejudicial error in the giving of the instruction.

As already indicated by stipulation, fourteen other cases have been consolidated with the instant case. These cases were numbered in the Superior Court 156082, 156083, 156109, 156110, 156111, 156159, 156160, 156505, 156523, 156546, 156583, 156806, 156808 and 156849.

The judgment in the instant case is, and the judgments in the fourteen consolidated cases are, affirmed.

PETERS, P. J., and WARD, J., concurred.

51 Cal.App.2d 148

SHEETS v. CLEVELAND.

Civ. 13414.

District Court of Appeal, Second District, Division 2, California.

April 6, 1942.

1. Elections 🔑305(4)

The time for taking an appeal from a judgment of the superior court annulling an election and declaring a vacancy to exist in a particular office is ten days after entry of judgment. St.1939, p. 267, §§ 8575, 8576; Code Civ.Proc. §§ 939, 1859; Civ.Code, § 3534.

2. Elections 🔑305(4)

Under rule that a specific statutory provision relating to a particular subject will govern in respect to that subject as against a general provision, although the latter standing alone would be broad enough to include the subject to which the more particular provision relates, the time for taking an appeal in case of the annulment of an election is determined by special statute; that is, section 8576. St.1939, p. 267, §§ 8575, 8576; Code Civ.Proc. §§ 939, 1859; Civ.Code, § 3534.

3. Elections 🔑305(4)

Where notice of appeal from superior court's judgment declaring that an election to fill a vacancy in office of trustee of an elementary school district was void and that such office was vacant was filed 37 days after entry of judgment in superior court, the appeal was not taken within time prescribed by law and would be dismissed. St.1939, p. 267, §§ 8575, 8576; Code Civ.Proc. §§ 939, 1859; Civ.Code, § 3534.

4. Appeal and error 🔑356

The filing of a notice of appeal within time allowed by law is "mandatory".

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Proceedings by Ruby Sheets against Dan Cleveland. From an order that a vacancy existed in a certain office, defendant appeals. On motion to dismiss the appeal.

Appeal dismissed.

J. H. O'Connor, Co. Counsel, and Beach Vasey, Deputy Co. Counsel, both of Los Angeles, for appellant.

Cleves & Patterson, of Los Angeles, for respondent.

McCOMB, Justice.

This is a motion to dismiss the appeal from an order of the trial court that a vacancy existed in the office of trustee of the Mountain View Elementary School District of Los Angeles County, on the ground that the appeal was not taken within the time prescribed by law, to-wit, within ten days after the entry of judgment by the superior court.

These are the undisputed facts:

August 19, 1941, a judgment was entered by the superior court declaring that an election to fill a vacancy in the office of trustee of the Mountain View Elementary School District of Los Angeles County held June 6, 1941, was null and void and that said office was vacant. September 25, 1941, appellant filed its notice of appeal from the foregoing judgment.

Respondent relies upon this proposition:

The time for taking an appeal from a judgment of the superior court annulling an election and declaring a vacancy to exist in a particular office is ten days after the entry of judgment by the superior court.

[1] This proposition is tenable. Section 8575 of the Elections Code, St. 1939, p. 267, reads in part thus: "Any party

aggrieved by the judgment of the court may appeal therefrom to the district court of appeal, as in other cases of appeal thereto from the superior court. * * *"

Were this the only provision on the subject, an aggrieved party would have sixty days after the entry of judgment within which to file a notice of appeal. (Sec. 939, Code Civ.Proc.) However, section 8576 of the Elections Code reads thus: "Whenever an election is annulled or set aside by the judgment of the superior court, and no appeal has been taken within ten days thereafter, the commission, if any has issued, is void and the office vacant."

[2] Therefore, under the established rule that a specific provision relating to a particular subject will govern in respect to that subject as against a general provision, although the latter standing alone would be broad enough to include the subject to which the more particular provision relates, the time for taking an appeal in the case of the annulment of an election is determined by the special statute, namely, section 8576 of the Elections Code. (Sec. 3534, Civ.Code; Kahrs v. County of Los Angeles, 28 Cal.App.2d 46, 49, 82 P.2d 29; sec. 1859, Code Civ.Proc.) Section 8576 of the Elections Code constitutes an exception to the general statute. (Sec. 8575, Elections Code; Sec. 939, Code Civ.Proc.)

[3, 4] In the instant case the notice of appeal was filed thirty-seven days after the entry of judgment in the superior court, which was after the time prescribed by law for the filing of notice of appeal in such cases. It follows that the appeal was not taken within the time prescribed by law and, since the filing of a notice of appeal within the time allowed by law is mandatory in order to confer jurisdiction upon this court (Lancel v. Postlethwaite, 172 Cal. 326, 331, 156 P. 486; Irving v. Sheetz, 26 Cal.App.2d 751, 752, 80 P.2d 502), the appeal must be dismissed.

It is so ordered.

MOORE, P. J., and W. J. WOOD, J., concurred.

ESTATE OF Daniel A. KELLY, Deceased. SALVATION ARMY OF AND AT PASADENA (a Religious and Charitable Corporation) et al., Appellants, v. Raymond H. CRAWFORD, as Administrator, etc., et al., Respondents.

L. A. 18333.

Supreme Court of California.

April 14, 1942.

In Bank.

Appeal from Superior Court, Los Angeles County.

Brown, Bissell & Beery, of Pasadena, and F. Walton Brown, Newby & Newby, and Dee Holder, all of Los Angeles, for appellants.

Charles F. Hutchins, of Pasadena, W. W. Wallace, Arch R. Tuthill, and Milo V. Olson, all of Los Angeles, Frank C. Dunham, E. DeYoung Vasse, and S. E. Lambert, all of Pasadena, and C. J. Novotny, of San Diego, for respondents.

PER CURIAM.

Pursuant to the stipulation on file herein among the parties to the appeal in the above entitled cause the order construing will and for partial distribution appealed from is hereby modified in accordance with said stipulation and as so modified said order is affirmed without costs. Upon the going down of the remittitur the trial court is directed to enter the order as so modified. Also pursuant to said stipulation the remittitur shall issue forthwith.

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51 Cal.App.2d 234

Ex parte CROWLEY.

Cr. 1800.

District Court of Appeal, Third District, California.

April 13, 1942.

1. Criminal law 🔑238

"Reasonable and probable cause" for commitment of an accused means such a state of facts as would lead a man of ordinary caution to believe and conscientiously entertain a strong suspicion that the person accused is guilty.

> The word "probable" means having more evidence for than against; supported by evidence which inclines the mind to believe, yet leaves room for doubt.
>
> See Words and Phrases, Permanent Edition, for all other definitions of "Probable" and "Reasonable and Probable Cause".

2. Criminal law 🔑238

To authorize a committing magistrate to hold a defendant to answer, on ground that there is "reasonable and probable cause" for commitment, facts stated before magistrate must induce a reasonable probability that all acts have been done which constitute offense charged, that crime charged was committed by defendant, and that crime is triable in county where prosecution is pending, and also that crime is not barred by statute of limitations.

3. Criminal law 🔑238

A committing magistrate is not bound by the rule of reasonable doubt, and may hold a defendant to answer though the evidence would not support a verdict of guilty.

Habeas corpus proceeding by Justin M. Crowley.

Writ discharged.

Chester Monette, of Eureka, for petitioner.

Jeremiah R. Scott, Dist. Atty., and Carl L. Christensen, Jr., Deputy Dist. Atty., both of Eureka, for respondent.

TUTTLE, Justice.

Petitioner was indicted by the Grand Jury of Humboldt County. The record does not indicate the crime, but we assume it was murder. Thereafter, on motion of petitioner, the indictment was set aside, but the court, under the provisions of sections 997 and 998 of the Penal Code, held him to answer for the crime of manslaughter. He now seeks release through habeas corpus, upon the ground that the evidence is insufficient, and that the facts show justifiable homicide.

[1-3] We have had little or no assistance from The People. Neither they nor petitioner were represented when the cause was called for argument. In their

"points and authorities" they merely refer to the transcript, which contains several hundred pages of testimony. However, we have satisfied ourselves that the evidence was sufficient to establish the existence of reasonable and probable cause for the commitment upon the charge of manslaughter. In 7 Cal.Jur., pages 982–983, it is stated:

"The term 'probable' has been defined to mean 'having more evidence for than against; supported by evidence which inclines the mind to believe, yet leaves room for doubt.' And the term 'reasonable or probable cause' has been defined to mean such a state of facts as would lead a man of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion that the person accused is guilty. In other words, to authorize a committing magistrate to hold a defendant to answer, the facts which are stated before him must induce a reasonable probability that all the acts have been done which constitute the offense charged, that the crime charged was committed by the accused, and is triable in the county where the prosecution is pending, and also that the crime has not become barred by the statute of limitations.

"The committing magistrate is not bound by the rule of reasonable doubt, and may hold a defendant to answer though the evidence before him would not support a verdict of guilty."

The writ is discharged.

THOMPSON, Acting P. J., concurred.

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51 Cal.App.2d 206

In re DURAIND'S ESTATE.

GARDNER et al. v. BANK OF AMERICA NAT. TRUST & SAV. ASS'N et al.

Civ. 11981.

District Court of Appeal, First District, Division 2, California.

April 10, 1942.

1. Appeal and error ⇨77(2)

An order admitting a formal will and subsequent modifying instruments to probate as will of decedent was a "final order", where appeal was not taken therefrom. Code Civ. Proc. § 939.

See Words and Phrases, Permanent Edition, for all other definitions of "Final Order".

2. Wills ⇨269

A decedent would be presumed to know that instrument executed by her was a formal will.

3. Executors and administrators ⇨32(1)

The refusal to revoke letters of executor named in will was not error, notwithstanding provision in codicil that cousins should take care of decedent's house and affairs, where decedent intended merely to guard her personal effects until executor should take possession.

4. Wills ⇨206

The admission of an instrument to probate as a "codicil" to formal will instead of as "will" was proper, where instrument did not expressly revoke and was not inconsistent with will and merely purported to make some minor modifications.

See Words and Phrases, Permanent Edition, for all other definitions of "Codicil" and "Will".

5. Wills ⇨386

A reasonable construction of provisions of instrument admitted to probate as a codicil to a will by probate court would not be disturbed on appeal.

6. Wills ⇨368

An appeal from order admitting will to probate as codicil and refusing to revoke executor's letters and to appoint persons named in instrument as executrices, did not deprive probate court of jurisdiction to entertain petition for partial distribution. Probate Code, §§ 1000–1003; Code Civ.Proc. § 949.

7. Wills ⇨384

Where instrument admitted to probate as codicil was first construed on subsequent petition for partial distribution, any error in construction was not in excess of probate court's jurisdiction, and was before reviewing court on appeal from decree granting partial distribution. Probate Code, §§ 1000–1003; Code Civ.Proc. § 949.

8. Wills ⇨565(1)

The quoted words in codicil leaving "personal property" to cousins meant "personal effects" and not all property not realty, where words had been so used in decedent's writing which was basis of previous codicil composed by attorney disposing of personal effects.

See Words and Phrases, Permanent Edition, for all other definitions of "Personal Effects" and "Personal Property".

9. **Wills** 🔑423

A decree admitting certain instruments to probate as will of decedent was "in rem" and bound the world, where decree had become final, notwithstanding that if thereafter produced, a later will containing revocatory clause could be admitted to probate. Probate Code, § 510.

See Words and Phrases, Permanent Edition, for all other definitions of "In Rem".

◆

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding in the matter of the estate of May Rosalie Duraind, deceased, wherein Rosalie Gardner and another filed a petition to admit an instrument to probate as the will of deceased, opposed by the Bank of America National Trust & Savings Association and others. From orders admitting the instrument to probate as a codicil to a will and granting partial distribution of the estate, Rosalie Gardner and another appeal.

Orders affirmed.

O'Connor, Neubarth & Moran and Harold H. Cohn, all of San Francisco, for appellants.

Thomas P. O'Brien and W. Urie Walsh, both of San Francisco, for respondents.

STURTEVANT, Justice.

On the 27th day of September, 1940, the trial court made an order admitting to probate as the will of the decedent three several instruments which were, omitting signatures and attesting clause, in words and figures as follows:

"Last Will and Testament of May Rosalie Duraind

"I, May Rosalie Duraind, also known as May R. Duraind, being of sound and disposing mind and memory, and not acting under the fraud, duress, menace or undue influence of any person whomsoever, do hereby make, publish and declare this instrument to be my Last Will and Testament in the manner following, that is to say:

"First: I hereby revoke all Wills and Codicils to Wills heretofore at any time made by me.

"Second: I declare that I am a single woman, and that I have never been married; that both of my parents are deceased, and that my sisters and brother are deceased, and that my nearest living relatives are cousins.

"Third: I direct that I be buried in accordance with my situation in life, and that the funeral arrangements are to be handled by Ed Kenny of Gantner, Felder & Kenny. Ed Kenny knows my wishes in this respect, he having recently buried my sister, Honore Therese Duraind. I direct that my Executor, hereinafter named, pay all of my just debts and my funeral expenses as soon as this can lawfully and conveniently be done after my demise.

"Fourth: I give, devise and bequeath unto the Province of the Holy Name, a California corporation, all of my property, whether real, personal or mixed, together with all property over which I have the power of testamentary disposition and the power of appointment, and I direct that said Province of the Holy Name dispose of said property in accordance with the instructions given to said corporation by me.

"Fifth: In the event that for any reason the devise or bequest contained in the preceding paragraph hereof should fail or be declared invalid, with respect to the whole or any part thereof, I then hereby devise and bequeath all of the rest, residue and remainder of my estate, together with all property over which I have the power of appointment and the power of testamentary disposition, to the Very Reverend John Leonard Callahan, O. P., in his individual capacity, absolutely, and free and clear of any trust, express or implied. Should the Very Reverend John Leonard Callahan, O. P., die before this Will becomes operative, I then give, devise and bequeath all of said property to the Reverend William Lewis, O. P.

"Sixth: I make no provision in this, my Last Will and Testament, for any other person, whether claiming to be an heir of mine or entitled to share in my estate, and should any person object to this, my Last Will and Testament, or contest the same, I give to such person so objecting or contesting the sum of one dollar ($1.00) and no more; provided they prove in a Court of law that they are entitled to share in my estate.

"Seventh: I appoint the Bank of America National Trust & Savings Association as Executor of this, my Last Will and Testament.

"In witness whereof, I have hereunto set my hand this 6th day of September, 1939.

"May Rosalie Duraind.

"San Francisco, California, Oct. 27, 1939.

"I hereby appoint my cousins, Doretta Yoell and Rosalie Gardner, to take charge of my personal property and distribute it according to my instructions.

"May Rosalie Duraind.

"I, May R. Duraind, make this instrument a codicil to my last will and testament.

"I. I give and bequeath my household furniture, bric-a-brac and personal effects to Doretta Yoell and Rosalie Gardner and Gladys Atkinson share and share alike.

"In all other respects my said will is affirmed. Doretta Yoell shall make a proper division of this personal property.

"May Rosalie Duraind.

"Dated October 28, 1939."

[1] Said order dated September 27, 1940, has not been appealed from and has become final. (C.C.P. sec. 939.) Thereafter, on the 6th day of May, the trial court admitted to probate as a codicil of said will a document in words and figures as follows, towit:

"Saturday, Aug. 24, 1940

"I hereby declare my wish, if death should overtake me in the night, that my Cousin Rosa and her daughter Dorothy, take care of my house and affairs. The house has been made over to the Dominican Fathers of St. Dominic's Church, but my personal property I wish to leave to my cousins, Rose & Dorothy, also Gladys and Dottie, etc. Give what they do not want to the Sisters of the Holy Family. My Santa Cruz property can be sold and the money used to establish a burse in Mama's name at St. Dominic's Church. God bless you all.

"Signed, May R. Duraind,
or May Rosalie Duraind."

Rosalie Gardner and Dorothy Gardner contend that the trial court should have granted their petition to admit said instrument to probate as the will of said decedent and to revoke the letters of the Bank of America National Trust and Savings Association, hereinafter called the bank, as executor under the order dated September 27, 1940. We think the contention has no merit.

[2] There is no contention that the decedent was incompetent. The instrument dated September 6, 1939, was a formal will. It must be presumed the decedent knew that to be the fact. After that date she never stated directly that she revoked that instrument. By the instruments dated October 27 and October 28, 1939, she modified slightly its dispositive terms, and both of the latter instruments were admitted to probate as parts of her last will and testament. However, on August 24, 1940, she wrote again. As shown above it was admitted as a codicil.

[3] We think the court did not err in refusing to revoke the letters of the bank as executor. Its order dated September 27, 1940, was based on the unequivocal words contained in the instrument dated September 6, 1939. The instrument dated August 24, 1940, did not expressly name any one as executor. Bearing in mind decedent was the mistress of a household, that she was the owner of a very large number of items of furniture, bric-a-brac, jewelry, and household effects; that she had given instructions as to the disposal thereof; that Doretta Yoell and Rosalie Gardner at least knew of those instructions, we think it is quite reasonable to hold that, to carry into effect those said instructions, she wrote in the said instrument the words, "that my Cousin Rosa and her daughter Dorothy take care of my house and affairs." She wanted them to care for her house and to impound and hold safely said personal effects until her executor should take possession. That she feared the items might be injured or purloined appears from the expression "if I should die in the night." What else prompted that expression? As material to the naming of executors what mattered it whether she died during the night or during the day? That she was speaking of guarding her personal effects and not of changing the executor of her will we think is clear and the trial court did not err in refusing to revoke the letters of the bank.

[4, 5] Neither are we of the opinion that the instrument dated August 24, 1940, was a will. The instrument dated September 6, 1939, was a formal will. It, as modified by the instruments dated October 27, 1939, and October 28, 1939, had been ad-

judged the will of the decedent. The instrument dated August 24, 1940, did not expressly revoke the will as so adjudged nor was it wholly inconsistent therewith. It did not purport to dispose of decedent's real estate. It did purport to make some minor modifications which will later be discussed. It contained references to her real estate and tied into the provisions of the will as so adjudged. Under all of those facts the trial court held that it was a codicil. The court was warranted in so holding. 68 C. J. 412, sec. 2; Cheever v. North, 106 Mich. 390, 64 N.W. 455, 37 L.R.A. 561, 58 Am.St. Rep. 499. Moreover, in so holding the court made a reasonable construction of the provisions of said instrument and that construction may not be disturbed on appeal. In re Estate of Maloney, 27 Cal.App.2d 332, 334, 80 P.2d 998.

The instrument dated August 24, 1940, was admitted to probate as a codicil on May 6, 1941. As noted above an appeal was taken from that order. On June 30, 1941, a decree was made granting a petition for partial distribution. An appeal was taken from that decree also. We pass to a consideration of that appeal.

[6, 7] The appellants contend the court was without jurisdiction to hear and determine the petition for partial distribution pending the determination of the appeal from the order refusing to admit the document of August 24, 1940, as the last will and testament of the decedent and refusing to appoint appellants executrices of the last will and testament of the decedent. The jurisdiction to hear a petition for partial distribution is set forth in the Probate Code, sections 1000–1003. The appellants do not claim that the order appealed from was made without a full compliance with said provisions. But their contention is that the perfecting of an appeal from the order dated May 6, 1941, "* * * stays proceedings in the court below upon the judgment or order appealed from * * *." (C.C.P., sec. 949.) They cite no decision directly in point. We think none can be found. Because the trial court in its order dated May 6, 1941, called the document dated August 24, 1940, a *codicil* and refused to call it a *will*, or because it refused to revoke the letters of the bank and appoint the appellants executrices, did not and should not stay the hands of the probate court to proceed with the administration of said estate. In its order of May 6, 1941, the trial court placed no construction on the instrument dated August 24, 1940. Said instrument was first construed June 30, 1941, at a time when the court had jurisdiction. If it was incorrectly construed that was error within but not in excess of its jurisdiction. Such error, if any, is before us on this appeal. We therefore pass to a consideration thereof.

[8] When on June 30, 1941, the petition for partial distribution came on for hearing, the probate court was called upon to construe the instrument dated August 24, 1940, and determine its dispositive provisions. In doing so that court held that the words "personal property" as therein used meant "personal effects." The appellants earnestly contend such interpretation was too narrow and that the words meant, in effect, all property not real estate. It will be conceded at once that said words sometimes have that meaning. But the question before the probate court was what meaning did the decedent have when she used the words? The answer, we think, is to be found in the record. On September 6, 1939, she executed the formal will leaving to the Province "* * * all of my property, whether real, personal or mixed. * * *" On October 27, 1939, she wrote longhand, "I hereby appoint my cousins Doretta Yoell and Rosalie Gardner to take charge of my *personal property* and distribute it according to my instructions." (Emphasis ours.) The next day she showed that paper to her attorney and he wrote the instrument dated October 28, 1939, which provides: "I. I give and bequeath my household furniture, bric-a-brac, and *personal effects* to Doretta Yoell and Rosalie Gardner and Gladys Atkinson share and share alike. In all other respects my said will is affirmed. Doretta Yoell shall make a proper division of this personal property." (Emphasis ours.) Those two papers read together show clearly the meaning of the decedent when she used the words "personal property." Her meaning in the use of the words is made clearer by other facts contained in the record. The decedent was the owner and occupied a dwelling in San Francisco. As shown by the inventory she was possessed of a very large number of items of furniture, bric-a-brac, jewelry, and other belongings. In a gift to the church such articles were hardly appropriate. Said items were clearly the subject of the instrument dated October 28, 1939. Doretta Yoell was designated to make "a prop-

er division" thereof. When writing the instrument dated August 24, 1940, the decedent again used the words "personal property." That they were used in that instrument in the same sense in which they were used in the instrument dated October 27, 1939, appears as follows. Referring to the property the decedent said, "Give what they do not want to the Sisters of the Holy Family." That language used regarding cash, stocks and bonds, would hardly be adopted by an individual who made four wills or codicils in less than a year.

At all times herein mentioned the decedent had four cousins. Each was over the age of twenty-one years. In the instrument dated September 6, 1939, she left all of her property to the Province. She provided that if any one contested her will such person should receive $1. She made no mention of any one of the cousins. However, the appellants claim that the instrument dated August 24, 1940, in effect left them about $18,000 in cash, bonds, stock, etc., or about seventy-five per cent of her entire estate. If the decedent intended to make any such change it is manifest that she would have used clear words evidencing the same.

[9] The several points regarding the validity of the order made May 6, 1941, have been discussed because learned counsel for the parties have presented them. However, the order dated September 27, 1940, ordered the instruments dated respectively September 6, 1939, October 27, 1939 and October 28, 1939, admitted to probate as the will of the decedent. That order had become final. It determined what was the last will and testament of the decedent. It was a decree in rem and bound the world. In re Estate of Baker, 170 Cal. 578, 585, 150 P. 989. True it is that if a later will containing a revocatory clause was produced it could be admitted to probate. Prob.Code, sec. 510; In re Estate of Moore, 180 Cal. 570, 182 P. 285. But the record in the cited case shows it involved a subsequent will which in terms revoked prior wills. The instrument dated August 24, 1940, does not purport to do so. At most it was a supplementary testamentary instrument. Counsel cite no statute and no decision in this state which is to the effect that it could be admitted to probate after the order dated September 27, 1940, had become final. In other jurisdictions the rule is a subsequent document under such facts will not be admitted to probate. In re Bronson's Estate, 185 Wash. 536, 55 P.2d 1075, 107 A.L.R. 238 and notes, 249. As the point has not been presented by either party we express no opinion thereon.

The orders appealed from are affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

51 Cal.App.2d 195

SMITH v. RANDALL.

Civ. 13228.

District Court of Appeal, Second District,
Division 2, California.
April 9, 1942.

1. Money received 🔑17(1)

A complaint alleging that within four years last past under written agreement defendant received $3,000 for use and benefit of plaintiff, and that demand had been made upon defendant for payment thereof, but that the same had not been paid, stated a cause of action.

2. Money received 🔑17(1)

A complaint in the form of a common count for money had and received states a cause of action and is not vulnerable either to a general demurrer or a special demurrer on ground of uncertainty or unintelligibility.

3. Pleading 🔑428(4)

An objection to the introduction of any evidence on ground that complaint fails to state cause of action is to be treated as in nature of a general demurrer to the complaint, and rules of law applicable to general demurrer are applicable to an objection to evidence on ground that complaint does not state cause of action.

4. Licenses 🔑18½

An individual who is bona fide owner of securities may dispose of them for his own account when such sale is not made for benefit of the issuer or any underwriter of such security or for promotion of any scheme or enterprise with intent of violating or evading the Corporate Securities Act, without first obtaining a permit from the corporation commissioner. Gen.Laws 1937, Act 3814, § 2(c)3.

5. Licenses 🔑39

If a vendor sells securities which he owns, which sale is made directly or indirectly for benefit of issuer of security or any underwriter thereof or for direct or indirect promotion of any scheme or enterprise with intent of violating or evading the Corporate Securities Act, the sale is void unless the vendor first obtains a permit from corporation commissioner. Gen.Laws 1937, Act 3814, § 2(c)3.

6. Licenses 🔑39

In action for money had and received to recover amount paid for corporate stock sold without first obtaining a permit from corporation commissioner to sell stock, evidence sustained finding that defendant did not as bona fide owner sell the stock to plaintiff, but that the sale was in fact of stock of the corporation for purpose of financing a mining venture, and sustained judgment for plaintiff. Gen.Laws 1937, Act 3814, § 2(c)3.

◆

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action for money had and received by William L. Smith against C. C. Randall. Judgment for plaintiff, and defendant appeals.

Affirmed.

Arthur C. Fisher, of Los Angeles, for appellant.

Irvin C. Louis, Mildred Gilmore, and Jessie Torrance, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury in an action to recover a judgment for money had and received, defendant appeals.

The facts so far as material here are:

Plaintiff filed a complaint reading as follows:

"Plaintiff complains and alleges:

"I

"That plaintiff and defendant are now and were at all times herein mentioned, residents of the County of Los Angeles, State of California.

"II

"That within 4 years last past, at and within the County of Los Angeles, State of California, under a written agreement, the defendant received the sum of Three Thousand ($3,000) Dollars, for the use and benefit of plaintiff. That demand has been made upon defendant for payment thereof but the same has not been paid nor any part thereof.

"WHEREFORE, Plaintiff prays judgment against defendant for the sum of Three Thousand ($3,000) Dollars together with interest at the rate of 7% per annum from the date same became due, and costs of suit and for such other and further relief as may seem proper."

Defendant objected to the introduction of any evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action. This objection was overruled. The evidence discloses that defendant sold plaintiff 2500 shares of the capital stock of C. B. R. Mines Co., Ltd., a Nevada corporation, without first obtaining a permit from the Commissioner of Corporations of California so to do; and that the sale of said stock was for the purpose of financing the mining operations of the corporation. The transactions were evidenced by the following documents:

(a) "Feb. 9, 1937.

"Received of W. L. Smith $500.00 in full payment for 500 shares of my C. B. R. Mines Co., Ltd. stock, certificate for which will be delivered within ten days from date.

"(Signed) C. C. RANDALL."

(b) "July 27, 1937.

"Received of W. L. Smith $1,600. cash, note for $213. payable on or before ninety days from date, which with $187.16 stood by me on discounting of a certain Trust Deed sold by W. L. Smith, makes payment in full for 2000 shares of my C. B. R. Mines Co. Ltd. stock, certificate for which will be delivered upon return of W. E. Covey, Pres. to Los Angeles.

"C. C. Randall."

It is necessary for us to determine two questions which will be stated and answered hereunder seriatim:

First: Did plaintiff's complaint state a cause of action?

[1, 2] This question must be answered in the affirmative. The complaint is in

the form of a common count for money had and received. The law is established by an unbroken line of decisions in this state that such a complaint states a cause of action and is not vulnerable either to

1) a general demurrer (Kavanagh v. Wade, 42 Cal.App.2d 92, 98, 108 P.2d 475; Doyle v. McPherson, 36 Cal.App.2d 81, 83, 97 P.2d 249), or

2) a special demurrer on the ground of uncertainty or unintelligibility (Pike v. Zadig, 171 Cal. 273, 276, 152 P. 923.)

[3] It is likewise established that an objection to the introduction of any evidence on the ground that a complaint fails to state a cause of action is to be treated as in the nature of a general demurrer to the complaint, and the rules of law applicable to a general demurrer are applicable to an objection to the introduction of evidence on the ground that the complaint does not state a cause of action.

Second: Under the facts disclosed in the instant case was defendant required to obtain a permit from the Corporation Commissioner of California before selling to plaintiff the shares of stock of the C. B. R. Mines Co., Ltd.?

[4, 5] This question must be answered in the affirmative. While it is true that an individual who is a bona fide owner of securities may dispose of his own property for his own account when such sale is not made directly or indirectly for the benefit of the issuer or any underwriter of such security or for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of the Corporate Securities Act, without first obtaining a permit from the Commissioner of Corporations (Act 3814, sec. 2(c) 3, vol. 1, Deering's General Laws (1937) 1771; People v. Pace, 73 Cal. App. 548, 551, 238 P. 1089); it is likewise settled that, if a vendor sells securities which he owns, which sale is made directly or indirectly for the benefit of the issuer of the security or any underwriter of the same or for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading the Corporate Securities Act, such sale is void, unless the vendor first obtains a permit from the Commissioner of Corporations of the State of California (Act 3814, sec. 2(c) 3, supra.)

[6] In the instant case there is ample evidence to sustain a finding that defendant did not as a bona fide owner sell the stock of the C.B.R. Mines Co., Ltd. to plaintiff, but that the sale was in fact of stock of the corporation for the purpose of financing a mining venture.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

51 Cal.App.2d 191

TORREY v. NELSON, et al.

Civ. 12996.

District Court of Appeal, Second District, Division 1, California.

April 9, 1942.

1. Appeal and error 🔑842(7)

Where evidence establishes uncontradicted state of facts in favor of one party, a "question of law" is presented for appellate court.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

2. Appeal and error 🔑1015(1)

In absence of uncontradicted state of facts, trial court's ruling on motion for new trial may not be disturbed.

3. Automobiles 🔑245(72)

A pedestrian who, in crossing street in brightly lighted marked crosswalk, first noticed approaching automobile about 200 feet away when pedestrian was in center of street, and who continued to cross at an ordinary gait and continued to watch the automobile which struck pedestrian, was not contributorily negligent as matter of law Vehicle Code, § 560, St.1935, p. 188.

4. Automobiles 🔑206

A pedestrian who in crossing street at marked crosswalk had right of way over approaching automobile, if exercising due care, could presume that motorist would also exercise due care. Vehicle Code, § 560, St.1935, p. 188.

5. New trial ⚿70

In action for injuries to pedestrian struck by automobile while crossing street in brightly lighted marked crosswalk, granting new trial on ground of insufficiency of evidence to support verdict for defendants was not an abuse of discretion. Vehicle Code, § 560, St.1935, p. 188.

◆

Appeal from Superior Court, Los Angeles County; Clement L. Shinn, Judge.

Action by John W. Torrey against Martin Nelson and others to recover for injuries sustained when plaintiff was struck by an automobile. From an order granting plaintiff a new trial, defendants appeal.

Affirmed.

George P. Kinkle, of Los Angeles, for appellants.

John W. Hill, of Pasadena, and Benjamin Lewis, of Los Angeles, for respondent.

DORAN, Justice.

In an action for damages for injuries, sustained by the plaintiff when struck by an automobile, defendants appeal from the order granting plaintiff a new trial upon the ground of the insufficiency of the evidence to support the verdict of the jury in favor of defendants. The accident in question occurred while plaintiff was crossing a highway in a marked crosswalk. When plaintiff was about three-quarters of the way across the highway he was struck by defendants' car. It was dark at the time, about 6:20 p.m., but the crossing was brightly lighted. Plaintiff was in the center of the street when he first noticed defendants' car approaching, about 200 feet away. He continued to cross the street at an ordinary gait; but also continued to watch the approaching car. When the car had approached to within 50 or 60 feet of plaintiff it appeared to be traveling faster than plaintiff had at first estimated. Plaintiff thought the driver of the car would slacken its speed and give plaintiff an opportunity to get across the street. The driver appears to have slowed up when the car was 50 or 60 feet from plaintiff; but the car did not stop, and continued on until it struck plaintiff. At the time of the accident plaintiff was wearing dark trousers and a light tan or khaki jacket. Some evidence was introduced as to plaintiff having been intoxicated at the time of the accident, but the plaintiff testified that he had nothing intoxicating to drink that day, and the testimony offered on behalf of defendants is not conclusive on this question.

[1-5] Appellants (defendants) contend that the trial court abused its discretion in granting respondent (plaintiff) a new trial; and that the evidence shows respondent to have been guilty of contributory negligence as a matter of law. However, appellants concede that if there is a substantial conflict in the evidence, and if there is substantial evidence in support of respondent's case and a verdict for respondent would not be against the weight of the evidence, then the order of the trial court should be affirmed. Actually, it is only where the evidence establishes an uncontradicted state of facts in favor of one or the other of the parties that a question of law is presented for the consideration of an appellate court. McCann v. McCann, 20 Cal. App. 567, 129 P. 965. In the absence of such a state of facts the ruling of the trial court on the motion for a new trial may not be disturbed. Cases cited by appellants to show respondent to have been guilty of contributory negligence as a matter of law are inapplicable to the facts here presented. The cases cited deal with situations in which the injured party either ignored the approaching vehicle, deliberately stepped in front thereof, or took other similar action in disregard of personal safety. It may not be said as a matter of law that respondent here acted in disregard of his personal safety. Section 560 of the Vehicle Code, St. 1935, p. 188, gave respondent the right of way over defendants' car, and respondent, if exercising due care himself, was entitled to presume that the driver of defendants' car would also exercise due care under the circumstances. The evidence presented would support a verdict in favor of respondent, and the trial court cannot be said to have abused its discretion in granting a new trial. The order is affirmed.

YORK, P. J., and WHITE, J., concurred.

ALEXANDER et al. v. STATE PERSONNEL BOARD et al.*

Civ. 13040.

District Court of Appeal, Second District, Division 2, California.

April 10, 1942.

Hearing Granted June 8, 1942.

1. Officers 🔑72(1)

Where State Personnel Board made a decision discharging petitioners from positions as employees of the state, and statute then in effect authorized petitioners to apply for a rehearing before Board within 30 days after receiving a copy of decision, and petitioners permitted five months to elapse after receiving copy of decision before a petition for rehearing was filed with Board, the petition was not effectual and perfunctory denial of petition by Board added no vitality to it. Gen.Laws 1937, Act 1404, § 173(c).

2. Officers 🔑103

Where an administrative remedy is provided by statute, relief must be sought from the administrative body and such remedy exhausted before courts will act, and this rule is not a matter of judicial discretion but is a fundamental rule of procedure laid down by courts of last resort, followed under doctrine of "stare decisis", and binding upon all courts.

See Words and Phrases, Permanent Edition, for all other definitions of "Stare Decisis".

3. Officers 🔑103

Where an administrative remedy is provided by statute and administrative procedure prescribes a rehearing before administrative body, the rule of "exhaustion of remedies" will apply in order that administrative body may be given an opportunity to correct any errors that it may have made before resort may be had to courts.

See Words and Phrases, Permanent Edition, for all other definitions of "Exhaustion of Remedy".

4. Mandamus 🔑169

Where State Personnel Board made a decision discharging petitioners from positions as employees of the state, and statute then in effect authorized petitioners to apply for a rehearing before Board within 30 days after receiving a copy of decision, and petitioners permitted five months to elapse after receiving copy of decision before filing a petition for rehearing with Board, and such petition was not filed until after petitioners had filed a petition in superior court for writ of mandate to review Board's decision, dismissal of latter petition was proper. Gen.Laws 1937, Act 1404, § 173(c).

5. Constitutional law 🔑318

Where State Personnel Board made a decision discharging petitioners from positions as employees of the state, and petitioners had not filed a petition for rehearing with Board, as was authorized by statute, before petitioners filed petition in superior court for a writ of mandate to review Board's decision, petitioners could not complain that proceedings before Board deprived petitioners of "due process of law" in that Board admitted testimony contrary to rules of evidence and that there was never any determination by a quorum of Board. Gen. Laws 1937, Act 1404, § 173(c).

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

6. Mandamus 🔑13

Where State Personnel Board made a decision discharging petitioners from positions as employees of the State, and statute afforded petitioners opportunity for rehearing before Board, if there was any deficiency in evidence introduced before Board, or any weight to that evidence which was offered but excluded, the Board should have been given opportunity to hear other testimony or to reverse its decision before petitioners applied to courts for relief by mandamus to review Board's decision. Gen.Laws 1937, Act 1404, § 173(c).

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Mandamus proceedings by Arthur H. Alexander, and another, against the State Personnel Board of the State of California, and others, to review a decision of the Board discharging petitioners from their positions as employees of the State of California and for other relief. From a judgment of dismissal, petitioners appeal.

Affirmed.

For prior opinion, see 120 P.2d 76.

Holbrook & Tarr and W. Sumner Holbrook, Jr., all of Los Angeles, for appellants.

Earl Warren, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondents.

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* Subsequent opinion 137 P.2d 433.

SCOTT, Justice pro tem.

An opinion was filed herein on December 22, 1941. Thereafter a petition for rehearing was granted and the matter set down for oral argument on January 28, 1942. Presiding Justice MOORE and Justice McCOMB having disqualified themselves, the issues were argued before Acting Presiding Justice WOOD and Justices pro tempore SCOTT and STEPHENS. Upon due consideration we are satisfied that the former opinion properly disposes of the appeal.

Petitioners appeal from judgment of dismissal of their fourth amended petition for writ of mandate, entered following order sustaining demurrer without leave to amend. It was sought to review a decision of respondent personnel board discharging petitioners from their positions as employees of the State of California. In the action they also sought an order of reinstatement and back salaries.

The judgment of the trial court must be upheld because petitioners had failed to exhaust their administrative remedies before instituting this action and were not entitled to a writ of mandate.

The chronological record shows the omission which was fatal to petitioners' case:

On July 12, 1938, complaints against petitioners were filed with the state personnel board charging petitioners with incompetency, inefficiency, dishonesty, discourteous treatment of the public, failure of good behavior, wrongful behavior and other acts alleged to be incompatible with and inimical to the public service of the state. Petitioner Alexander had held the position of Petroleum Production Inspector with the State Land Commission. Petitioner Sturzenacker had held the position of Chief of the Division of State Lands, with the same commission.

On August 23, 1938, respondent State Land Commission suspended petitioners from their respective positions, and this order has not been vacated.

On September 26, 1938, hearings on the petitioners' cases were commenced before respondent State Personnel Board.

On April 8, 1939, a copy of the board's findings, conclusions of law and decision adverse to petitioners was mailed to, and two days later was received by, petitioners' counsel.

On April 11, 1939, the decision was entered on the official roster of state employees.

On April 21, 1939, the findings, conclusions and decision were entered in the minutes of the board.

On July 5, 1939, this petition for writ of mandate was filed.

On September 11, 1939, petitioners filed with the board a petition for rehearing in their case. It was denied at a meeting of the board held ten days later.

Petitioners assert that the demurrer to their fourth amended petition for a writ of mandate was sustained upon the sole ground that they had not petitioned for a rehearing by the board before they filed their petition for the writ of mandate.

[1] The State Civil Service Act (Deering's Gen.Laws, 1937, Act 1404), in effect during the period under consideration, made provision for filing of charges against state employees and hearings thereon. Section 173, subdivision (c), of the act provides in part: "Rehearing. Within thirty days from and after receipt by him of a copy of the decision rendered by the board in a proceeding under this section, the employee or the appointing power may apply for a rehearing by filing with the board a petition in writing therefor." This petition, on notice to the parties affected, must be granted or denied within sixty days. If it is granted the case is set down for further hearing. Whether the time within which such application for rehearing must be made be calculated from the date of service on petitioners herein of a copy of the board's decision or from the date of entry of the decision in the minutes of the board, it is obvious that more than thirty days, in fact about five months, had elapsed before the petition for rehearing was filed with the board. Not being within the time provided by law, it was not effectual for any purpose and the perfunctory denial by the board added no vitality to it.

[2-4] "Where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act. * * * It is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of stare decisis, and binding upon all courts. * * * exhaustion of the administrative remedy is a

jurisdictional prerequisite to resort to the courts. * * * where the administrative procedure prescribes a rehearing, the rule of exhaustion of remedies will apply in order that the board may be given an opportunity to correct any errors that it may have made." Abelleira v. District Court of Appeal, 17 Cal.2d 280, at pages 292, 293 and 302, 109 P.2d 942, at page 949, 132 A.L.R. 715. This rule is grounded in experience and reason. The instant case illustrates its validity and justice.

[5] Petitioners make complaint concerning the proceedings before the personnel board, and assert that they were of such a nature that they deprived petitioners of their rights without due process of law. It is alleged that by reason of various matters, the essential ones of which are set forth below, "there is not and never has been any determination by respondent board, or a quorum of respondent board, or by any unprejudiced or impartial members of said board upon the merits of the charges" against them. It is alleged that the evidence was taken partly before the entire board of five members, partly before less than five members and partly by having one of its members act as referee and report to the board. Prejudice is charged against one board member. It is claimed that an attempt at hasty and ill-advised action evidenced prejudice on the part of two others. Testimony is alleged to have been admitted contrary to rules of evidence. Hearings are said to have been unduly extended, even requiring attendance on a legal holiday, and counsel for petitioners were hurried beyond reason at their sessions before the referee. It is finally claimed that petitioners were required to argue the case before the whole board prior to the time when the transcript of 3,000 to 4,000 pages and 152 exhibits was completed. It is at once apparent that upon petition for rehearing matters of procedure or evidence affecting the substantial rights of petitioners could have received consideration by the entire membership of the board. At that time it appears they would have had the official transcript of the evidence, and if in any respect it failed to support their decision an opportunity would have been afforded to supplement the testimony or to modify their decision.

[6] Appellants in their brief assert: "There is no question as to the meritoriousness of petitioners' application for judicial relief in this matter." Our attention has not been directed by appellants to any portion of the record in this case in which they allege either (1) that there was not sufficient competent and legally admissible evidence to support a finding by the personnel board that the charges against them were true, or (2) the substance or effect of any defense testimony which would avail against that produced against them and which they were actually precluded by the board from presenting in their own behalf. If there was any such deficiency in the evidence introduced, or any weight to that offered and excluded, the personnel board should have been given an opportunity to call for or permit other testimony or to reverse its decision.

Judgment affirmed.

W. J. WOOD, Acting P. J., concurred.

STEPHENS, Justice pro tem. (concurring in the judgment).

I concur in the judgment, because the decision of the Supreme Court in the case of Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715, leaves no room for doubt that where an administrative remedy is provided by statute this relief must be sought from the administrative body, and that exhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts.

It is made clear that such remedy has not been exhausted when the petitioners have not sought a rehearing, even though the statutory provision for rehearing is permissive in form. However, in the case of Gantner & Mattern Co. v. California Employment Commission, 17 Cal.2d 314, 109 P.2d 932, 934, the Supreme Court makes this statement: "The exhaustion of remedial procedure as laid down by the statute is required unless the petitioner can positively state that the commission has declared what its ruling will be in the particular case, and that, petitioner is unable to do." If this is to be regarded as in the nature of an exception to the rule, has not the case been brought within the exception where the facts alleged show that the commission, in the same case and upon the identical situation which would be presented upon petition for rehearing, has so definitely and finally passed upon the question that its action upon a formal petition for rehearing would be obvious? If this is not true, then the exception (if exception it can be called) is practically confined to the rare case in which the petitioner can allege that the commission has declared, in so many words, that if a rehearing is asked for it will be denied. With this in mind it may be of value to briefly review some of the facts here presented.

It must be remembered that the matter comes before us after the trial court had sustained a demurrer to the petition without leave to amend. Therefore, all material allegations of the petition must at this time be taken as true. According to such allegations, defendant Wood, a member of the tribunal established by law to hear the complaints, made the statement, before any hearing had been commenced or a word of evidence presented, that "he had personally investigated the charges against petitioners and each of them, and in his opinion the charges were well founded and petitioners and each of them were guilty of the acts alleged therein." If a judge should make such a statement before beginning a trial he would be instantly disqualified. The question of whether or not Wood was disqualified to act was certainly a matter vitally important to petitioners. In fact—particularly in view of the later action of the board—it may even be questioned whether or not any hearing has been held that complies with the statute (sec. 173(b), State Civil Service Act), which says: "It shall be the duty of the board * * * to consider carefully the evidence submitted in the hearing and to render a decision which in its judgment is just and proper." Morgan v. United States, 298 U.S. 468, 481, 56 S.Ct. 906, 80 L.Ed. 1288; Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129. The matter of this disqualification was presented to the entire board and the entire board acted in refusing the protest. Subsequently the board itself, over petitioners' protest, again acted upon the same matter by appointing the alleged objectionable member as sole referee to hear the evidence, thus, from petitioners' standpoint, adding insult to injury. Finally, the entire board, over petitioners' protest and acting solely upon a report of the alleged objectionable referee, decided the case adversely to petitioners, although not a single member of the board excepting such sole referee had heard a word of the testimony offered in behalf of petitioners and could not have read the record of it because at that time the transcript had not been written up.

So far as this vital matter of whether or not Wood should be disqualified is concerned, no new facts and no new problems for determination were presented to the trial court or to this court that had not been presented to and passed upon by the defendant board, not only once but at least three times. Is it sound reasoning to now say that all redress must be denied to petitioners because they did not give the commission an opportunity to pass upon the same matter a fourth time?

I have concurred in the judgment herein solely because as I read the Abelleira and Gantner decisions the rule as there laid down does not permit of the additional step suggested by the above discussion. I cannot refrain from observing, however, that if the exception pointed out in the Gantner decision is to be of any practical value this additional step is unavoidable.

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51 Cal.App.2d 221

PEOPLE v. STEINBERG.

Cr. 3555.

District Court of Appeal, Second District, Division 3, California.

April 10, 1942.

Hearing Denied May 8, 1942.

1. Receiving stolen goods 🔑**8(3)**

Evidence sustained conviction for receiving stolen goods of defendant who admitted receiving the goods but denied any criminal intent and who claimed that testimony implicating him in offense was incredible. Pen. Code, § 496.

2. Receiving stolen goods 🔑**5**

If defendant received stolen goods for his own personal gain and to deprive the true owner thereof, his subsequent repentance would not prevent conviction for receiving stolen goods. Pen.Code, § 496.

3. Criminal law 🔑**254**

In a trial before the court, the credibility of witnesses is for the decision of the court.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Dave Steinberg was convicted of receiving stolen property, and he appeals.

Judgment affirmed.

Wyman G. Reynolds, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty.Gen., for respondent.

SHINN, Justice.

Defendant appeals from a judgment of conviction on two counts of receiving stolen property after a trial before the court pursuant to an indictment. He bases his appeal upon the alleged insufficiency of the evidence. Upon the trial he admitted having received the goods described in the first count of the indictment but denied any criminal intent Pen.Code, sec. 496, and denied having received the goods described in the second count. The case on appeal turns upon the credibility of witnesses, as it did in the trial court, although, of course, under entirely different rules.

On the night of March 15, 1941, four men entered the storage room of a dealer in lubricating oils and greases and stole a large quantity of oil in quart cans and drums and some cans of grease. The oil was contained in 284 cartons, comprising 6816 quart cans and was of the value of $957.43. All of the men had been drinking heavily on the day of the burglary. Three of them, Boroff, Kirtley, and Wilkinson, were arrested and entered pleas of guilty to burglary and applied for and received probation. While their applications were pending they made statements to the probation officer, and after being granted probation they testified before the grand jury and at the preliminary examination of a fourth man, Roy Long, who also was charged with the burglaries. The three testified against defendant Steinberg and the account they gave of his receipt of the property was substantially as follows: Boroff, who was employed by a sign truck display company and who had known defendant for at least several months, talked with him a day or two before the burglary about disposing of oil and grease, and in reply to a question by the prosecutor as to what defendant said on that subject, he answered, "Well, they asked him if he could use any of it if we got some and he said 'Yes.'" No mention was made in the conversation of the type of oil, the brand or the quantity. About midnight Saturday, March 15, the first load was taken from the storeroom and was immediately delivered by automobile and a truck taken from the oil company's garage to defendant's service station on north Spring Street. The quantity so delivered was of the value of $426.60. When the men reached the service station with the oil and grease defendant was at his home. He came to the service station upon a telephone call from an employee at the station, arriving before the truck was unloaded. The oil and grease were unloaded into a shed on the premises and defendant at that time gave Boroff $50 in cash and said he could use some more oil and grease at his service station on Brooklyn Avenue. The thieves then returned to the storage room of the oil company, stole another load of oil and grease and delivered that in another truck of the oil company to defendant's Brooklyn Avenue station. Defendant was there when it was delivered and stored in a shed on the premises. The cans of oil and grease and some drums of oil delivered at this address made a pile some four feet by five feet by nine feet. The $50 received from defendant Saturday night was divided equally among the four burglars. The following day defendant paid Boroff $100 in cash, which likewise was divided among three or perhaps the four men. On Monday, after an argument over the price of the oil and grease, defendant finally agreed to pay $400 for the two lots delivered and gave Boroff three checks for $50 each, postdated, which Boroff cashed at a cafe. This money was likewise divided. Defendant stopped payment on these checks when the bank opened on Tuesday morning.

[1] This testimony, if it was believed by the trial judge, was sufficient to prove all of the elements of the crime of receiving stolen property. Without explanation of the circumstances pointing toward defendant's guilt there would have been no basis for a theory of innocence. The evidence of defendant's guilt upon the second count, arising out of the second delivery of oil and grease, which was made to the Brooklyn Avenue station, in so far as it rested upon the veracity of the witnesses, was equally as strong as that which related to his guilt upon the first count arising out of the delivery to the Spring Street station. The fact that no stolen property was found

at the Brooklyn Avenue address when the police visited the premises on Wednesday following the burglaries did not render incredible the testimony as to its delivery there.

Defendant offered the following explanation: that he had had no conversation with any of the men about purchasing oil or grease; that he was not called to the service station until about 6 o'clock Sunday morning, at which time the oil and grease had all been stored in a shed on the premises. The burglars asked him for money, which he refused to give them, saying that he had none; that he asked them how they came to have the property and Boroff told him that he was working for an oil company which did not have sufficient money to pay his wages and that he had been paid in merchandise. Boroff then got some oil and gas for his car and signed a ticket showing the receipt of the same. On the ticket defendant wrote, "Bill Boroff, 05-V812 Packard, 10 (gallons) Sup (Super Shell) 1.50, 7 quarts G S (Golden Shell) 1.75, (total) 3.25. Recd from Bill 109 cases Hyves, 7 cans Hyves, 2 tires." Below this Boroff signed his name. Defendant testified that the circumstances looked "funny" to him; that he called police headquarters Sunday morning and inquired whether an oil burglary had been committed; that a woman who answered the phone said she would connect him with the burglary detail, whereupon a man answered, told him that he had heard of no oil burglary and that the officers who worked in the north Spring Street district where defendant's service station was located were not on duty Sunday and could not be reached until Monday morning; that on Monday morning he again called the police department and in response to the call two officers came to his north Spring Street station. Defendant in the meantime had had the oil stored in a shed, which he locked. When the officers came they were shown the stolen goods and defendant delivered to them the key to the shed. Defendant gave the officers Boroff's name and the license number of his car. He denied seeing the men on Sunday, on which day they had testified he paid them $100, but admitted having given them the three postdated checks for $50 each on Monday. Boroff was arrested on Tuesday and Kirtley and Wilkinson shortly thereafter. On Tuesday the officers went to defendant's Brooklyn Avenue service station but found none of the stolen goods there. No part of the stolen property other than that delivered to defendant's Spring Street service station was ever recovered. Defendant's account of his call to the police on Monday and his cooperation with them afterwards was fully corroborated. There was no corroboration of his testimony as to the telephone call on Sunday.

Defendant was arrested Tuesday night or Wednesday morning. He was subsequently released without a charge having been filed against him. After Boroff, Wilkinson and Kirtley were sentenced and placed on probation they testified before the grand jury, which returned an indictment against defendant. Boroff testified to having seen defendant in jail following the latter's first arrest and that on that occasion defendant had said to him, "No use of all of us taking the rap. You boys go ahead and say you stored it in my place. I will get a lawyer and see what we can do." Defendant denied having made the statement.

At the time Boroff, Kirtley and Wilkinson were before the court for sentence the court referred the matter of the implication of the fourth man and defendant Steinberg to the grand jury and questioned the other three as follows: "There is no reason why the three of you would not be willing to appear before the Grand Jury and tell the same story that you told the probation officer?" to which the three answered that there was no such reason. Boroff was then sentenced, execution of the sentence was suspended and he was placed on probation. Proceedings against Wilkinson and Kirtley for imposition of sentence were suspended and they were placed on probation.

Appellant has called to our attention many contradictions and discrepancies in the testimony of said three witnesses, consisting of conflicting statements made in their reports to the probation officer, in testimony given at the time of their preliminary examinations and at the preliminary examination of the fourth man, Roy Long, and other statements inconsistent with their testimony upon the trial of defendant. Each of the three men made two different reports to the probation officer, stating in the first reports that the burglary had been committed in the daytime on Sunday morning. In the first reports it was stated that the oil and grease had been taken to a place on north Spring Street and stored in a shed, but defendant or his place of business was not named. In the second reports they implicated defendant as the receiver of the stolen property. Other contradictions consisted of statements and testimony involving the fourth man, Roy Long, and contradictory statements and testimony to the effect that they could not recall whether he participated in the burglaries.

[2, 3] It is earnestly insisted by appellant that the three witnesses who testified against him were so thoroughly impeached that their testimony was shown to be wholly unworthy of belief. It is further argued that the conduct of appellant in reporting the receipt of the property to the authorities and thereafter cooperating with them for the arrest of the offenders conclusively proved that he did not receive the property for his own gain or to prevent the owner thereof from again possessing the same, these being elements of the crime of receiving stolen property as the offense is defined in section 496 of the Penal Code. We do not consider it necessary to review at length the arguments made in support of this contention. It may be conceded that the question whether appellant was innocent or guilty was a difficult one for the trial judge to decide. If the testimony of the defendant was to be believed, the stolen property was brought to his place of business without previous arrangement or knowledge upon his part and he proceeded from the time of its delivery with the purpose of aiding the police in apprehending the thieves and convicting them of their crime. In furtherance of this purpose, according to his explanation, he issued the three $50 checks in order to prevent the removal of the oil before the burglars could be apprehended. If such had been his motives and if he had received the stolen property with no intention of keeping it, he would have been innocent of the crime charged. He was ably represented by counsel at the trial and this defense was thoroughly presented and, as shown by the record, was given thoughtful consideration by the trial judge. However, it was not unreasonable for the trial judge to believe that the stolen property was not taken to defendant's place of business without a prior arrangement having been made for its purchase by defendant. The payment of $50 at the time of the receipt of the oil and the further sum of $100 on the following day would have been wholly inconsistent with defendant's protestations of worthy motives and righteous efforts to bring the criminals to justice. The conduct of the defendant in reporting the receipt of the property to the police may well have been the result of an afterthought and of fear on defendant's part that the stolen property might be traced to him. His repentance, if admissions made through fear and for self-protection could be called repentance, would have availed him nothing after he had received the property for personal gain and for the purpose of depriving the true owner thereof. Under the most familiar rules the credibility of the witnesses was for the decision of the trial judge. Defendant, unfortunately for him, where his claimed defense rested almost entirely upon his own credibility, was shown to have suffered two prior convictions of burglary, pursuant to one of which he had been placed on probation and to the other had served a term in the state's prison. We find no ground for holding that the evidence introduced against defendant was without probative force or that it was insufficient in law to establish his guilt under both or either counts of the indictment. The unquestionable contradictions, conflicts, and other weaknesses in the testimony of the three principal witnesses for the People, when considered with the circumstantial evidence relating to defendant's receipt of the stolen property, do not render incredible the testimony which implicated defendant in the criminal acts charged. People v. Dorland, 1934, 2 Cal.2d 235, 243, 40 P.2d 474.

The judgment is affirmed.

SCHAUER, P. J., and PARKER WOOD, J., concurred.

51 Cal.App.2d 161

HAGENBURGER et al. v. CITY OF LOS ANGELES et al.

Civ. 12001.

District Court of Appeal, First District,
Division 2, California.

April 7, 1942.

Hearing Denied June 1, 1942.

1. Municipal corporations 🔑121

When a city zoning ordinance establishing a residential district and permitting use of premises for specified purposes, but prohibiting use for other specified purposes is under attack, court need not consider the validity of the ordinance as a whole, but may direct the attack to the reasonableness of the enforcement of the ordinance against the particular property involved.

2. Injunction 🔑85(2)
Municipal corporations 🔑122(2)

A zoning ordinance establishing a residential district and permitting use of lots included therein for specified purposes but prohibiting use for other specified purposes may be assumed to be generally valid for the purposes indicated, but if it is unreasonable, arbitrary and discriminatory as applied to land within the district used as a nursery, from which no sales were made, the owner was entitled to an injunction restraining the operation of the ordinance with respect to those particular parcels.

3. Municipal corporations 🔑601

Where a zoning ordinance establishing a residential district permitted the use of any lot for farming and other specified purposes and made several specific exceptions to such uses not including the raising of plants and flowers, the word "farming" was not used as applying to the cultivation of a large tract of land, but as applying to a cultivation of an indefinite quantity of land, and including gardening or horticulture, fruit growing, raising of vegetables, trees, shrubs, plants and similar products in view of council's knowledge of the area of the lots within the district.

See Words and Phrases, Permanent Edition, for all other definitions of "Farming".

4. Injunction 🔑85(2)

Where the use to which property surrounding lots used for a nursery from which no sales were made was such that they were no longer suitable or desirable for residential purposes, the enforcement of a city zoning ordinance establishing a residential district including such property as to the nursery operators would be unreasonable, and hence they were entitled to an injunction restraining its enforcement.

5. Municipal corporations 🔑601

The residential restrictions of a city zoning ordinance establishing a residential district permitting the use of any lot or premises for "farming" did not apply to owners operating a nursery from which no sales were made on lots within such district because such activities consisted of "farming" within the exception.

Appeal from Superior Court, Los Angeles County; Dudley S. Valentine, Judge.

Action by Carl Hagenburger and others against the City of Los Angeles and others to enjoin the enforcement of a municipal zoning ordinance as it related to property occupied by plaintiffs. From an adverse judgment, the defendants appeal.

Affirmed.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and William Christensen and Bourke Jones, Deputies City Atty., all of Los Angeles, for appellants.

Tanner, Odell & Taft, of Los Angeles, for respondents.

NOURSE, Presiding Justice.

The plaintiffs instituted this action to restrain the enforcement of a municipal zoning ordinance in so far as it related to the property occupied by them in block 49 of a subdivision in the western section of the city of Los Angeles.

About 1921 they acquired a lot on Santa Monica Boulevard and subsequently acquired three adjoining lots, all in block 50, upon which they established a nursery. This property extended north to Ohio Avenue and was all zoned as business property. In 1931 they leased four lots in block 49 which faced on the south side of Ohio Avenue opposite the nursery, and they acquired these lots by purchase in 1939. These lots extended north to a narrow alley which separated them from property of a local high school, and were zoned as residential property in 1923. At the time of the lease there was a residence on one of the lots and a building occupied and used in the business of a laundry on another. Lot 1 of the same block was used by another in the operation of a dirt and stone hauling business. Upon the school grounds across the narrow alley from the lots in question there were situated an athletic field, bleachers and a school nursery, the latter lying about 100 feet from the parcel of land leased by the respondents. This nursery had been maintained for many years with lath houses, hot houses and other buildings on the school property, and large quantities of trays, pots, containers, dirt and fertilizer lay in plain view from plaintiffs' property. The lots in block 50 upon which the main business of plaintiffs' nursery is conducted have frontages on both Ohio Avenue and Santa Monica Boulevard, both of which are heavily traveled streets within a strictly business territory.

The plaintiffs have for many years carried on a specialized nursery business from the premises located in block 50 with their principal office maintained on Santa Monica Boulevard. The business is chiefly wholesale and is confined to the trade in cactus, succulents and novelty plants. Since their acquisition of the lots in block 49 the plaintiffs have used those lots entirely for the purpose of seeding, planting and raising plants, some of which are grown in flats, some in pots, and an average of about 150,000 a year are grown directly in the ground. Sales are not ordinarily made from these lots, and the plants are not there displayed for sale. Specimens are kept in the main plant on Santa Monica Boulevard from which sales are made. When sales of the plants grown in block 49 are made they are dug out of the ground and taken across Ohio Avenue to the packing shed where they are wrapped and prepared for delivery. This practice had been carried on for about ten years before this proceeding was commenced without serious objection from those in the neighborhood. The lots involved in this proceeding upon which the nursery stock is planted and raised are located in a narrow strip between a well used business section and the rear of the plot of land used by the high school on which are located the athletic field, the athletic bleachers or grandstand, and the school nursery.

It is upon the facts thus presented that the trial court found that the enforcement of the ordinance as to plaintiffs' use of the four lots in block 49 was unreasonable; that plaintiffs had for approximately ten years last past been in possession of "and engaged in farming said lots"; that during said ten years they have improved said property and expended great sums of money thereon and have established a garden thereon, products from which are sold and delivered from the premises on the other side of Ohio Avenue; that the plants raised thereon required constant care, cultivation, attention and irrigation, and that the use which the plaintiffs have made of said lots is that of "farming" within the meaning of the zoning ordinance. Section 12.04 (e) of the zoning ordinance provides in part as follows: "Any lot or premises may be used for farming, the keeping of domestic live stock and the raising of poultry, rabbits, bees, pigeons or other similar enterprises. * * * Nothing herein contained shall be construed as permitting dairies, stockyards, cattle feeding yards, horse corrals or stables except for private use, hog or goat ranches, hog or goat raising establishments or dog or cat breeding establishments."

[1, 2] When a zoning ordinance of this type is under attack it is not necessary for the court to consider the validity of the ordinance as a whole, but it may direct the attack to the reasonableness of the enforcement of the ordinance against the particular property involved. Hence, it may be assumed that this ordinance is generally valid for the purposes intended, but if it is unreasonable, arbitrary and discriminatory as applied to respondents' land, the judgment restraining the operation of the ordinance in respect to those particular parcels should be affirmed. This is the settled rule of decision as recently announced in Reynolds v. Barrett, 12 Cal.2d 244, 83 P.2d 29, where numerous authorities are cited. The trial court based its finding and conclusion that this particular ordinance was unreasonable as to respondents' property upon all the surrounding circumstances, including the showing that because of the use to which the properties surrounding these particular lots were put, they were no longer suitable or desirable for residential purposes, and also because of the fact that the use to which the respondents put these parcels was a farming use within the contemplation of the ordinance.

The question of what constitutes "farming" is one which has been subject to much comment in the decisions. The authorities which define the term are found generally in the cases involving the operation of workmen's compensation acts where "farm labor" is exempted from the operation of the act. Webster defines "farming" as the act or business of cultivating the land; the business of tilling the soil; to produce crops or animals on a farm. He defines a farm as a plot or tract of land devoted to the raising of domestic or other animals; as a chicken farm; a fox farm; a tract of land devoted to agricultural purposes. "Agriculture" he defines as the art or science of cultivating the ground; the art or science of the production of plants and animals useful to man or beast; it includes gardening or horticulture, fruit growing, and storage and marketing. The terms farming, husbandry and tillage are said to be synonymous of or equivalent of the term agriculture. 3 C.J.S., Agriculture, § 1, p. 366. In Ginn v. Forest Nursery Co., 165 Tenn. 9, 52 S.W.2d 141, page 142, where the question was whether an employee in a nursery was a "farm laborer" within the exception of the Workmen's Compensation Act, Code 1932, § 6851 et seq., whose duties were to till the soil, to tend growing plants, shrubs and young trees, to prepare them for market and to deliver them to a shipping point, the court said: "The harvesting and marketing of grain, the transplanting and care of tobacco plants, and the delivery of a bale of cotton from farm to shipping point, are all ordinary incidents of farm labor. The work and labor performed by plaintiff in error differed from that of the ordinary farmer only in the kind and nature of the products of the soil grown and prepared for market. No difference in hours of labor, hazard, or remuneration is pointed out which might induce a Legislature to include the one and exclude the other from the operation of the statute. The labor performed by plaintiff in error and contemplated by his employment was agricultural in the literal sense and meaning of the word, and we think we would not be justified in holding that he was not a 'farm or agricultural laborer.'"

In Hill v. Georgia Casualty Company, Tex.Com.App., 45 S.W.2d 566, 567, the Texas court in defining horticulture said: "The cultivation of a garden or orchard; the science or art of growing fruits, vegetables, and flowers or ornamental plants. Horticulture is a branch of plant production, which is one of the main divisions of agriculture." In affirming the decision the same court held in Guerrero v. United States Fidelity & Guaranty Co., 128 Tex. 407, 98 S.W.2d 796, 798, that the Workmen's Compensation Act, Vernon's Ann. Civ.St. art. 8306 et seq., intended the exemption of the "farming and agricultural industry," and that "On the theory that horticulture is one of the main divisions of agriculture, it was held in the Hill case that one who was engaged as a laborer for a nurseryman or in the nursery business was a 'farm laborer' within the meaning of the statute * * *."

In Re Bronxville Nurseries, 258 App. Div. 1019, 17 N.Y.S.2d 95, the employees of a nursery company were held to be farm laborers within the Workmen's Compensation Law, Consol.Laws, c. 67, where it was found that their duties consisted of "the preparation, fertilization, and cultivation of the soil, seeding, budding, grafting, transplanting and related operations, the constant care of the products of the soil which calls for a knowledge of modern scientific methods, and the preparation for market of the finished product, whether it be tree, shrub, bush or plant." In that case it was also pointed out that pending the appeal the statute was amended in 1939 defining the term "farm laborer" to include all the activities above noted.

Appellants rely upon Hein v. Ludwig, 118 Pa.Super. 152, 179 A. 917, 918, where the Pennsylvania court held that workmen employed in the greenhouses of a commercial florist were not farm laborers within the Workmen's Compensation Act, 77 P.S. § 1 et seq. It was therein pointed out that the property of the employer "was devoted to no use other than the operation of her greenhouses, which were artificially heated by means of steam and mechanically watered." The court referred to an early definition of agriculture as contemplating the cultivation of a large tract of land and indicated that the term would also include fruit growing, but it held that since the employee was engaged in the greenhouse alone, and therefore was not engaged in the cultivation or tilling of the soil he could not be deemed an "agricultural worker," and in this connection it emphasized the fact that the plants and flowers were raised under artificial conditions in a commercial plant rather than in the open ground which might be termed a "farm." Appellants also rely upon Chudnov v. Board of Appeals, 113 Conn. 49, 154 A. 161, 162. There the question at issue was whether permission to engage in "farming, truck gardening, nurseries or greenhouses" in any of the residential zones permitted the use of a plot for raising poultry. The court adopted the definition of "farming" found in 25 Corpus Juris, page 674, as "The business of cultivating land, or employing it for purposes of husbandry * * *." It also accepted the expression found in Hein v. Ludwig, supra, that the word "farming" was used to denote a considerable tract of land devoted to the cultivation of crops and produce. Though it was recognized that a farmer who owns a large tract of land under cultivation, a small portion of which is devoted to a dairy or to raising chickens, is nevertheless a farmer, it was held that a small tract devoted exclusively to raising livestock or chickens was not a farm. Story v. Christin, 14 Cal.2d 592, 95 P.2d 925, 125 A.L.R. 1402, is also cited holding that nursery stock does not constitute a crop and does not become part of the realty, but we do not deem this in point here.

[3] The controlling point here is that the ordinance permits the use of "any lot or premises * * * for farming, the keeping of domestic live stock and the raising of poultry, rabbits, etc.," and that it made several specific exceptions to such uses. The use of the lots for the raising of plants and flowers not being included in the exceptions it must be assumed that the city council in adopting this ordinance knew the measurements and area of the separate lots in the territory, and that it did not therefore use the word "farming" as applying to the cultivation of a large tract of land. To the contrary it would seem that the term was used as it is defined in volume 25 Corpus Juris 672, as "an indefinite quantity of land, some of which is cultivated, whether it is large or small, isolated, or made up of many parcels, for a farm may be of any size, of any shape, of any boundaries, and may include less than one lot, or comprise several lots or parts of lots." Though in a restricted sense "farming" has been used to apply to the cultivation of large tracts of land for the production of crops for the use of man and animals, here the city council used the word in its general sense as including gardening or horticulture, fruit growing, the raising of vegetables, trees, shrubs, plants and similar products.

[4, 5] The judgment appealed from is based upon the two findings of fact and the conclusions of law founded thereon that, (1) because of the surrounding circumstances the enforcement of the ordinance as to respondents would be unreasonable under the rule of Reynolds v. Barrett, supra, and (2) that the residential restrictions of the ordinance did not apply to respondents as long as they were engaged in the activities outlined in the findings of fact because such activities consisted of "farming" within the exceptions of the ordinance. We are in accord with both of these conclusions.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concurred.

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51 Cal.App.2d 232

LEBAL CO. OF AMERICA, Limited, v. MASTRUP.

Civ. 6685.

District Court of Appeal, Third District, California.

April 13, 1942.

Rehearing Denied May 13, 1942.

Hearing Denied June 12, 1942.

1. Evidence 🔑437

In corporation's action to recover purchase price of stock under written contract of sale showing on its face conformity with requirements of permit to sell stock, the "parol evidence rule" did not preclude defendant from showing that sale was void because it did not conform to requirements of permit.

See Words and Phrases, Permanent Edition, for all other definitions of "Parol Evidence Rule".

2. Evidence 🔑437

Parol evidence is competent to show that a written contract, lawful on its face, is illegal or part of an illegal transaction, and the illegality, if serious, need not be pleaded or urged to enable the court to act on it. Code Civ.Proc. § 1856.

3. Evidence ⚿437

The "parol evidence rule" does not preclude the admission of evidence to show that consideration was vicious or illegal.

4. Licenses ⚿39

Where permit authorized corporation to sell stock for cash or for not less than 25 per cent. in cash, balance payable in six equal monthly cash installments, written contract for sale of stock calling for payment in full in cash upon execution was void for nonconformity with permit, where uncontradicted evidence showed that buyer would pay for stock at an uncertain time in future.

◆

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Action by Lebal Company of America, Limited, against Louis I. Mastrup to recover the purchase price of stock. From a judgment for plaintiff, defendant appeals.

Reversed.

Lounibos & Lounibos, of Petaluma, for appellant.

Geo. B. Keane, of San Francisco, and Murphy & Brownscombe, of Santa Rosa, for respondent.

HAWKINS, Justice pro tem.

Defendant appeals from a judgment for the entire purchase price of certain shares of the capital stock of respondent corporation.

Respondent, a California corporation, held a permit from the corporation commissioner to sell this stock for cash or for not less than 25 per cent in cash, the balance payable in six equal monthly cash installments.

A contract in writing for the sale of this stock from respondent to appellant was duly executed by both parties. This contract was in all respects regular upon its face and called for payment in full in cash upon the execution thereof.

However, the evidence shows without contradiction that at no time, either before or after the execution of said contract, was it contemplated by the parties that the sale was to be made for cash, but that appellant would pay for said stock at an uncertain time in the future, when he was able to sell some Transamerica stock owned by him, which at the time of the negotiations was impounded in another transaction. Nothing has been paid on the purchase price.

[1] Appellant contends that the sale was void because it did not conform to the requirements of the permit from the corporation commissioner. Answering this contention, respondent asserts that the written contract of sale shows conformity on its face and that because of the parol evidence rule, the evidence of the actual intentions of the parties should not have been received by the trial court and cannot here be considered.

[2] "Parol evidence is always competent to show that a written contract lawful on its face, is illegal or part of an illegal transaction, and such illegality, if serious, need not be pleaded nor urged, to enable the court to act upon it." 3 Williston on Contracts, sec. 1753, p. 3060; Morey v. Paladini, 187 Cal. 727, 203 P. 760; Endicott v. Rosenthal, 216 Cal. 721, 16 P.2d 673; Code Civ.Proc. sec. 1856.

[3] The parol evidence rule "does not apply so as to preclude the admission of evidence to show that the consideration was vicious or illegal, for if such evidence were excluded the policy of the law in making a deed, contract, or other undertaking founded on an illegal consideration void would be defeated by the parties expressing on the face of the instrument a legal consideration." 22 C.J., p. 1170, sec. 1567.

[4] The contract for the sale of this stock is void for nonconformity with the requirements of the permit of the corporation commissioner. Commercial Building Co. v. Levy, 108 Cal.App. 54, 290 P. 1048; Commercial Building Co. v. Summers, 117 Cal.App. 428, 3 P.2d 1033; Domenigoni v. Imperial Livestock & Mortgage Co., 189 Cal. 467, 209 P. 36; Imperial Livestock & Mortgage Co. v. Tracy, 208 Cal. 205, 281 P. 50.

Since a reversal is to be ordered, it is not necessary to consider other assignments of error made by appellant.

The judgment appealed from is reversed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

51 Cal.App.2d 228

VAN RENNES et al. v. SOUTHERN COUNTIES GAS CO. OF CALIFORNIA.

Civ. 13398.

District Court of Appeal, Second District, Division 1, California.

April 13, 1942.

Rehearing Denied May 4, 1942.

Hearing Denied June 12, 1942.

1. Trial 🔑45(1)

Where pleadings and proof were based on theory that gas company was negligent in maintaining meter box with hole in the top of box which caused pedestrian to fall and sustain injury, excluding evidence offered for purpose of showing that the pedestrian through her former attorney had represented that pedestrian fell on account of box being higher than surrounding soil was not error.

2. Gas 🔑14½

In action for personal injuries sustained by pedestrian who fell over meter box maintained by defendant gas company, sustaining objection to question asked of plaintiff's expert regarding whether it would require a blow of some force in order to cause break which appeared in photograph of meter box was not error since the question at issue was not the cause of the breaking of the lid.

3. Trial 🔑260(1)

The trial court's refusal to give defendant's requested instructions was not prejudicial error where the subject matter of such instructions was properly given and substantially covered in other instructions.

4. Appeal and error 🔑1032(3), 1064(1), 1067

For a reversal to be ordered on account of errors committed in giving or refusing of instructions to jury, it must affirmatively appear and the court must affirmatively be of opinion that there has been a miscarriage of justice.

5. Appeal and error 🔑977(3, 5)
New trial 🔑6

A motion for new trial is to a great extent addressed to the sound legal discretion of the court and its action either in granting or refusing new trial is conclusive and will not be disturbed in absence of a clear and affirmative showing of a gross, manifest or unmistakable abuse of discretion.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Personal injury action by Richard Van Rennes and others against Southern Counties Gas Company of California. From an adverse judgment, defendant appeals.

Affirmed.

LeRoy M. Edwards and O. C. Sattinger, both of Los Angeles, for appellant.

Frank Desimone and S. L. Kurland, both of Los Angeles, for respondents.

YORK, Presiding Justice.

This is the second appeal in an action for damages for personal injuries sustained by Katie Van Rennes when she fell over a cement meter box maintained by the Southern Counties Gas Company.

At the conclusion of a jury trial on July 26, 1939, a verdict was returned in favor of plaintiffs Van Rennes. Thereafter, the trial court granted defendant gas company's motion for judgment notwithstanding the verdict, from which judgment the plaintiffs appealed. This court on May 19, 1941, reversed the judgment notwithstanding the verdict and directed the trial court to enter judgment pursuant to the verdict which had theretofore been rendered in favor of plaintiffs. Van Rennes v. Southern Counties Gas Co., 44 Cal.App.2d 880, 113 P.2d 238. Accordingly, judgment on verdict in open court was entered on July 28, 1941, nunc pro tunc as of July 26, 1939.

Defendant's motion for a new trial having been denied on September 5, 1941, it prosecutes this appeal from the aforesaid judgment in favor of plaintiffs, contending that the court committed prejudicial error at the trial of said cause (1) in rejecting certain evidence offered by defendant, and (2) in giving and refusing to give certain instructions. It is also contended that the trial court erred in determining it had no discretion to do other than deny the motion for new trial which was made after filing of the remittitur on the first appeal.

For a statement of facts, the issues drawn by the pleadings and the evidence adduced in support thereof, reference is hereby made in the interest of brevity to the opinion of this court in Van Rennes v. Southern Counties Gas Co., supra.

Apparently in an attempt to establish that respondent Katie Van Rennes, through her former attorney, R. C. Dutton, following the accident had "represented the cause of the accident to be contrary to the contention made by her in her pleadings and proof," appellant made what it now claims was an offer of proof under the following circumstances:

"Mr. Van Rennes, did you have anything to do with hiring an attorney by the name of Dutton, in connection with this litigation?

"Mr. Desimone (attorney for respondents): I object to that as incompetent, irrelevant and immaterial. * * *

"The Court: What do you expect to show?

"Mr. Sattinger (attorney for appellant): I expect to show by testimony that we can produce that we received a letter from an attorney named Dutton, of Anaheim, which letter sets forth in substance that claim is made against us because of the fact that our meter box, the edges of it, were higher than the surrounding soil; to which I replied denying liability. I expect to show, also, that Mr. Dutton wrote that letter after conferring with Mrs. Van Rennes; and, further, that Mr. Dutton, if produced, would testify that the examination of the box was merely on that basis, the edges being higher than the dirt, and that in the summer of 1938 there was no break in the top of that box. I believe most of those matters are not privileged matters.

"The Court: Were those matters stated in a letter?

"Mr. Sattinger: No, not all those matters. I will be glad to produce the letter. The letter merely makes claim on account of the box being higher than the surrounding soil. There is no claim that there was any hole in the top of the box at the time of the accident. * * *

"The Court: In view of counsel's statement in his offer of proof, the objection is sustained."

Mr. Dutton was later produced as a witness and testified that he was a lawyer, was generally familiar with the situs of the accident, having formerly lived at Buena Park, and that he saw no holes in the meter box when he passed by the place in his automobile. No questions were asked with respect to his employment as an attorney by Katie Van Rennes or her husband, nor was he interrogated as to any of the matters contained in appellant's so-called "offer of proof." No objections were made to any of the questions put to the witness Dutton, and the letter purportedly written by him was not produced. Moreover, respondent Katie Van Rennes was not questioned concerning any of the matters referred to in the said offer of proof.

[1] Whether, instead of the top of the meter box being broken, said box stood up above the soil surrounding it, would not necessarily affect the jury's ultimate conclusion that said meter box was negligently maintained by appellant, hence no error resulted through the ruling of the court rejecting the evidence referred to.

[2] Likewise, no error resulted from the court's ruling sustaining respondents' objection to the question asked of a claimed expert as to whether it would require a blow of some force in order to cause the breaks which appeared in the photographs of the meter box produced at the trial herein. In sustaining said objection, the court properly ruled that the question at issue was not the *cause* of the breaking of the lid of the meter box, but the *condition* of the lid on May 20, 1938, the day on which respondent Katie Van Rennes was injured. (Italics added.)

[3, 4] An examination of the instructions given by the trial court reveals that the jury was fully and impartially informed of the law applicable to the facts presented by the evidence. An examination of the proferred instructions of appellant which were refused by the court discloses that the subject matter thereof was properly given and substantially covered in other instructions. The trial court's refusal to give the requested instructions was not prejudicial error. "For a reversal to be ordered on account of errors committed in the giving or refusing of instructions to the jury, it must affirmatively appear, and the court must affirmatively be of the opinion that there has been a miscarriage of justice." Haney v. Takakura, 2 Cal.App.2d 1, 9, 37 P.2d 170, 174.

[5] As to appellant's final contention, there is nothing in the record which shows that the trial court determined it had no discretion to do other than deny the motion for new trial which was made after the decision of this court on the first appeal. It is settled that a motion for a new trial is to a great extent addressed to the sound legal discretion of the court to which the application is made, and that its action, either in granting or refusing a new trial, is conclusive and will not be disturbed,

in the absence of a clear and affirmative showing of a gross, manifest or unmistakable abuse of discretion.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concurred.

51 Cal.App.2d 193

TALBOT et al. v. FIRE & POLICE PENSION BOARD OF CITY OF PASADENA et al.

Civ. 10058.

District Court of Appeal, Second District, Division 2, California.

April 9, 1942.

Rehearing Denied April 30, 1942.

Hearing Denied June 8, 1942.

1. Appeal and error 🔑1218

A motion to recall a remittitur may be granted in certain unusual circumstances, but action must be taken by the moving party as soon as he learns of the facts on which the motion is made.

2. Appeal and error 🔑1218

Where appellants were informed concerning facts on which their motion to recall remittitur was based, but they delayed more than seven years in asking to have remittitur recalled, motion was denied.

Action by Ida May Talbot and others against the Fire & Police Pension Board of the City of Pasadena and others. From the judgment, plaintiffs appealed, and the appeal was dismissed for want of prosecution. On plaintiffs' motion to recall remittitur.

Motion denied.

John N. Metcalf and Elton G. Galusha, both of Los Angeles, for appellants.

Harold P. Huls, City Atty., and Thomas W. LeSage, Deputy City Atty., both of Pasadena, for respondents.

W. J. WOOD, Justice.

Appellants have presented a motion to recall the remittitur, which was issued on January 2, 1935. Respondents characterize the matter set forth in the notice of motion as "confused and ambiguous" and charge that many false statements are made therein. Notice of appeal was filed on April 2, 1933, and upon notice duly given to counsel for appellants, the appeal was dismissed on November 2, 1934, for want of prosecution. It appears from the notice of motion now before us that the main reason advanced in support of the motion is based on the fact that appellants were unable to secure a transcript of the notes of the reporter who was on duty at the trial. To this respondents reply that all of the facts were before the court at the time the appeal was dismissed and that counsel for respondents had then offered to assist counsel for appellants in the preparation of the bill of exceptions notwithstanding the absence of the reporter, which offer had not been acted upon by counsel for appellants.

[1, 2] It would be inappropriate to enter into a discussion of the lengthy statements and counter statements concerning the various steps in the litigation, for it is manifest that the motion must be denied because of the great delay on the part of appellants in asking that the remittitur be recalled. A motion to recall a remittitur may be granted in certain unusual circumstances but it is a fundamental rule that the motion must be promptly made. Action must be taken by the moving party as soon as he learns of the facts upon which the motion is based. Gutelius v. General Electric Co., 39 Cal.App.2d 292, 102 P.2d 1108. Although informed concerning the facts upon which the motion is based, appellants have delayed more than seven years in asking to have the remittitur recalled.

The motion is denied.

MOORE, P. J., concurred.

McCOMB, J., deeming himself disqualified, did not participate in the discussion or decision of the foregoing case.

51 Cal.App.2d 180

MORTGAGE GUARANTEE CO. et al. v. SAMPSELL.

Civ. 11907.

District Court of Appeal, First District, Division 1, California.

April 9, 1942.

1. Mortgages 🔑375

The statute providing that there can be no deficiency judgment where property is sold under a purchase money mortgage or deed of trust applied only to an attempt to recover a deficiency judgment, and did not either wipe out the debt or prohibit a resort by creditor to a chattel mortgage and assignment of rentals which was given as additional security. Code Civ.Proc. § 580b.

2. Mortgages 🔑199(2)

Where trust deed, which was given along with chattel mortgage, authorized beneficiary to take possession and collect rents and profits in event of default, the assignment of rentals constituted additional primary security with the realty described in the deed of trust and personalty described in the chattel mortgage.

3. Mortgages 🔑375

Where trust deed, which was given along with chattel mortgage, authorized beneficiary to take possession and collect rents and profits in event of default, an action by beneficiary to recover rent pursuant to trust deed was not an action to obtain a money judgment nor was order requiring rentals to be paid a "deficiency judgment", and, hence, a sale of the realty under the trust deed would not prevent creditor from proceeding to foreclose his chattel mortgage and to obtain rentals assigned to him in trust deed for security, even if rentals did not constitute additional security. Code Civ.Proc. §§ 580a, 580b.

See Words and Phrases, Permanent Edition, for all other definitions of "Deficiency Judgment".

4. Mortgages 🔑375

The sale of mortgaged realty under power given in deed of trust will not bar a subsequent action to recover remainder of the indebtedness. Code Civ.Proc. § 726.

5. Mortgages 🔑199(1)

Generally, unpaid rents accrued prior to taking appropriate steps to subject them, unless conveyed to mortgagee by valid assignment, or expressly pledged by the mortgage, belong to mortgagor.

6. Mortgages 🔑199(2)

Under trust deed authorizing beneficiary to take possession and collect rents and profits in event of default, the date of beneficiary's demand fixed date upon which his right to the rents accrued.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Mortgage Guarantee Company and others against Paul W. Sampsell, as trustee in bankruptcy, etc., to recover possession of property sold by plaintiffs to defendant's bankrupt, and for the rents, issues and profits, wherein R. E. Allen was appointed as receiver. From an order requiring receiver to pay over certain funds, the defendant appeals.

Modified and affirmed.

Loeb & Loeb and Norman Newmark, all of Los Angeles, for appellant.

Fleming & Robbins and C. S. Tinsman, all of Los Angeles, for respondents.

BRAY, Justice pro tem.

On or about October 15, 1937, defendant Villa Riviera, Inc., purchased from plaintiff Mortgage Guarantee Company, a certain apartment house building property, together with all furniture and furnishings therein, for the sum of $1,001,224.50. A down payment of something more than $250,000 was made, partly by exchange of other properties. The balance of $750,000 was evidenced by a promissory note in that amount, secured by a purchase money deed of trust with power of sale on the real property and a purchase money chattel mortgage with power of sale on all personal property. Both the deed of trust and the chattel mortgage provided that the beneficiary at its option should be entitled to rents. The controversy is over the rents. The provision of the deed of trust concerning the rents is as follows:

"In the event of any breach or default by Trustor in the payment of any indebtedness secured hereby, or in the performance of any obligation, covenant, promise or agreement in this Deed of Trust or in any note secured thereby, or in the event of waste as defined herein, the Beneficiary shall be entitled, at its option, without notice, either by itself or by a receiver to be appointed by a Court therefor, and without regard to the adequacy of any security for the indebtedness secured hereby, to enter upon and take possession of the property conveyed hereby, or any part thereof, exclude Trustor and all persons claiming under him, and do and perform any acts which the Trustor is obligated hereunder to do or perform, in such manner and to such extent as may be necessary or proper to conserve the value of said property and protect the security of this Deed of Trust, *and collect and receive the rents, issues and profits thereof and apply the same, less costs of operation and collection, including reasonable attorney's fees, upon the indebtedness secured by this Deed of Trust, said rents, issues and profits being hereby assigned to the Beneficiary as further security for the payment of all indebtedness secured hereby.*" (Italics ours.)

The promissory note was transferred by respondent Mortgage Guarantee Company to respondent Title Insurance & Trust Company, as trustee or depositary. For the purposes of this appeal both respondents will be treated as a single unit.

On April 22, 1939, Villa Riviera, Inc., defaulted in the payment of an installment of principal under the terms of the note, and in the payment of certain taxes. As a result, respondent elected to declare the entire balance under the note due and payable. On May 23, 1940, respondent made demand upon Villa Riviera, Inc., to deliver possession of all the real and personal property and for all rentals due or to become due for the use and occupancy of said premises. The demand having been refused, respondents on May 29, 1940, brought this action for possession of the property and for the rents, issues and profits. That same day a receiver was appointed ex parte. Thereafter the receiver collected all the rents, issues and profits from the apartment house until pursuant to the stipulation of the parties on October 9, 1940, the court ordered the receiver to deliver possession of the real and personal property to the respondent. None of the moneys received by the receiver have ever been turned over to the beneficiary. On December 12, 1940, the receiver filed his report and account showing the amount of money he had on hand, and asked the court for instructions as to whom to pay this money.

In the meantime and on September 24, 1940, pursuant to the power of sale in the deed of trust, respondents caused the real property to be sold and bought it in as depositary and trustee for the sum of $610,000. On November 22, 1940, Villa Riviera, Inc., was adjudicated a bankrupt and appellant was thereafter appointed and qualified as trustee of its estate. On December 9, 1940, the chattel mortgage was foreclosed, through exercise of the power of sale contained therein. The respondent as trustee and depositary bought in the personal property at $90,000. The total indebtedness due under the note and the instruments securing it was $742,410.88. After deducting the $610,000 paid for the real property and the $90,000 paid for the personal property there remained a deficiency of $43,790.16.

The dispute here is whether the moneys in the hands of the receiver should be paid by him to respondents to apply upon that balance due, or should be paid to the appellant trustee in bankruptcy.

It is the appellant's contention that the exercise of the power of sale under a purchase money deed of trust terminates the right of the beneficiary to the rents collected by a receiver pending the sale, even, though the proceeds of the sale were insufficient to pay the whole indebtedness.

A second contention of the appellant is that, in any event, where the right of collection and possession is granted in such a deed of trust and chattel mortgage to the beneficiary or receiver upon default, such right does not include rents accrued, but unpaid, at time of default and demand therefor.

Appellant's first point rests primarily upon his contention that the order of the court instructing the receiver to pay to the beneficiary the rents in his hands, is in effect the obtaining of a deficiency judgment which is barred by the provisions of section 580b, Code of Civil Procedure, which provides:

"580b. Deficiency judgment forbidden in certain cases. No deficiency judgment shall lie in any event after any sale of real property for failure of the purchaser to complete his contract of sale, or under a deed of trust, or mortgage, given to secure payment of the balance of the purchase price of real property."

Appellant contends that the order of the court requiring the referee to pay over the rents to the respondent is a money judgment and therefore, a deficiency judgment. Moreover, appellant contends that section 726, Code of Civil Procedure, precludes the recovery of the rents, because the mortgagee had elected to follow another form of action to recover his debt, namely, a sale under the power of sale in the deed of trust. Section 726 provides:

"There can be but one form of action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of his chapter." And then goes on to prescribe the procedure for the foreclosure of such mortgages by court action.

Since this case was tried in the lower court, and on January 12, 1942, the Supreme Court has answered every contention of appellant on his first point, by its decision in the four consolidated cases cited as Hatch v. Security-First National Bank, 19 Cal.2d 254, 120 P.2d 869. In those cases, the court had under consideration a situation in which an estate had given a deed of trust on real property to secure an indebtedness. Thereafter the heirs of the estate had executed a deed of trust on different real property which belonged to them individually, as additional security for the indebtedness of the estate. As further and additional security for the same indebtedness, the estate also pledged certain personal property owned by the estate. Upon default, the deed of trust upon the estate real property was first foreclosed under the power of sale contained therein. The proceeds of this sale were applied to the indebtedness but left a large balance due upon the indebtedness. Next a sale of the pledged personal property was had. The proceeds of this sale reduced the indebtedness, but still left considerable of a balance. Finally, the deed of trust upon the individually owned property of the heirs was foreclosed under its power of sale, and the proceeds of such sale likewise applied upon the debt. Thereafter, suits were brought upon behalf of the estate and the individuals to quiet title to the estate pledged personal property and the real property owned and pledged by the individual heirs. In those cases, it was contended that where a creditor holds a mortgage or deed of trust as security for an obligation and resorts to that security, either by judicial foreclosure or by power of sale, he may take no further steps to collect his debt unless he proceeds within three months under sections 580a, 725a or 726, Code of Civil Procedure, to establish the existence of an actual deficiency in the amount realized from the original security. The court there held that these sections impose no such requirement where the creditor merely seeks to realize upon additional security held by him and makes no attempt to secure a personal judgment for the unpaid balance. The court thoroughly reviews the cases in California and points out that it has long been held that this type of legislation is a limitation solely upon the creditor's right to obtain a personal judgment for a deficiency against his creditor, and that the words "money judgment" used in section 580a refers only to a judgment in an action to obtain a *deficiency* judgment. The court also points out (page 254 of 19 Cal.2d 120 P.2d 869), that cases from other jurisdictions which establish a different rule, cited by the plaintiffs there (and which have been relied upon by the appellant here), do not apply for the reason that the statutes in the other jurisdictions are fundamentally different from those of this state. For example, the New York statute provides that in the event of the failure of the mortgagee to move for a deficiency judgment within a certain length of time and in a certain manner "the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt * * *." Civil Practice Act, § 1083-a. Therefore, in that state, failure to request a deficiency judgment at the proper time is tantamount to conceding that the mortgage debt has been paid in full by the proceeds of the foreclosure sale. But our statutes do not even purport to wipe out the debt, but only to apply in the contingency that a deficiency judgment is sought.

[1] The Hatch case was considering section 580a which applies to a non-purchase mortgage or deed of trust, and which in effect prohibits a deficiency judgment until it is shown in the manner and within the time allowed by that section, that the price for which the property was sold was its fair market value. Section 580b, which is the section upon which appellant relies in this case, states, in effect, that there can be no deficiency judgment at all where property is sold under a purchase money mortgage or deed of trust. In other words, for a purchase money mortgage or deed of trust the security alone can be looked to for recovery of the debt. But the de-

cision in the Hatch case that section 580a applies only to an attempt to recover a deficiency judgment and does not either wipe out the debt or prohibit a resort to any other or additional security, answers equally the contention of appellant that under section 580a a sale of the property either wipes out the indebtedness or prevents the creditor from foreclosing upon other security or from obtaining any type of judgment other than one for a deficiency. As said in the Hatch case (page 262 of 19 Cal.2d, page 874 of 120 P.2d), "The statute [580a there, but equally applicable to 580b here] * * * does not provide that failure to sue thereunder for a deficiency judgment is to be deemed a concession that the principal obligation has been fully satisfied." Therefore, there is nothing to prevent the creditor from proceeding to foreclose upon any additional security which he may have, which in the Hatch case, was a pledge of personal property by the estate and a deed of trust upon additional property of the heirs, and which in the case at bar was a chattel mortgage and the assignment of rentals.

[2, 3] There can be no question but that the assignment of rentals in the deed of trust constituted additional primary security with the real property described in the deed of trust and the personal property described in the chattel mortgage. Title Guaranty & Trust Co. v. Monson, 11 Cal.2d 621, 81 P.2d 944. But even if these rentals did not constitute additional security, the action brought for them was not an action to obtain the money judgment mentioned in section 580a, nor was the order of the court requiring them to be paid to the respondent a deficiency judgment in the sense in which it is used in section 580b. Therefore, in no event would the sale under the deed of trust of the real property therein described, prevent the creditor from proceeding to foreclose his chattel mortgage and to obtain the rentals which in the deed of trust were assigned to him for security.

[4] Appellant's contention that section 726, Code of Civil Procedure, which provides that there can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real or personal property, prevents the creditor from proceeding to obtain the rentals in this case, is answered also by the Hatch case, page 258 of 19 Cal.2d, page 872 of 120 P.2d, "Since there was no judicial foreclosure in the present cases, these provisions of the statute [referring to sec. 726] have no direct application." To the same effect, Ramsey v. Furlott, 14 Cal.App.2d 145, at page 147, 57 P.2d 1007, at page 1008, "It is well settled that such a sale, under the powers given by a deed of trust, will not bar a subsequent action to recover the remainder of the indebtedness." Also, Merced Secur. Sav. Bank v. Casaccia, 103 Cal. 641, 37 P. 648; Bank of California v. McCoy, 23 Cal. App.2d 192, 72 P.2d 923.

The determination that the sale of the real property under the deed of trust does not wipe out the indebtedness nor prevent the creditor from proceeding to recover upon any other security, makes it unnecessary to consider a point raised by the appellant to the effect that the court should determine the amount of the deficiency actually attributable to the unpaid purchase price of the personalty.

The next contention of appellant is, that the respondent is not entitled to those rentals collected by the referee after his appointment but actually accrued prior to his appointment. When the receiver took charge there was an accumulation of accounts receivable being rentals due from persons occupying the premises. During his administration the receiver collected these accounts. As pointed out hereinbefore, the deed of trust provided that in the event of default the trustor was entitled, either by itself or by a receiver to be appointed by the court, to enter upon and take possession of the property and to collect and receive the rents, issues and profits thereof, "said rents, issues and profits being hereby assigned to the beneficiary as further security. * * *" Appellant contends that this only can refer to rents, issues and profits thereafter accruing and not to those already accrued.

Respondent contends that the language is broad enough to include both.

[5] The general rule on the question of who is entitled to rents of mortgaged real property is set forth in 41 Corpus Juris, page 632, "Unpaid rents accrued prior to taking appropriate steps to subject them, unless conveyed to the mortgagee by a valid assignment, or expressly pledged by the mortgage, belong to the mortgagor, but there is authority to the contrary."

The general rule, too, upon the question of whether the pledge in the mortgage of the rents, issues and profits for the security of the mortgaged debt refers to prior accrued rents is set forth In re Clark Realty Co., 7 Cir., 234 F. 576, at page 582, 148 C.C.A. 342, where the court says, "As to the claim of the mortgagees to the rents and profits: The referee held that these rents belonged to the mortgagees from the time when by intervening petitions they claimed them, but denied their right to them prior to the date of the claim. Much of the brief of counsel for the mortgagees is devoted to the proposition that the clause in the mortgages including with the property mortgaged 'all the rents, issues and profits issuing and to issue out of said premises,' is valid. There can be no question as to the validity of this clause. The question is as to its effect. This clause in the mortgage did not give to the mortgagees an absolute right to the rents. Until there was a default and until the mortgagees made some claim or demand for the rents, they belonged to the mortgagor. Until the mortgagee takes some steps to sequester the rents, he is not entitled to them. 'Ordinarily the mortgagor is entitled to rents and profits accrued up to the time that the mortgagee enters, or brings his right of entry or his bill to foreclose, and this right inheres in a trustee in bankruptcy.' [Citing cases.] Under these authorities the decision of the referee and the District Court, giving to the mortgagees the rents from and after the time they made claim for them and denying the rents accruing prior to such claims, was correct."

That the general rule is followed by the California courts is shown in Bank of America, etc., v. Bank of Amador Co., 135 Cal.App. 714, at page 721, 28 P.2d 86, at page 89. "The fact that the rents, issues, and profits of the mortgaged property 'are expressly pledged for the security of the mortgaged debt, with the right in the mortgagee to take possession upon default, the mortgagee is not entitled to the rents and profits until he takes actual possession, or until possession is taken in his behalf by a receiver.' Simpson v. Ferguson, 112 Cal. 180, 40 P. 104, 44 P. 484, 485, 53 Am.St.Rep. 201. Thus, the fact that in the instant case the trust deed purported to include the rents, issues, and profits as security would not avail, unless the trustees were in actual possession at the time of the execution of the chattel mortgage belonging to the plaintiff." To the same effect, Binney v. San Dimas Lemon Ass'n, 81 Cal.App. 213, 253 P. 346; Casey v. Doherty, 116 Cal.App. 42, 2 P.2d 495; Becker v. Munkelt, 27 Cal.App.2d 761, 81 P.2d 1041.

Respondent cites Steinberg v. Evans, 20 Cal.App.2d 124, 66 P.2d 712, as being opposed to this rule. However, an examination of that case shows that the question involved was not between rentals accrued before steps taken upon default and rentals thereafter accruing, but was a question between the holder of the deed of trust and the purchaser of the property from the trustee in bankruptcy the court holding that the sale was made expressly subject to a certain assignment of rents and therefore the purchaser was not entitled to such rents. The case of Associated Co. v. Greenhut, 3 Cir., 66 F.2d 428, cited by respondent, is distinguished from the case at bar and from the California rule. The issue there was whether rents collected between the adjudication in bankruptcy of a mortgagor who had defaulted and the sale under mortgage foreclosure, belong to the trustee of the bankrupt estate or to the mortgagee. The case holds that the assignment of the rents became absolute, effective and enforceable upon the default which admittedly occurred. There was no question there, as here, of rentals which had accrued prior to the default. This case might be authority for the proposition that the time when the mortgagor's right to the rents ends is at the time of default. However, this question has been answered in California by the case of Title Guaranty & Trust Co. v. Monson, supra, where the court (11 Cal.2d page 627, 81 P.2d 944) fixes the date of demand of possession as the date upon which the mortgagee's right to the rents commences.

The case of Carlon v. Superior Court, 2 Cal.2d 17, 38 P.2d 149, likewise relied upon by respondent, does not consider the question involved here. In the Carlon case there was no question raised as to rents accrued prior to the appointment of the receiver, the sole question being the claim of a senior mortgagee to rents collected by a receiver appointed at the request of, and in a suit by, a prior mortgagee. The court held that a prior mortgagee obtaining the appointment of a receiver is entitled to the rents collected by the receiver as against a prior mortgagee who made no application for the appointment of a receiver, even though the prior mortgage contains a provision assigning the rents as further security upon default. The case uses this significant language, page 22 of 2 Cal.2d, page 151 of 38 P.2d, "Had no receivership been applied for, said rents, issues, and profits from the property would have inured to the benefit of the mortgagor and been wholly lost to both mortgagees." New York and a few other jurisdictions appear to have a different rule but the cases hereinbefore mentioned as well as the quoted language from the Carlon case show clearly that California does not follow the New York rule. On principle, too, as the deed of trust provides for the assignment of the rentals only upon default, the rentals accrued prior to such default are the property of the mortgagor, and, as decided in the case of Title Guaranty & Trust Co. v. Monson, supra, default for this purpose is deemed to have occurred as of the date of demand of possession by the mortgagee.

[6] Although conceding in his closing brief that the date of demand for possession and rents, is the date upon which the mortgagees' right to the rental commences, appellant since has written to this court a letter now contending that the date upon which the receiver was appointed should be the proper date for this purpose, stating that, while, as between the mortgagor and the mortgagee, the date of demand is the correct date, yet as between the mortgagee and the receiver, the latter should be considered as in the same position as a creditor and that a creditor would not be entitled to claim the rents except upon the levy of an execution, and therefore the receiver would not be entitled to the rents until he had been appointed so he could take actual possession. Therefore, contends the appellant, the receiver should surrender the rents accrued prior to his appointment. The decision in the Monson case, supra, fixes the date of demand as the date upon which the mortgagee's right to the rents accrues, so it is immaterial whether thereafter a receiver is appointed or not. The mortgagee is entitled to the rents from that date on.

Since the oral argument in this case, and at the suggestion of the court, a stipulation has been filed setting forth certain facts as to the moneys held by the receiver. From this stipulation, it appears that of the rentals received by the receiver, the sum of $2,502.54 were rentals receivable, due and accrued as of the date of demand, May 23, 1940. In addition, there were outstanding as of the same date and due and accrued, other accounts receivable amounting to the sum of $1,672.20. In view of the fact that, according to the stipulation, the rentals were payable in advance, and these sums had accrued and were due and payable prior to and on May 23, 1940, the appellant should be entitled to these rentals, without deduction or pro rating. By paragraph 4 of the order appealed from the trial court directs the receiver to pay to the plaintiff the sum of $21,661.37, and to assign to the plaintiff the accounts receivable therein described. In accordance with the views herein expressed, it is ordered that this paragraph of the order be modified by directing the receiver to pay to appellant trustee the sum of $2,502.54, and to assign to the appellant trustee $1,672.20 of the accounts receivable. As so modified the order is affirmed. Both sides to bear their own costs on this appeal.

PETERS, P. J., and KNIGHT, J., concurred.

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51 Cal.App.2d 198

CROUSER et al. v. BOICE et al.

Civ. 12044.

District Court of Appeal, First District, Division 1, California.

April 10, 1942.

Hearing Denied June 8, 1942.

1. Appeal and error 🔑**110**

Where jury trial is a matter of right, appeal lies from order granting new trial, though action was not tried by a jury, but if action is wholly equitable, and new trial is granted, appeal does not lie. Code Civ. Proc. § 963, subd. 2.

2. Constitutional law 🔑**70(1)**

The question whether order granting new trial should be appealable whether action is at law or in equity is a matter for the Legislature and not for the courts to determine. Code Civ.Proc. § 963, subd. 2.

3. Action 🔑46

Legal and equitable issues may be joined in the same complaint.

4. Set-off and counterclaim 🔑5

Legal issues may be brought in by way of counterclaim or cross-complaint, even though the complaint pleads a purely equitable cause of action.

5. Action 🔑66

Where legal and equitable remedies are sought in the same action, each remedy is governed by the law that would apply to it if the other remedy had not been requested.

6. Jury 🔑13(14)

If the plaintiff requests legal relief in an action that is essentially equitable, the parties are entitled to a jury trial on the legal issue.

7. Appeal and error 🔑110

Action for specific performance of contract for sale of realty for certain amount, or, if defendants could not perform contract to recover damages in amount of purchase price of the realty, presented no legal issues, and the parties were not entitled to a jury trial as a matter of right on any issue, and hence there could be no appeal from order granting a new trial. Code Civ.Proc. § 963, subd. 2.

8. Specific performance 🔑128(1)

In specific performance suit where vendors are unable or refuse to convey realty in accordance with contract, damages are granted, not in the exercise of a legal jurisdiction, but in the exercise of equity jurisdiction of the court.

9. Equity 🔑39(1)

Generally, where equity has taken jurisdiction over a particular controversy, it will proceed to decide the whole issue and award complete relief.

10. Specific performance 🔑128(2)

If specific performance of contract for the sale of realty is impossible because of a failure of the vendor's title to realty, or any other cause, and purchaser is aware of the true condition before and at the time he brings his suit for specific performance, the court, being of necessity obliged to refuse the remedy of specific performance, will not, generally, retain the suit and award compensatory damages.

11. Specific performance 🔑128(2)

If specific performance of a contract for sale of realty is possible at commencement of action by purchaser, and while action is pending, vendor renders his remedy impracticable by conveying the subject matter to a bona fide purchaser for value, court will not compel the purchaser to bring a second action at law, but, having acquired jurisdiction, will do full justice by decreeing a recovery of damages.

12. Specific performance 🔑128(2)

If specific performance of contract for sale of realty was originally possible, but before commencement of suit, vendor makes it impossible by a conveyance to a third person, or if the disability existed at the very time of entering into the contract on account of a defect in vendor's title, or other similar reason, if the purchaser brings suit for specific performance in good faith, without knowledge of existing disability, court, though it cannot grant specific performance, will retain the case, assess purchaser's damages, and decree a pecuniary judgment in place of the purely equitable relief originally demanded.

13. Appeal and error 🔑803

Where order granting a new trial was not appealable, it was effective as granting a new trial. Code Civ.Proc. § 963, subd. 2.

14. Appeal and error 🔑790(2)

Where judgment on which execution was predicated had been set aside by a new trial order, so that execution could not be had, appeal from order in regard to execution was dismissible as involving a "moot question".

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

Appeals from Superior Court, Los Angeles County; Kurtz Kauffman, Judge pro tem.

Action for specific performance of a contract for the sale of realty by George E. Crouser and another against Peter D. Boice and another. From an order granting defendants a new trial, and from an order recalling an execution theretofore issued, the plaintiffs appeal, and the defendants move to dismiss the appeals.

Appeals dismissed.

John P. Tobin, of Los Angeles, for appellants.

Cook & Obegi, Ernest N. Clark, and Charles E. Cook, Jr., all of Van Nuys, for respondents.

PETERS, Presiding Justice.

By this motion defendants seek to have dismissed appeals taken by plaintiffs from an order granting defendants a new trial, and from an order recalling an execution theretofore issued. So far as the appeal from the order granting a new trial is concerned, the motion to dismiss is predicated on the theory that the case is one in equity where a jury trial is not a matter of right, and that under section 963, subdivision 2, Code of Civil Procedure, an appeal from an order granting a new trial is permitted only in law cases where a jury trial is a matter of right. So far as the appeal from the order recalling execution is concerned, the motion to dismiss is predicated on the theory that this appeal is moot by reason of the finality of the order granting the new trial.

[1, 2] The principal question presented is whether the main action was one in equity. Section 963, subsection 2, Code of Civil Procedure, provides that an order granting a new trial is appealable only "where a trial by jury is a matter of right." Where a jury trial is a matter of right, an appeal lies from the order granting a new trial although the action was not in fact tried by a jury. Raben v. Hamilton Diamond Co., Inc., 17 Cal.App.2d 277, 61 P.2d 940. But if the action is wholly equitable, and a new trial is granted, such order is not appealable. Why the legislature has thus seen fit to distinguish between law cases tried by the court and equity cases does not appear. It may well be that, from a standpoint of policy, the order should be appealable whether the action is at law or in equity, but that is a matter for the legislature and not for the courts to determine.

[3-6] Under our system of code pleading it is permissible to join legal and equitable issues in the same complaint, and it is permissible to bring in legal issues by way of counterclaim or cross-complaint even though the complaint pleads a purely equitable cause of action. Where legal and equitable remedies are sought in the same action, each remedy is governed by the law that would apply to it if the other remedy had not been requested. Thus, even though the action is essentially equitable, if the plaintiff requests legal relief, the parties are entitled to a jury trial on the legal issue. Pacific Western Oil Co. v. Bern Oil Co., 13 Cal.2d 60, 87 P.2d 1045, overruling Bettencourt v. Bank of Italy, etc., Ass'n, 216 Cal. 174, 13 P.2d 659; Hughes v. Dunlap, 91 Cal. 385, 27 P. 642; Farrell v. City of Ontario, 39 Cal.App. 351, 178 P. 740. In Farnsworth v. Hunter, 11 Cal.2d 27, 77 P.2d 840, it was held that upon amendment of the pleadings in an equitable action so as to include a legal cause of action for damages, the parties were entitled to a jury trial on the legal issue. Very recently the Supreme Court has held that where the complaint pleads a purely equitable cause of action and the defendant cross-complains for legal relief, the parties are entitled to a jury trial on the legal issue, and that the order granting a new trial in such action is appealable. Connell v. Bowes, 19 Cal.2d 870, 123 P.2d 456; see, also, Thomson v. Thomson, 7 Cal.2d 671, 62 P.2d 358, 117 A.L.R. 1.

It is at once apparent that in the present case the real question presented is whether or not the parties were entitled as of right to a jury trial on any issue presented by the pleadings. If so, although the other issues may all be equitable, so far as § 963, subsection 2, Code of Civil Procedure, is concerned, the order granting the new trial is appealable. But, if the parties were not entitled to a jury trial as a matter of right on any issue, the order is not appealable and the appeal must be dismissed.

The complaint is in the usual form of an action for specific performance. It alleges that by written contract dated October 11, 1940, defendants agreed to sell and plaintiffs agreed to buy certain described real property for $1,122.47; that plaintiffs have complied with the agreement but defendants have refused to perform; that the consideration agreed to be paid is just, fair and equitable. In paragraph VIII of the complaint it is alleged that the reasonable value of the property is $1,122.47 "and that if defendants * * * cannot perform the terms of said written agreement for the sale of said property, plaintiffs have sustained damages" in that amount. The prayer of the complaint is for specific performance, but if the defendants "cannot perform and complete the terms of the written agreement herein," the plaintiffs pray that they "recover judgment against them * * * in the sum of $1,-

122.47." The answer denies the basic allegations of the complaint, and, as an affirmative defense, pleads that the contract was intended as a mere memorandum; that both parties knew that at the time the memorandum was made that defendants did not have title to the premises for the reason that they had sold the premises on a conditional sales contract, and that the purchaser thereunder had until October 14, 1940, to pay up such contract; that the purchaser did pay up on said contract; that defendants had no title to sell to plaintiffs.

On these issues the trial court found in favor of plaintiffs. The court found that all the necessary elements of an action for specific performance were present; that the reasonable value of the premises was $1,122.47 "and that if said defendants are unable or refuse to perform, that, and in such event, plaintiffs are entitled to damages in the sum of $1,122.47." In connection with defendants' defense, the court found that at all times here pertinent defendant Peter D. Boice had title to the property; that although Boice had entered into a conditional sales contract in reference thereto, the purchaser at the time plaintiffs' contract was entered into was in default thereunder; that on October 14, 1940, certain "defaults under the land contract were paid * * * and that said payments were made subject to the agreement herein mentioned; that it is not true that the agreement herein mentioned was understood to be a memorandum." In its conclusions of law the trial court provided that "plaintiffs are entitled to specific performance of said agreement and judgment for same and, if defendant Peter D. Boice are [is] unable or refuse to perform said agreement, plaintiffs are entitled to judgment against the defendants Peter D. Boice and Anna V. Boice in the sum of $1,122.47 * * *." By its judgment the trial court provided "that plaintiffs are entitled to specific performance of the agreement executed or if defendants Peter D. Boice and Anna V. Boice refuse or are unable to perform, plaintiffs are entitled to recover damages in the sum of $1,122.47 and that Peter D. Boice and Anna V. Boice are ordered to perform each and every obligation set forth in said agreement * * *."

[7-12] It is apparent from the pleadings, findings, conclusions and the judgment that the plaintiffs pleaded a cause of action for specific performance, that the trial court found plaintiffs had proved a case entitling them to specific performance, and that, by its judgment, the trial court decreed specific performance. The issue of damages was presented not as an alternative to specific performance in the event the plaintiffs were unable to prove a case entitling them to that relief, but was presented only as an alternative in the event that, because of some act of defendants, they were unable or refused to comply with the specific performance decree. In other words, this is not a case where the plaintiffs were granted damages because they failed to prove that they were entitled to specific performance. If it were, it would be obvious that defendants would have been entitled to a jury trial as a matter of right on the legal issue of damages. Thus, for example, where the plaintiffs' proof fails to show that the consideration is fair and equitable, the plaintiffs are not entitled to the equitable relief of specific performance, but the trial court may grant the legal relief of damages, in which event the parties are entitled as of right, upon demand, to a jury trial. Farnsworth v. Hunter, supra. The present case is one where no legal issues at all were presented by the pleadings. The court found that plaintiffs had proved every element of a cause of action for specific performance, and that the plaintiffs were entitled to that equitable relief. Damages were granted only in the event defendants were unable or refused to convey. In such event, the authorities are practically uniform that damages are granted not in the exercise of a legal jurisdiction, but in the exercise of the equity jurisdiction of the court. This principle illustrates one phase of the general rule that equity having taken jurisdiction over a portion of a particular controversy it will proceed to decide the whole issue and to award complete relief. Pomeroy, in volume 1 of his well-known work "Equity Jurisprudence," 4th Ed., § 237, at p. 374, discusses the problem as follows: "Holland v. Anderson, 38 Mo. 55, was a suit by the vendee to cancel a contract for the sale of land, on the ground of the vendor's fraud. A rescission was found to be impossible, because the property had been changed, and the parties could not be restored to their original condition. The general doctrine was stated that 'a court of equity will sometimes give damages, which are generally only recoverable at law, in lieu of equitable relief, when it has obtained jurisdiction on other grounds.' The application of the principle to the relief of damages has frequently occurred in

suits for a specific performance. The following rules have been established by American decisions: If through a failure of the vendor's title, or any other cause, a specific performance is really impossible, and the vendee is aware of the true condition of affairs before and at the time he brings his suit, the court, being of necessity obliged to refuse the remedy of specific performance, will not, in general, retain the suit and award compensatory damages, because, as has been said, the court never acquired a jurisdiction over the cause for *any* purpose: [Citing cases.] A second rule is, that if the remedy of specific performance is possible at the commencement of a suit by the vendee, and while the action is pending the vendor renders this remedy impracticable by conveying the subject-matter to a bona fide purchaser for value, the court will not compel the plaintiff to bring a second action at law, but having acquired jurisdiction, will do full justice by decreeing a recovery of damages: [Citing cases.] The third rule is as follows: If a specific performance was originally possible, but *before the commencement of the suit* the vendor makes it impossible by a conveyance to a third person; or if the disability existed at the very time of entering into the contract on account of a defect in the vendor's title, or other similar reason,—in either of these cases, if the vendee brings his suit in good faith, without a knowledge of the existing disability, supposing, and having reason to suppose, himself entitled to the equitable remedy of a specific performance, *and the impossibility is first disclosed by the defendant's answer or in the course of the hearing, then, although the court cannot grant a specific performance, it will retain the cause, assess the plaintiff's damages, and decree a pecuniary judgment in place of the purely equitable relief originally demanded.* This rule is settled by an overwhelming preponderance of American authorities: [Citing many cases.]" (Last emphasis ours.) See, also, 22 Cal.Law Rev. 208, where the principle is discussed and several cases cited; Hupp v. Lawler, 106 Cal.App. 121, 288 P. 801.

We think this principle is determinative of the present case. Plaintiffs pleaded a purely equitable cause of action. So far as the pleadings, findings, conclusions and judgment are concerned, plaintiffs believed they were entitled to such relief when they filed the action. Defendants pleaded that plaintiffs knew defendants did not have title. The court found that defendants in fact had title and had never informed plaintiffs to the contrary. At the very time judgment was entered the trial court must have believed that specific performance was possible, because it granted that relief. It is obvious, therefore, that the award of damages in the event defendants were unable or refused to perform was intended as a substitute for the relief of specific performance. This being so, such award, under fundamental principles, was made in the exercise of the equity jurisdiction of the court, and defendants were not entitled as of right to a jury trial on that issue. It inevitably follows that under § 963, subsection 2, Code of Civil Procedure, the order granting the new trial is not appealable.

Appellants urge that the judgment recites that defendants "stipulated in open court that judgment may be entered for plaintiffs," and point out that the cases hold it is error to grant a new trial following a consent judgment. In the record appears an affidavit of defendants' counsel in which it is admitted that it was stipulated that a judgment for specific performance could be entered, but in which it is vehemently denied that defendants consented to a judgment for damages. This is the main point urged by appellants in their appeal from the order granting the new trial. Whatever the merits of this point may be, it is obvious that since the order granting the new trial is non-appealable, the error, if any, in granting a new trial following a consent judgment, like other error in the exercise of jurisdiction, cannot be reached by an abortive appeal.

[13, 14] So far as the appeal from the order recalling the execution is concerned, it likewise must be dismissed. The order granting the new trial being non-appealable, such order is effective as granting a new trial. The judgment upon which the execution was predicated has been set aside by the new trial order. Obviously, therefore, execution cannot be had, and the appeal from the order in regard to execution is moot and should, for that reason, be dismissed.

For the foregoing reasons, the appeals from the order granting the new trial and from the order recalling the execution are dismissed.

KNIGHT and WARD, JJ., concurred.

METROPOLITAN WATER DIST. OF SOUTHERN CALIFORNIA v. RIVERSIDE COUNTY.*

Civ. 11904.

District Court of Appeal, First District, Division 1, California.

April 9, 1942.

Hearing Granted June 8, 1942.

1. Taxation ⚿183

The term "municipal corporation" as used in constitutional amendment under which property of a municipal corporation located outside of the municipal corporation may be subject to taxation is used in its technical sense and means "city". Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "City" and "Municipal Corporation".

2. Taxation ⚿183

A metropolitan water district organized for purpose of developing, storing and distributing water for domestic and municipal purposes was not a "city" and therefore was not a "municipal corporation" within constitutional amendment under which property of a municipal corporation located outside of the municipality may be subject to taxation. Gen.Laws 1937, Act 9129; Const. art. 13, § 1.

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Appeals from Superior Court, Riverside County; O. K. Morton, Judge.

Actions by the Metropolitan Water District of Southern California against the County of Riverside for taxes previously paid under protest. From adverse judgments, plaintiff appeals.

Reversed with instructions.

James H. Howard, Arthur A. Weber, Ray W. Bruce, Charles C. Cooper, Jr., and Donald M. Keith, all of Los Angeles, for appellant.

Earl Redwine, Dist. Atty., and William O. Mackey, Chief Deputy Dist. Atty., both of Riverside, for respondent.

BRAY, Justice pro tem.

Appeals from judgments of the Superior Court of Riverside County in suits brought by the plaintiff district against the defendant county, under the provisions of sections 3804 and 3819 of the Political Code, to recover taxes previously paid under protest.

The Metropolitan Water District of Southern California was organized under the Metropolitan Water District Act, Deering's General Laws, Act 9129, Stats. 1927, p. 694, for the purpose of developing, storing and distributing water for domestic and municipal uses and purposes. In the performance of its functions, it has acquired and devoted to such uses and purposes certain real property situated in the county of Riverside. This property is outside the boundaries of the district and was subject to tax by the county at the time it was acquired by the district. The county has levied and collected taxes upon the property, which the district paid under protest and now seeks to recover General demurrers to plaintiff's complaints were sustained by the trial court and judgments were entered for the defendant.

The question involved is whether or not property of a metropolitan water district, located outside of its boundaries, and which was subject to tax at the time it was acquired by the district, is taxable by the county in which such property is located, under the provisions of section 1, article XIII of the State Constitution. It is virtually agreed between the parties that the determination of this question depends upon whether the Metropolitan Water District is a municipal corporation within the meaning of said constitutional section, as contended by the defendant, or is not such, as contended by the plaintiff.

Section 1, article XIII of the Constitution provides that property "such as may belong to the United States, this State, or to any county, city and county, or municipal corporation within this State shall be exempt from taxation, *except such lands and the improvements thereon located outside of the county, city and county or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation* * * *." (Italics ours.) The taxes in question here were imposed upon the assumption that the Metropolitan Water District is a municipal corporation, and having acquired lands in Riverside County which were subject to taxation by the county at the time of their acquisition, comes within the exception above set forth.

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* Subsequent opinion 134 P.2d 249.

It seems to be conceded that if the Metropolitan Water District is not a municipal corporation within the meaning of this constitutional provision, it is such a state agency as to entitle its property to be exempt from taxation, under that portion of the above constitutional provision which exempts property of the state, and because of what is referred to in Turlock Irr. Dist. v. White, 186 Cal. 183, at page 189, 198 P. 1060, at page 1063, 17 A.L.R. 72, and cases there cited as "the implications in favor of the exemption of public property."

An interpretation of the words "municipal corporation" under this particular constitutional section has been made in two cases. In Turlock Irrigation District v. White, 1921, 186 Cal. 183, 198 P. 1060, 1061, 17 A.L.R. 72, the Supreme Court determined that an irrigation district, while it is a "quasi-municipal corporation" and even a "public corporation for municipal purposes," is not a municipal corporation within the meaning of this constitutional section. The court calls attention to the argument sent out to the voters of the state when the amendment to the Constitution which contains the section in question here was being submitted for vote, and points out that, in that argument, the voters were informed that the amendment was necessary to protect the counties against municipalities of the type of San Francisco and Los Angeles, which were acquiring large areas in the other counties, which areas could not be taxed by the counties in which they were situated unless the exception to exemption from taxation provided in the new section was adopted. And said the court, "It is apparent that the term 'municipal corporation' was thus presented to the people as synonymous with such corporations as Los Angeles and San Francisco; that is to say, as municipal corporations in the strict technical sense." The court further pointed out that the nature of irrigation, swanp land, drainage, levee and reclamation districts has been a matter of judicial investigation and interpretation in a number of California, as well as other cases, and that it had been held that they were public corporations for municipal purposes, but not municipal corporations.

In Laguna Beach County Water District v. Orange County, 1939, 30 Cal.App.2d 740, at page 743, 87 P.2d 46, at page 48, in which case a hearing was denied by the Supreme Court, the court applied this same rule to a county water district saying, "It is thoroughly settled that among such organizations, irrigation districts, drainage districts, utility districts, and other similar organizations, are not municipal corporations, but public agencies exercising governmental functions and that, under the theory that their properties are in effect properties of the state, they are not subject to taxation. Sec. 85, 24 Cal.Jur. 102, and cases cited. It must also be true that districts organized under special legislative enactments cannot be municipalities for their legality has long been recognized (Argyle Dredging Co. v. Chambers, supra, [40 Cal.App. 332, 181 P. 84]) and the Constitution provides (art. 11, sec. 6) that 'corporations for municipal purposes shall not be created by special laws * * *.' It is true that none of these districts are identical in manner of organization and powers possessed. Nor are they precisely similar to county water districts. However, the right of eminent domain and the right of taxation is common to many of them, including county water districts. While our courts have not ruled on the precise question before us, there are several comments in cases which constitute expressions of judicial opinion on the nature of county water districts. The Supreme Court, in Coachella Valley Water Dist. v. Stevens, 206 Cal. 400, 274 P. 538, described a county water district as a governmental agency exercising governmental powers. In Morrison v. Smith Bros., Inc., 211 Cal. 36, 293 P. 53, it was said that a county water district was a public corporation that may be called a quasi-municipal corporation. In Galt County Water Dist. v. Evans, 10 Cal.App.2d 116, 51 P.2d 202, 203, county water districts were defined as 'public corporations inferior in power and scope to a municipal corporation'." The decision then continues, 30 Cal. App.2d at page 746, 87 P.2d at page 50, "We have already concluded that a county water district does not fall within the technical definition of a municipal corporation. As the Supreme Court held that the term 'municipal corporation' was used in the 1914 amendment to section 1 of article 13 of the Constitution in that technical sense, and no other, it follows that the property of plaintiff lying outside of its boundaries cannot be taxed under the provisions of that section."

The lower court in this case completely ignored the fact that the term "municipal corporation" as used in the constitutional provision involved here had already been interpreted in the Turlock Irrigation District and Laguna Beach cases, and treated the question practically as one of first impression. Respondent likewise asks the court, in spite of the holding in these two cases, to follow the dissenting opinion of Justice Sloane in the Turlock case. Justice Sloane's decision agreed with the majority that the purpose of the constitutional amendment was to prevent counties and municipalities from going into other counties and taking from their tax rolls property from which such counties were collecting taxes at the time the property was acquired by the foreign county or municipality. But Justice Sloane contended that it is unreasonable to interpret the Constitution in such a manner that extensive irrigation districts could be permitted to do this very thing. Here the respondents argue that it is likewise unreasonable to interpret the Constitution as permitting municipalities to unite in a metropolitan water district and thereby take from the tax rolls of another county property which the Constitution prohibits them from so taking as individual municipalities. Both Justice Sloane, in his dissenting opinion in the Turlock case, and the respondent here, contend that the real purpose of the constitutional amendment was to prevent abuses threatened, and likely to recur, from permitting private lands subject to taxation in one jurisdiction to be taken over for public uses by other communities and by depriving the territory in which the lands are situated of the revenue from this taxation, thus throw part of the burden of such public use upon territory not benefited by it, and that there could be no possible reason or justification for protecting these outside jurisdictions from the invasion of cities in search of water storage and distribution and leaving them exposed to precisely the same invasion by irrigation districts outside their territory, or, as say the respondents, by allowing municipalities which could not do it singly, to join together in a metropolitan district and accomplish the same result.

There is much to be said for this argument and for Justice Sloane's statement that (186 Cal. at page 193, 198 P. at page 1064, 17 A.L.R. 72), "The direct object of the amendment was to protect and conserve the revenues of the invaded territory, and with that object in view it can make no difference whether the public use acquired is by a city or county, or some other public corporation exercising municipal functions." However, this court is bound by the interpretation given in the majority opinion in the Turlock case, and by the decision in the Laguna Beach case.

Respondent attempts to avoid the applicability of the cases above mentioned and many others which hold that districts such as irrigation, reclamation and county water partake of the character of state agencies and are not municipal corporations in the strict or technical sense, by claiming that there is some fundamental difference between a metropolitan water district and these other agencies, and that because of its broad powers it is a municipal corporation even though the others may not be. However, there is no fundamental difference between a county water district, such as was under consideration in the Laguna Beach case, and a metropolitan water district. In re Orosi Public Utility District, 196 Cal. 43, 235 P. 1004, determined that a public utility district is a public agency or quasi-municipal corporation, rather than a municipal corporation, and it would be difficult to classify a metropolitan water district as being in any different category in this respect from a public utility district. In fact in Morrison v. Smith Bros., Inc., 211 Cal. 36, at page 43, 293 P. 53, at page 56, the court, in holding a public utility district to be a quasi-municipal corporation, stated that the Metropolitan Water District Act is closely patterned on the County Water District and Public Utility District Acts, and permits "the creation of a district which, for all practical purposes, is the same as" the public utility district there in question. In Metropolitan Water District v. Whitsett, 215 Cal. 400, at page 407, 10 P.2d 751, it was held that its general objects and purposes were not municipal affairs.

In a case decided prior to the Laguna Beach case, Metropolitan Water District of Southern California v. Superior Court of Riverside County, 1934, 2 Cal.2d 4, 37 P.2d 1041, 1042, an action brought to determine if the superior judges of Riverside County were disqualified to sit in condemnation cases brought by the district in their county, the district alleged in its petition that it was a municipal corporation. The court there distinguished this type of district from such public agencies as irrigation, levee, swamp land and drainage districts, calling petitioner "a public or municipal corporation" and stating that it more closely resembles a municipal corporation than it does a state agency. While it referred to the district as a municipal corporation it really classified it as a quasi-municipal corporation. In that case the disqualification of the judges depended upon the question of whether the metropolitan water district was included in the term "public agency" as used in section 170, Code of Civil Procedure. While generally speaking, the words "public agency" are broad enough to include a water district, or even a municipality, still the court felt that for the purposes of that act, the words when considered with their context "irrigation, reclamation, levee, swamp land or drainage district, or any public agency," referred to public agencies of the type of "irrigation, reclamation, levee, swamp land or drainage districts," rather than public agencies of the type of cities or quasi-municipal corporations.

In the last-mentioned case, the court was not considering the question of actually what type of entity the Metropolitan District of Southern California was, as between a public corporation for municipal purposes or a quasi-municipal corporation on the one hand and a city or town on the other but merely whether the district came within the designation "or any public agency" in that one particular act. It assumed, because the district so alleged, that it was a municipal corporation. It then pointed out that, in any event, for the purposes of the particular act, such a district "more closely resembles a municipal corporation than it does a state agency such as irrigation and reclamation districts" and that because the legislature in the sentence then under construction only referred to irrigation, reclamation, levee, swamp land or drainage districts, it did not intend to embrace by the words "or any public agency" districts of the metropolitan water district type. For the purposes of that section and that case, it didn't make any difference whether the metropolitan water district was a municipal corporation, or a quasi-municipal corporation or a public corporation for municipal purposes. The later Laguna Beach case, having in mind another question entirely, held the view that a county water district which, as we have pointed out, is similar to a metropolitan water district, was more of the type of the irrigation and drainage districts than a municipal corporation, being "public agencies exercising governmental functions and that, under the theory that their properties are in effect properties of the state, they are not subject to taxation." 30 Cal.App.2d at page 743, 87 P.2d at page 48.

[1, 2] There is an apparent conflict in the decisions concerning the character of the districts of the type of the plaintiff and of even the irrigation, reclamation and drainage district type. In some cases they have been held to be of the public or state agency type, in others of the municipal or quasi-municipal type. An examination of the particular act or statute under consideration in the particular case discloses that the conflict is more apparent than real. In each case the court was determining the status of the particular district for the purposes of that particular act or case, rather than as a broad, general description or designation. There are many cases holding that districts of the type of plaintiff are quasi-municipal corporations and have many municipal powers. In the construction of section 1 of article XIII of the Constitution, the courts in the Turlock and Laguna Beach cases could very well have held that the words "municipal corporation" included quasi-municipal corporations or public corporations for municipal purposes. But they didn't do so. They held that in the argument sent to the voters the only type of public bodies discussed other than counties which are expressly mentioned in the section, were cities. Even the term "municipal corporation" appearing in the constitutional amendment was not mentioned in the argument but only the word "city." They then held that insofar as section 1 of article XIII was concerned, the voters had in mind only cities as exclusive of any other type of municipal corporation. Under this holding, it makes no difference whether or not a metropolitan water district is a municipal corporation or only a quasi-municipal corporation or a public corporation with municipal powers. In any event, it is not a city or town, nor is it "synonymous with such corporations as Los Angeles and San Francisco; that is to say, as municipal corporations in the strict technical sense." Turlock Irrigation District v. White, supra, 186 Cal. at page 185, 198 P. at page 1061, 17 A.L.R. 72.

It may be anomalous that for certain purposes, such as liability for torts, qualifications of judges to try condemnation cases, or the consideration of certain statutes, metropolitan water districts are treated in the same category as municipalities (using the word in its technical sense, meaning cities), and yet for the purposes of taxation be placed in some other category. But, by reason of the determination of the question already made by the holding that the electors, in adopting the constitutional amendment, employed the term in a narrow, technical sense which excluded public corporations and quasi-municipal corporations and included only cities, the matter has already been decided.

The judgment is reversed, and the trial court is instructed to overrule the demurrer of defendant.

PETERS, P. J., and KNIGHT, J., concurred.

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51 Cal.App.2d 170

KIRKPATRICK v. HARVEY.

Civ. 2658.

District Court of Appeal, Fourth District, California.
April 7, 1942.

1. Judgment 🔑470

A "judgment", though only an original debt or liability in new form, has finality, and cannot be indirectly attacked, although it can be set aside through some form of direct attack permitted under California law.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment".

2. Judgment 🔑485, 489

A judgment sued on cannot be attacked except in accordance with rule governing collateral attack, including general rule that judgment cannot be collaterally attacked unless void on face of record or entered without jurisdiction.

3. Bankruptcy 🔑428

A wife remained personally liable on joint judgment against husband and wife incurred in connection with community property, even if husband's discharge in bankruptcy discharged wife so far as her community interest was concerned. Civ.Code, §§ 167, 171, 171b.

4. Evidence 🔑386(1)

Parol evidence is not admissible to change the legal effect of judgment or the record of it in any material respect.

5. Judgment 🔑518

In action against wife on joint judgment against wife and husband, wife's proffered evidence that judgment was for debt incurred in connection with community property, and that husband's discharge in bankruptcy discharged wife because husband only is liable for such debts, was properly rejected as a "collateral attack" on judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack".

6. Judgment 🔑916

The question whether certain of defendant's property could be subjected to payment of judgment against defendant could not be raised in action on judgment for which defendant was personally liable on the face thereof.

◆

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action on a judgment by W. J. Kirkpatrick against Mary A. Harvey. From a judgment for the plaintiff, the defendant appeals.

Affirmed.

Alfred Siemon and Bennett Siemon, both of Bakersfield, for appellant.

Louis Ferrari, G. D. Schilling, C. H. White, D. Bianco, and Thomas M. O'Connor, all of San Francisco, for respondent.

BARNARD, Presiding Justice.

This is an action upon a judgment. The complaint, which was filed on December 29, 1939, alleged that on November 28, 1934, the plaintiff's assignor recovered judgment against this defendant in the sum of $5,539.57. The answer set up as a separate defense that the judgment sued upon was a joint judgment against this defendant and her husband; that such judgment was recovered in an action upon a promissory note signed by this husband and wife and secured by a deed of trust on real property; that the money was borrowed for the benefit of the community and the trust deed given was upon community property; that the debt evidenced by the note was therefore the debt of the husband and not of this defendant; and that on October 7, 1935, the husband was discharged in a bankruptcy proceeding in which the debt evidenced by the prior judgment was listed and in which all of the community property of these parties and all of the separate property of the husband were listed and inventoried.

At the trial, the court excluded all evidence proffered for the purpose of establishing the facts alleged in this separate defense of the answer. Judgment for the plaintiff followed and the defendant has appealed.

The appellant contends that section 171b of the Civil Code, which was adopted after the debt here in question was created, is but a codification of the law as it previously existed; that under sections 167 and 171 of that code a wife's separate property is not liable for debts incurred in connection with the community property; that the husband only is liable on such debts; that since a wife's separate property may not be subjected to the payment of a debt incurred in connection with the community property it follows that the discharge of the husband in bankruptcy from such an obligation is also a discharge of the wife; and that the proffered evidence would, therefore, have furnished a complete defense in this action.

The appellant relies particularly upon the case of Bimrose v. Matthews, 78 Wash. 32, 138 P. 319, 322, in which the court said: "When the husband was discharged in bankruptcy from the obligation of the contract, it must of necessity follow that the wife was also discharged, because her separate property is not subject to the community debts." That case differs from the one now before us in that it was a direct action upon a liability arising from contract and not an action upon a prior judgment.

The defense here relied upon rests not only on the fact that the husband had been discharged in bankruptcy, but upon proving a number of other facts relating to the original debt and upon the operation of certain statutes of this state affecting the enforcement of the judgment by limiting the kind of property which may be subjected thereto. The real question here is whether all of these matters, taken together, constitute a defense in such an action to renew a judgment.

[1, 2] While a judgment is but the original debt or liability in a new form (Woehrle v. Canclini, 158 Cal. 107, 109 P. 888), it has, under our system, a certain finality and although it may be set aside through some form of direct attack permitted under our law it may not be indirectly attacked. In an action upon a judgment the judgment sued on may not be attacked except in accordance with the rules and principles governing collateral attack. Hill v. City Cab, etc., Co., 79 Cal. 188, 21 P. 728. The general rule is that a judgment may not be collaterally attacked unless it is void upon the face of the record or it has been entered without jurisdiction.

[3-6] The judgment here sued upon has not been satisfied. If it be assumed that the discharge in bankruptcy of her husband has also discharged the appellant, insofar as her community interest is concerned, this is only a partial release or satisfaction and she remains personally liable on the prior judgment so far as shown by the face of this record. Parol evidence is not admissible to change the legal effect of a judgment or the record of it in any material respect. Hartson v. Dill, 151 Cal. 137, 90 P. 530; Helpling v. Helpling, 50 Cal.App. 676, 195 P. 715. There is a difference between the validity of a judgment and whether it can be collected from certain property. Appellant is personally liable on the face of the judgment sued upon, and whether her separate property may be subjected to the judgment goes merely to the manner in which the judgment may be enforced and not to its validity and depends not only upon the operation of certain statutes but upon certain facts which do not appear in the judgment or on the face of the record.

In our opinion, the facts here sought to be established were not admissible and could not constitute a defense to this particular action. The proffered proof amounted to nothing more than a collateral attack upon the judgment sued on and was properly rejected. It may well be that under certain of our statutes the appellant's separate property may not be subjected to the payment of this judgment. This, however, is another question which may be raised at the appropriate time and in the proper manner, but which is not controlling here.

The judgment appealed from is affirmed.

MARKS, and GRIFFIN, JJ., concurred.

51 Cal.App.2d 150

BROWN et al. v. CITY OF OAKLAND et al.

Civ. 11759.

District Court of Appeal, First District, Division 1, California.

April 7, 1942.

Hearing Denied June 1, 1942.

1. Schools and school districts ⚷89

School authorities have the duty to enforce or cause to be enforced regulations for supervision of pupils on school grounds.

2. Schools and school districts ⚷89

School authorities are ordinarily not liable for personal injuries sustained by persons other than pupils as result of the condition of school premises, unless by statute the authorities are expressly or impliedly made liable.

3. Schools and school districts ⚷65

The use of school property for recreation and other purposes than school purposes is authorized.

4. Schools and school districts ⚷78, 89

School boards are liable as such in the name of the school district for judgments against the district for injury to persons or property, and may insure against liability for damages. School Code, § 2.990.

5. Schools and school districts ⚷89

If a child puts equipment on school grounds to use not contemplated by those in charge, and equipment is of such nature that a reasonably prudent child would know that equipment was not intended for that purpose, no liability can attach to school authorities for injuries received by child.

6. Schools and school districts ⚷122

Where broad-jumping pit on school ground was of such a nature that it might be used as a sand box by children, it was a fact question in action against school districts and school authorities for personal injuries sustained by child in playing in the pit, whether a reasonably prudent child would use pit for a sand box.

7. Schools and school districts ⚷89

In action against school districts and school authorities for injuries sustained by child while playing in broad-jumping pit on school grounds during baseball game to which public had been invited, if jury found that pit was of such a nature that it might be used as a sand box, invitation to attend game included an invitation to use equipment in close proximity to the ball game, and it was a fact question whether pit was within extent of invitation. School Code, § 6.740 et seq.; § 6.750 et seq.

8. Schools and school districts ⚷121, 122

In action against school districts and school authorities for injuries sustained by child in broad-jumping pit which child was using as a sand box, whether school authorities used ordinary care in maintaining school ground in close proximity to baseball diamond to which public had been invited, was a fact question to be determined without resort to doctrine of "res ipsa loquitur". School Code, § 2.801.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

9. Appeal and error ⚷842(7)

In action against school districts and school authorities for injuries sustained by child in broad-jumping pit which child was using as a sand box, during baseball game on school ground to which the public had been invited, whether evidence supported conclusion that child was injured by a dangerous condition which was obvious, or which should have been observed by a child of her age, was a fact question.

10. Witnesses ⚷406

In action against school districts and school authorities for injuries sustained by child on school ground when cut by broken glass, testimony that on day following accident witness observed and picked up pieces of broken glass near place where accident happened, was not admissible to impeach testimony of school custodian that he had never seen any glass around place where accident occurred.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action for personal injuries by Beverly Brown, a minor, etc., and others against the City of Oakland and others. From an adverse judgment, the plaintiffs appeal.

Judgment reversed.

Donahue, Richards & Hamlin and A. R. Rowell, all of Oakland, for appellants.

Ralph E. Hoyt, Dist. Atty., Arthur E. Sugden, Deputy Dist. Atty., and Weinmann, Quayle & Berry, all of Oakland, for respondents.

WARD, Justice.

This is a personal injury action. Judgment upon a nonsuit was granted in favor of all of the defendants. The appeal is limited to the judgment as it affects Oakland School District of Alameda County, Oakland High School District of Alameda County, Board of Education of the City of Oakland and William J. Parry.

The complaint alleges four causes of action. The first two are based upon the provisions of section 2.801 of the School Code, the others upon the Public Liability Act, St.1923, p. 675. Causes 1 and 3 pray for damages for an injury to a female minor child, and 2 and 4, for expenses for hospitalization, services of physicians, etc., incurred or to be incurred on behalf of the minor.

Appellants urge that a sufficient case has been proven under section 2.801 of the School Code by showing facts sufficient to charge the school authorities with constructive notice of the dangerous condition of a designated portion of the school ground, and this irrespective of whether or not appellants have shown notice under the Public Liability Act. Upon their theory we will assume for the purpose of the appeal that the causes of action relating to the Public Liability Act become mere surplusage. Meade v. Oakland High School Dist., 212 Cal. 419, 298 P. 987; Freund v. Oakland Bd. of Education, 28 Cal.App.2d 246, 82 P.2d 197.

[1-4] It is the duty of school authorities to enforce or cause to be enforced rules and regulations in the supervision of pupils on school grounds. Underhill v. Alameda E. School Dist., 133 Cal.App. 733, 24 P.2d 849; Bellman v. San Francisco H. S. Dist., 11 Cal.2d 576, 81 P.2d 894; Taylor v. Oakland Scavenger Co., 17 Cal.2d 594, 110 P.2d 1044. School authorities are ordinarily not liable for personal injuries sustained by persons other than pupils arising from the condition of school premises, unless by statute they are expressly or impliedly made liable. Krueger v. Board of Education, 310 Mo. 239, 274 S.W. 811, 40 A.L.R. 1091; 24 R.C.L., p. 604, sec. 60. In California, use of school property is expressly authorized for other than school purposes, including that of recreation. (Goodman v. Board of Education, 48 Cal.App.2d 731, 120 P.2d 665), and school boards are liable as such in the name of the district for judgments against the district based upon injury to persons or property (School Code, sec. 2.801; Goodman v. Pasadena City H. S. Dist., 4 Cal.App.2d 65, 40 P.2d 854; Bellman v. San Francisco H. S. Dist. supra) and may insure against liability for damages. (School Code, sec. 2.990.)

In the present case we are confronted with this question: Was the conduct of the minor under the circumstances shown by the evidence negligent, or that of the defendants free from negligence, as matter of law, making proper the judgment of nonsuit, or did it leave these questions of negligence or freedom therefrom as facts to be determined by the jury?

The injured minor was not a pupil at the school on the grounds of which the accident occurred, nor was she injured during school hours. She was upon the premises to view a baseball game. Some time prior to the injury, two sand pits had been installed near the baseball diamond for the athletic use of high school students in "broad jumping." Later, one of the pits was abandoned for such purpose, and part of the sand had been removed. It was in such pit that the injury occurred. The child had strayed away from the immediate presence of those who accompanied her to the game and, as she testified, was playing in the sand pit, "the one with the weeds. * * * The dog came in the sandbox and I put my hand back real fast and I hurt my hand [on] a broken jelly glass * * * in the weeds in the sandbox." The glass or fruit jar was partly covered by the sand.

Prior to the date of the accident visitors at the school grounds had seen children playing in the sand pit, although there is no proof that such fact had actually been called to the attention of the school authorities, or to those who, under their direction, supervised recreational activities under the permissive use granted by the provisions of division 6, part 3, chapters 1 and 2 of the School Code. There is some evidence from which a fact-finding body might conclude that the authorities had received constructive notice that children played in the sand pit, and there is evidence from which an inference could be drawn that foreign matter other than sand was in fact present in the pit, and that a representative of the school district was aware of such fact, the school custodian in charge of the school grounds, employed by the Board of Education of the City of Oakland, testifying that on different occasions he would examine the box, "kick it [the sand] around to see if I can find anything in there and then I take it out."

[5-8] Respondents argue that the school district did not "maintain" a sandbox for children at large to play in. While the primary purpose of the box was not for the pleasure of children at large, under all of the circumstances on this particular afternoon the public was invited on the grounds to witness a ball game. It may be be assumed that parts of the school ground adjacent to the baseball diamond would be used by the spectators. If a child puts equipment to a use not contemplated or intended by those in charge, and the equipment is of such a nature that a reasonably prudent child would know that the equipment was not intended for that purpose, no liability can attach to the school authorities for injuries received while the equipment is put to such unauthorized use. But where, as here, the sand pit was constructed for one purpose—as a broad-jumping pit, but it is of such a nature that it may conceivably be used for another purpose—as a sandbox—then it becomes a question of fact as to whether a reasonably prudent child would put the equipment to the use to which it was put. If the jury finds in favor of the plaintiffs on this issue, the invitation to attend the ball game included an invitation to use the equipment in close proximity thereto. It becomes a question of fact as to whether this equipment was within the extent of the invitation. Whether the sandbox was in close proximity to the portion of the ground used for recreational activities; whether a duty devolved upon the school authorities to use ordinary care in maintaining such portion of the ground as was in close proximity to the baseball diamond; whether defendants should have anticipated that children would play in the box, and whether under all the circumstances the box was adequately inspected, are questions of fact to be determined without resort herein to the doctrine of res ipsa loquitur.

In Young v. Gautier, 28 Cal.App.2d 494, 82 P.2d 959, the accident would not have occurred had the owner and operator of a swimming pool used proper care. In the present case the pit was not specially used as a play box for children. Whether defendants should have anticipated its use by them was a question of fact to be first determined, which prevents the application of the doctrine. The accident here might have been due to several unexplained causes which the defendants could not reasonably have anticipated and for which they would therefore not be responsible. Olson v. Whitthorne & Swan, 203 Cal. 206, 263 P. 518, 58 A.L.R. 129. In the Young case, the responsibility for the maintenance of the pool was definitely fixed; in the present, responsibility for the maintenance of the sand pit is debatable. Hubbert v. Aztec Brewing Co., 26 Cal.App.2d 664, 80 P.2d 185, 1016; Gibson v. County of Mendocino, 16 Cal.2d 80, 105 P.2d 105; Castro v. Sutter Creek U. H. S. Dist., 25 Cal.App.2d 372, 77 P.2d 509. Defendants may be liable for negligence for failure to reasonably anticipate the use of such equipment by children. Anstead v. Pacific Gas & Elec. Co., 203 Cal. 634, 265 P. 487. In Woodman v. Hemet Union H. S. Dist., 136 Cal.App. 544, 29 P.2d 257, relied upon by respondents, school property was used by an employee for his own business in no way connected with the school district, without even constructive notice to the school authorities. The court applied the familiar rule that the employee in the authorized and usual use of property must be acting within the scope of his employment. The facts are so dissimilar from those of the present case as to be of no assistance to respondents.

[9] Whether the evidence would support a conclusion that the minor plaintiff was injured by a dangerous condition which was obvious, or should have been observed by a child of her years, is a question of fact.

[10] One further question requires mention. The school custodian testified that he never happened "to see any cans or glass or rubbish around these sand pits at any time." Plaintiffs sought to impeach this testimony by proof that on the day following the accident another witness had observed and picked up pieces of broken glass within an area of five feet of the sandbox. Technically this would not impeach a statement made by the custodian that he never saw glass, etc., around the sand pit. Based upon the evidence as it appears in the record, the ruling sustain-

ing the objection to the introduction of such evidence was correct.

Bearing in mind the above evidence, and the principles set forth in Slater v. Shell Oil Company, 39 Cal.App.2d 535, 539, 103 P.2d 1043, the judgment should be and is hereby reversed.

PETERS, P. J., and KNIGHT, J., concurred.

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51 Cal.App.2d 213

SISTROM v. ANDERSON et al.

Civ. 13182.

District Court of Appeal, Second District, Division 2, California.

April 10, 1942.

1. Sales 🔑92

Where original contract for sale of turkeys by Arizona turkey raiser to California partnership was to be performed in Arizona, and written agreement of cancellation was executed by both parties in Arizona, Arizona law was controlling in seller's action in California for damages for breach of contract.

2. Sales 🔑92

Under Arizona law, there must be a consideration to extinguish the obligations created by a written contract for sale of personalty.

3. Sales 🔑179(4)

Where contract for sale of turkeys did not impose on seller obligation to provide cooling facilities, but instead by implication placed duty on buyers, and buyer who issued check for first lot of turkeys was conversant with conditions under which first lot of turkeys was killed and dressed, when he issued check, buyers were obligated to pay full contract price for first lot, though it had deteriorated due to inadequate and improper packing facilities of seller's ranch in hot weather.

4. Sales 🔑288(2)

Where there is a right of inspection of goods sold, there is a "waiver" by the buyer of an implied warranty of fitness by accepting the goods.

See Words and Phrases, Permanent Edition, for all other definitions of "Waiver".

5. Sales 🔑177

Where seller of turkeys did not engage to supply government certificate for turkeys and did not agree to keep dressed turkeys in such condition as would require or warrant issuance of such certificate, buyers were not entitled to refuse to accept delivery of turkeys because of deterioration from the heat and because buyer could not get a government certificate because of deterioration of turkeys.

6. Sales 🔑92

Under Arizona law the uncertainty of the market price of turkeys did not furnish "consideration" for cancellation of contract for sale of turkeys.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

7. Sales 🔑92

Where contract for cancellation of contract for sale of turkeys was bilateral and released both seller and buyers with respect to all executory obligations, the mutual promises supplied the necessary "consideration" under Arizona law, notwithstanding that seller did not in reality wish to be relieved from the executory obligations.

8. Sales 🔑92

Where one of the contracting parties is relieved from an executory obligation with no corresponding relief or gain to the other party, a separate and independent consideration is required under Arizona law for contract for cancellation of contract of sale of personalty.

9. Appeal and error 🔑1177(6)

Where the entire case must turn on a single issue of fact, which was not decided by trial court, the District Court of Appeal will ordinarily resubmit the case to the trial court to determine whether such issue of fact exists.

10. Appeal and error 🔑1175(2)

Where case was submitted to the trial court on a written record, District Court of Appeal could decide essential issue of fact without resubmitting the matter to the trial court which had failed to decide that fact issue.

11. Contracts 🔑95(1)

"Duress of goods", "moral duress", and "business compulsion" all stem from and are but an expansion by courts of equity of the old common-law doctrine of "duress" which embraced within its scope only such acts or threats as resulted from fear of life, the loss of a member, and imprisonment.

See Words and Phrases, Permanent Edition, for all other definitions of "Business Compulsion", "Duress", "Duress of Goods" and "Moral Duress".

12. False Imprisonment 🔑2
Threats 🔑10
Torts 🔑11

Where an act is accomplished by imprisonment, by threats, or by exhibition of force which apparently could not be restricted, the act is classed under Arizona law as "duress of the person", but where the act consists of a tortious seizure or detention of property from the person entitled to it, and requires some act as a condition for its surrender, the act is classed as "duress of goods" or "duress of property".

See Words and Phrases, Permanent Edition, for all other definitions of "Duress of Property" and "Duress of the Person".

13. Contracts 🔑95(1)

Any transaction is "voidable" under Arizona law where the party seeking to avoid the transaction was not bound to enter into it, and was coerced by fear of a wrongful act by the other party to the transaction.

See Words and Phrases, Permanent Edition, for all other definitions of "Voidable".

14. Contracts 🔑95(3)

If unlawful threats overcome the will of a person threatened and induce him to do an act which he would not otherwise have done, and which he was not bound to do, "duress" is effectuated under Arizona law and the person threatened may avoid the act.

15. Contracts 🔑95(3)

The threat to refuse to proceed under a contract, or to refuse to pay what is due under the contract or what is otherwise due, is not unlawful under Arizona law, and hence a threat to stand suit is not in the category of unlawful threats.

16. Sales 🔑92

The fact that seller of turkeys acceded to cancellation of contract of sale in order to obtain money due him for turkeys instead of being required to sue buyers for it, did not establish that buyers were guilty under Arizona law of "duress of goods", "moral duress" or "business compulsion", and seller was not entitled to recover for breach of the contract of sale.

◆

Appeal from Superior Court, Los Angeles County; Walter Desmond, Judge.

Action for damages for breach of contract by William Sistrom against L. V. Anderson and others. From an adverse judgment, the plaintiff appeals.

Judgment affirmed.

A. Ronald Button, of Los Angeles, for appellant.

Joseph A. Ball and Frank C. Charvat, both of Long Beach, for respondents.

HANSON, Justice pro tem.

This is an action for damages for breach of contract, in which the question for decision is whether a written cancellation of the contract sued upon is binding upon the parties to it.

Appellant, who was plaintiff below, for some ten years, has operated a ranch in Arizona where he raises a considerable number of turkeys. During this same period the defendants, as partners, have been engaged in the retail and wholesale meat business at Long Beach. It was the custom of the defendants to purchase in other states, among them Arizona, their annual holiday supply of turkeys. In these transactions the defendants were represented by defendant Anderson, who not only had visited plaintiff's ranch in Arizona and knew plaintiff was an extensive producer of turkeys, but he knew the buildings and facilities which plaintiff had at his ranch for killing and dressing turkeys. Moreover, he was familiar with the temperature conditions which prevailed annually in Arizona during November and December.

By the terms of the contract, which respondents contend was effectually cancelled, plaintiff undertook to sell and deliver to defendants between November 15, 1936, and January 15, 1937, so much of his entire flock of turkeys, stated to number 3,350, then on his Arizona ranch, as might be ready for market in the period mentioned.

On their part the defendants, as buyers, agreed to accept deliveries at the ranch on such dates in the period as the seller should designate by notice to them. There was a proviso that the notice should state the approximate number of turkeys which would be delivered. Moreover, the buyers undertook on the dates designated to grade, pack and pay for the turkeys tendered at certain designated prices per pound, dressed weight, dependent upon their grade in accordance with a standard set forth in the contract. Except for the fact that the contract required payment on a basis of "dressed weight," there was nothing to indicate which party should kill and dress the turkeys and there was no testimony on the point. Moreover, the contract says nothing about the seller's being required to provide any facilities, such as cooling rooms or ice, nor any restrictions on delivery because of any high temperature conditions which might prevail.

It is undisputed that the seller gave timely and proper notice to the buyers that he would be ready to deliver a certain number of turkeys on November 13 and a further number on the next day. While these dates anticipated the first delivery date as set forth in the contract, no objection was made thereto. Moreover, the evidence discloses that one of the defendants—Anderson—was on hand on November 13 and not only accepted delivery on that date of the first lot of turkeys which plaintiff killed and dressed, but graded and packed them at plaintiff's ranch and gave his check to plaintiff for them. It appears, however, that he did not stay on the ranch the next day to accept, grade and pay for the lot of turkeys which were killed and dressed on that day. Instead he returned to the ranch on the following morning, when he observed that the turkeys killed and dressed on the preceding day had deteriorated over night due to a lack of cooling facilities. While the seller, owing to a heat of 84 degrees outside on the previous day, had brought ice into the room where he placed the dressed turkeys so as to reduce the temperature therein to 70 degrees, he did not maintain the temperature at that point or lower after he had dressed the turkeys. As a consequence the dressed turkeys on the morning of the 15th appeared "green," in the language of the trade, and were no longer in prime condition. Before Anderson observed the condition of this second lot he had information from his partner at Long Beach that the first shipment had arrived in a "green" condition. On the morning in question not only did a dispute arise between plaintiff and Anderson as to the various grades Anderson was then assigning to the lot, but Anderson informed the seller that an agent of the government of the United States would not issue a certificate for the lot. The record does not disclose the meaning or import of such a certificate. In the absence of such proof we assume that such a certificate was necessary in order that the dressed turkeys might be shipped in interstate commerce. At all events, it is undisputed that Anderson advised plaintiff that the first lot of turkeys had arrived in Long Beach "green," and that unless plaintiff would accept his check for the second lot on the basis of his grading, and cancel the executory obligations under the contract, he would refuse to accept delivery of the lot and would not pay for them. In addition he threatened to stop payment of the check which had been given for the first lot, which had, as yet, not been collected. While the plaintiff strenuously objected to this proposal, he was faced with the alternative of yielding to it if he wished to have the outstanding check paid and the second lot of turkeys taken off his hands in accordance with the value predicated on the grading made by Anderson. Accordingly, he was induced to cancel, in writing, the executory provisions of the contract in return for having the outstanding check paid, along with the issuance of a check for the second lot.

[1, 2] In view of these facts appellant contends that the contract of rescission was without consideration, in that what respondents agreed to do they were obligated under the contract to do, and, secondly, that appellant's signature was procured through duress of goods and business compulsion. In answer to these contentions respondents, while agreeing that a consideration was essential, argue in effect that there was a consideration, in that (1) they were not obliged to pay the full contract price for the first shipment, as on its arrival at Long Beach it had deteriorated due to the inadequate and improper packing facilities on plaintiff's ranch in hot weather; (2) they were not required to accept delivery of the second lot because of such deterioration and for the further reason that Anderson could not get a government certificate on the morning on November 15th because of the existing condition of

the birds; and (3) the market price for turkeys was uncertain and that this uncertainty supplied a consideration. In response to the contention urged by appellant that there was duress of goods and business compulsion, respondents argue that this doctrine, on these facts, is inapplicable. We think it is obvious from the statement of the contentions of the parties that neither appellant nor respondents come to grips on the precise rule of consideration which is here applicable. However, before proceeding to a discussion of this and other points it is important to note that as the original contract was to be performed in Arizona and the written agreement of cancellation was executed by both parties in that state, its law is determinative of the controversy before this court. Restatement, Conflict of Laws, §§ 358 and 347. On the initial question, whether there was a consideration for the release of the contract sued upon, Arizona follows the rules laid down by the common law. Pleasant v. Arizona Storage, etc., Co., 34 Ariz. 68, 267 P. 794; Miller Cattle Co. v. Mattice, 38 Ariz. 180, 298 P. 640; J. D. Halstead Lumber Co. v. Hartford Accident, etc., Co., 38 Ariz. 228, 298 P. 925. Under those rules there must be a consideration to extinguish the obligations created by a written contract. 6 Williston on Contracts, Rev.Ed., § 1826, note 2.

[3-6] The difficulty with respondents' first argument is twofold. First, the contract did not impose upon the seller the obligation to provide cooling facilities, but instead by implication placed the duty on the buyers. Second, defendant Anderson was conversant with the conditions under which the first lot of turkeys had been killed and dressed, and so when he issued his check therefor that transaction was closed so far as making a claim that subsequent deterioration came about through plaintiff's inadequate facilities. Miller Cattle Co. v. Mattice, 38 Ariz. 180, 298 P. 640. Even in a case where there is a right of inspection, a buyer waives an implied warranty of fitness by accepting the goods. In the instant case the only implied warranty, if there was one, was that the turkeys were of merchantable quality when dressed, not that they would be of such quality thereafter. There is no suggestion in this record that the turkeys were diseased. Therefore there is no basis upon which respondents could have defended against a suit for the amount of the check, had they stopped payment of it. The second argument is not bettered by the additional argument therein based upon the fact that Anderson could not obtain a government certificate for the second lot. The answer to that argument is that plaintiff did not engage to supply such a certificate nor did he agree to keep the turkeys after they were dressed in such condition as would require or warrant the issuance of such a certificate. The third argument obviously is no argument at all.

[7, 8] It follows that the buyers were obligated to take delivery of the second lot of turkeys as they had taken delivery of the first lot, and pay for them on the basis of their grade. That being true, the threat that they would stop payment on the first check and would not pay for the second lot was idle and had no legal basis. They were obligated to pay, and so would have suffered no detriment by making the payment which the law required. However, as the contract of cancellation was bilateral and released each of the parties with respect to all the executory obligations of the original contract, these mutual promises supplied the necessary consideration. Here the seller was relieved from delivering any more turkeys and the buyer was correspondingly relieved from accepting and paying for them. 6 Williston on Contracts, Rev.Ed., § 1826, citing the cases. The fact that the seller did not in reality wish to be relieved does not alter the fact that there was a consideration. This is not a case where a separate and independent consideration is required, such as where one of the contracting parties is relieved from an executory obligation with no corresponding relief or gain to the other party, and for that reason appellant's authorities are not in point.

[9, 10] We come, then, to the question whether on the facts the doctrines of duress of goods or business compulsion are applicable. As the respondents had set up the agreement of cancellation and appellant was contending that it was invalid as a defense, the parties entered into a written stipulation to submit the case to the trial court to determine whether the cancellation was legally effective or whether it had been induced by fraud or duress on the part of the respondents. The court made no finding on the issue thus directly submitted to it. This we think is accounted for by the fact that the court thought such a finding was unnecessary in view of its finding that the plaintiff had not performed his obliga-

tions under the written contract and that the defendants had fulfilled all their obligations thereunder, even to the extent of accepting deliveries "of those [turkeys] available for marketing," and had not neglected to pay for them and had not on their part breached performance of the original written contract. This finding is based on the theory that it was the duty of plaintiff to keep the turkeys in marketable condition after they were dressed. But this, as has been pointed out, is not a correct construction of the contract. Hence the finding is not sustained by the evidence, and, moreover, we are without a finding on the vital issue whether the release was or was not induced by duress of goods or business compulsion. Where, as here, the entire case must turn on a single issue of fact, i.e., whether or not there was "business compulsion," we would ordinarily resubmit that question to the trial court. But where, as here, the case was submitted below on a written record, we think we may well decide that fact issue. We turn first to a discussion of the principles of law which govern.

[11-13] Duress of goods, moral duress and business compulsion, so called, all stem from and are but an expansion by courts of equity of the old common-law doctrine of duress. The modern nomenclature is simply an attempt to differentiate between the various recognized modern types of duress with its earlier common-law definition. In its new habiliments the doctrine is generally recognized, but the tests for its application vary. Duress, in the early common law, embraced within its scope only such acts or threats as resulted from fear of life, the loss of a member, mayhem and imprisonment. As the scope of the doctrine was enlarged by the equity courts they soon began to differentiate in the cases between duress of the person and duress of the goods or property of a party. Where an act was accomplished by imprisonment, by threats or by an exhibition of force which apparently could not be restricted, the act was classed as duress of the person. But where the act consisted of a tortious seizure or detention of property from the party entitled to it, and requiring some act as a condition for its surrender, the act was classed as duress of goods or property. Cooley on Torts, 4th Ed., § 367. Where the act of compulsion is not strictly one which may be defined as either duress of the person or of goods or property, but is more nearly analogous to duress of person, the courts often speak of it as involving "moral duress" or "business compulsion." But regardless of these labels, "the modern tendency of courts of law is to regard any transaction as voidable which the party seeking to avoid was not bound to enter into and which was coerced by fear of a wrongful act by the other party to the transaction. The earlier requirements of common-law duress may be regarded as merged in this broader definition." 5 Williston on Contracts, Rev.Ed., § 1603. This represents the rule in Arizona. Lundvall v. Hughes et al., 49 Ariz. 264, 65 P.2d 1377; Potter v. Home Owners' Loan Corporation, 50 Ariz. 285, 72 P.2d 429, 432. See also Restat.Cont. § 492.

[14, 15] The test in any case is whether the complaining party was or was not in a position to exercise his own will. If the unlawful threats overcome the will of the person threatened, and "induce him to do an act which he would not otherwise have done and which he was not bound to do," duress, as it is viewed today, is effectuated. 5 Williston on Contracts, § 1605. It is not, however, unlawful to threaten to refuse to proceed under a contract or to pay what is due under it or what is otherwise due. Hence a threat to stand suit is not in the category of unlawful threats.

[16] In the instant case the most that can be said for the evidence of the plaintiff is that he acceded to the cancellation of the contract in order to get the money that was due him on the first as well as his second delivery of turkeys, instead of being required to sue for it. Accordingly, while defendants took an advantage of the plaintiff, it was not an advantage which would constitute duress under any of the modern doctrines. For that reason the judgment must be affirmed.

Judgment affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

CLARKE v. VOLPA BROS. et al.

Civ. 2679.

District Court of Appeal, Fourth District, California.

April 7, 1942.

Rehearing Denied May 7, 1942.

Hearing Denied June 1, 1942.

1. Automobiles ⚿=246(39)

In action by truck shovel operator's helper who worked for independent contractor and assisted in loading defendant's gravel trucks at gravel pit, for injuries sustained when truck which was being backed into loading position ran over helper while he was preparing to oil the shovel, wherein evidence established that trucks in backing into position had created well-defined strip marked with ruts in the ground, reference in instructions to the strip as the strip of ground made by the trucks, and track or course followed or traveled by the trucks was not objectionable as misleading.

2. Trial ⚿=194(16)

In action by truck shovel operator's helper who worked for independent contractor and assisted in loading defendant's gravel trucks at gravel pit, for injuries sustained when truck which was being backed into loading position ran over the helper while he was preparing to oil shovel, instructions having effect of withdrawing from jury helper's testimony that he was in position of safety, so far as trucks traveling in usual manner were concerned, were erroneous as invading province of jury.

3. Automobiles ⚿=245(4)

In action by truck shovel operator's helper who worked for independent contractor and assisted in loading defendant's gravel trucks at gravel pit, for injuries sustained when a truck which was being backed into loading position ran over helper while he was preparing to oil shovel, whether truck had right to be where the helper was at time of accident, and whether rights of the helper and the truck driver were equal were questions for jury.

4. Trial ⚿=191(1), 252(1), 296(7)

The province of the jury is invaded by an instruction which assumes existence of fact which is not in evidence or in respect to which there is conflict of evidence, and any error in this respect is not cured by other charges submitting the question.

5. Trial ⚿=194(1)

The province of the jury is not invaded by instruction merely stating claim of party but not intimating that claim has been proved, or merely opening with formula "if you find" certain facts to be true.

6. Appeal and error ⚿=216(1)

That plaintiff failed to request trial court to give instructions based upon his theory did not preclude plaintiff on appeal from complaining of instructions based on the defendant's theory which were objectionable because they invaded province of jury by assuming existence of facts with respect to which there was conflict of evidence.

◆

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by Verne Clarke against the Volpa Brothers, a copartnership, and others, for injuries sustained by the plaintiff when he was struck by named defendant's truck. From an adverse judgment, the plaintiff appeals.

Reversed.

Rae B. Carter, of Fresno, and Adams & Griswold, of Merced, for appellant.

Chester O. Hansen and John Said, both of Fresno, for respondents.

GRIFFIN, Justice.

In October, 1940, the Division of Highways of the State of California was constructing a new bridge just west of the town of Minkler, near Fresno. Respondent Pete Volpa was a truck driver employed by the respondent Volpa Brothers and was engaged, at the time of the happening of this accident, in hauling gravel from a gravel pit located on private property to a point on the highway where the new bridge was being constructed. Leading from the highway, and along the edge of the gravel pit, an area had been "bulldozed" to make a private roadway for the loading trucks. Empty trucks coming westerly from the bridge turned off the highway into the roadway and backed along it until a proper position for loading was reached adjacent to the shovel, which was in the gravel pit. An area in the roadway 40 or 50 feet south of the shovel permitted an incoming truck to park if another truck was loading at the shovel or making an exit. The trucks were steel-bodied weighed over five tons unloaded, and were about six feet wide and ten feet long. They were equipped with dual rear wheels and with protective shields back of the cabs. These trucks were loaded by a so-called "truck shovel," similar in many respects to the more common steam shovel, which truck shovel was operated by one John Gale for an independent contractor. The appellant Verne Clarke was the assistant and helper of the operator of the truck shovel. The gravel pit or bed was west of the roadway, below its level, and covered with water. In scooping out gravel the shovel had made a well-defined cut with fairly well-defined banks. The east bank of the cut abutted the west side of the roadway which was made use of by the trucks. Commencing near the truck end of the truck shovel and extending to the shovel end, the wheels of incoming and outgoing trucks had worn ruts about ten inches deep in places in the roadway. It was the practice of trucks to back along these ruts. According to testimony adduced by respondents the most westerly rut was about two feet east of the edge of the east bank of the cut. According to testimony adduced by appellant, the most westerly rut was about four feet from that bank. The version of the accident related by appellant Verne Clarke, and resulting in his injury, may be thus summarized.

After the last truck was loaded on that afternoon, greasing of the shovel was required. At just about quitting time he walked about 150 feet to Gale's automobile which was parked in the area provided for that purpose on the roadway and obtained the equipment for greasing. He returned to the truck shovel (which took from five to ten minutes) with the equipment, and for its use laid a newspaper opposite the cab of the truck shovel and at the edge of the east bank of the cut at a place which would be between the shovel truck and the ruts in the roadway made by the loading trucks. He was squatting down facing north about 6½ or 7 inches from the edge of the bank with the newspaper directly in front of him and preparing the greasing equipment when the truck, which was backing up, struck him. During these movements he never saw nor heard the truck which ran over him while backing into place to be loaded. The right rear wheel of the truck passed completely over the full length of his body, causing considerable injury.

The version of the accident given by respondent Pete Volpa is as follows: He backed the empty truck from the highway along the roadway until he noticed that another truck was loading at the shovel. He accordingly parked the truck in the area provided for that purpose. When the other truck passed by, the driver raised five fingers indicating that it was five minutes until four p. m., and that respondent just had that amount of time to load one more truckful before four o'clock. He then backed toward the shovel, standing up and looking back over his left shoulder. He saw no one on the roadway nor in the vicinity thereof as he continued backing. He backed the truck into the ruts in the roadway and into position before 4 p. m. After backing the truck 50 or 75 feet in the ruts he stopped and then learned that appellant had been caught under the right rear wheel of the truck.

The only contention advanced by appellant on this appeal is that certain instructions offered by respondents and given by the court "deprived plaintiff of the right to a verdict," and "erroneously conferred upon defendants a right to a verdict." These instructions read as follows (emphasis added by appellant):

"*I instruct you that the defendant, Pete Volpa, had a right to haul his truck over the strip of ground made by the trucks hauling sand and that such right was equal in every respect to the right of the plaintiff to be where he was at the time of the accident.* Just as their rights were equal, so also was the duty of each to exercise ordinary care under all the circumstances equal. *The plaintiff could not assume, or act or rely upon the assumption that he would not be injured by defendants' truck or by any other truck passing by the place where he was,* but he was required to keep such a lookout for such trucks as under similar circumstances an ordinarily prudent person would have kept for his own safety and protection."

"If you find from the evidence that trucks were backing up over the same path pursued by Pete Volpa's truck with regularity and at brief intervals of time, that these trucks were so constructed and loaded that the driver thereof could not, while backing them, observe objects or persons immediately back of them, and that these trucks in backing followed approximately the same track or course, *then I instruct you that any place in the track or course so followed by these trucks was a position of danger.*"

"In determining whether or not the plaintiff was as vigilant and watchful for his own safety and protection as the law, as stated in these instructions, required him to be, *you may consider his position with reference to the course traveled by the trucks, the frequence and regularity with which trucks had been passing by his position, the noise made by the trucks in approaching and passing his position, the speed at which the trucks approached and passed by, his opportunity, if any, for seeing the trucks as they approached and passed by* together with any and all other circumstances and conditions surrounding the accident as established by the evidence."

It is argued first that the opening sentence of the instruction first quoted starts with misleading and confusing language by referring to "the strip of ground made by the trucks hauling sand"; that there is no evidence in the record that any strip of ground was made by the trucks or those operating them; that what the evidence shows is that the private roadway between the highway and the truck shovel was made by those who maintained and operated the truck shovel and that a jury would naturally conclude that the instruction referred to the entire length and breadth of this private roadway, and not merely to such part thereof as might be between the ruts made by the trucks. There is no merit to this contention. A careful review of the record in this case will clearly show that the trucks, in backing into such a position that they could be loaded by the "shovel operator," had created a well-defined "strip" marked with ruts in the ground.

The entire roadway, cleared for the use of the trucks, was not "made by the trucks" in the first instance. It was made by use of a "bulldozer." Part of the evidence on this question which clarifies what was meant by the use of the words "strip of ground made by the trucks" in the first instruction quoted, is reflected in the deposition of Pete Volpa, which is as follows:

"Q. In backing your truck into position, how close did you back your truck, how close did you back your truck to that edge or bank along beside the shovel? A. Well, we got—as we back in there, we had formed ruts, the tires had formed ruts. It was kind of soft-like, and when you got in those ruts you could not get out of it, so you just backed up in those ruts.

"Q. Were you backing up in those ruts at the time Clarke was injured? A. When you got in those ruts, you couldn't get out, you had to get in those ruts in order to back out."

[1] Considering the evidence in connection with the instructions given in this respect and on this subject, it is quite apparent that the jury could not have been confused as claimed by appellant, in using the terms "strip of ground made by the trucks," "in the track or course so followed by these trucks," and "to the course traveled by the trucks."

[2] Appellant adduced testimony showing that when the truck struck him he was up on the bank of the cut, three or four feet west of the most westerly rut in the roadway, and in a position of safety so far as trucks traveling in the ruts were concerned. The effect of the portions of the instructions, as given, was to withdraw such testimony from the consideration of the jury and to tell the jury either that when plaintiff was struck by the truck *he was on that part of the roadway between the ruts made by the trucks,* or that he was bound to anticipate that trucks would depart from the usual practice of following the ruts and without warning travel anywhere over the length or breadth of the roadway made by the "bulldozer." The concluding sentence of the first-quoted instruction emphasized this first error in the instruction by telling the jury that "plaintiff could not assume, or act or rely upon the assumption that he would not be injured by defendants' truck or by any other truck *passing by the place where he was.*" This language placed upon plaintiff the duty of anticipating negligence on the part of the defendants, even if plaintiff was in a position of safety on the bank of the cut and clear of all trucks traveling in the ruts. Rosella v. Paxinos, 110 Cal. App. 299, 302, 294 P. 39.

[3] There was a conflict in the evidence as to whether appellant was in a position of danger. Appellant also adduced testimony showing that the truck struck him after working hours were over and at a time when the advent of a truck was not to be expected. It was a question, therefore, for the jury to determine whether the truck had a right to be wherever plaintiff was at the time of the accident and whether their rights were "equal in every respect."

These basic errors appear in the first quoted instruction and reappear in the other quoted instruction as italicized. Although these instructions offered by respondent and given by the court were patterned almost literally from instructions given in the case of Warnke v. Griffith Co., 133 Cal. App. 481, 491, 492, 24 P.2d 583, they were not, by reason of that fact, proper here. There the evidence was undisputed that the injured person was standing in a position of danger, and it was also undisputed that he knew it was a dangerous place at the time in question. Burke v. John E. Marshall, Inc., 42 Cal.App.2d 195, 202, 108 P.2d 738. The instructions taken from that case, therefore, were not applicable to the instant case because those facts in the instant case were in dispute. In the instruction as given, those disputed facts were not left for a determination of the jury.

[4, 5] The rule here applicable is set forth in 24 Cal.Jur., page 841, section 101, which reads:

> "The province of the jury is invaded where an instruction assumes the existence of a fact which is not in evidence, or with respect to which there is a conflict of evidence, and any error in this respect is not, it has been held, cured by other charges which submit to the jury the question, whether such fact exists. The rule is not violated, however, by an instruction which merely states the claim of a party, but does not intimate that such claim has been proved, or which opens with the formula 'if you find' certain facts to be true."

[6] The application of this rule has been uniform. Preston v. Keys, 23 Cal. 193, 195; Ryan v. Los Angeles I. & C. S. Co., 112 Cal. 244, 254, 44 P. 471, 32 L.R. A. 524; Vinther v. Sunset Mutual Life Insurance Co., 11 Cal.App.2d 118, 123, 53 P. 2d 182. An application of these rules to the challenged instructions clearly demonstrates the error. The unmistakable error of the instruction was to tell the jury that the plaintiff was injured where the truck had an equal right to be at the time of such injury, and the province of the jury was plainly invaded by the instruction which assumed the existence of facts with respect to which there was a conflict of evidence. Respondents argue that their instructions were based on their theory of the case and that since appellant neglected to request the court to give any instructions based on his theory of the case and the evidence, appellant cannot complain of respondents' instructions. Citing Erxleben v. Kaster, Mo.App., 21 S.W.2d 195; Potter v. Back Country Transportation Co., 33 Cal. App. 24, 164 P. 342; Comstock v. Morse, 107 Cal.App. 71, 290 P. 108. This argument is not tenable. In the cases cited by respondents the question was left to the jury whether the disputed facts which would support the legal principle expounded in the instruction had been established. That was not done in the instant case.

For the reasons stated, the judgment should be reversed. The judgment is reversed.

BARNARD, P. J., and MARKS, J., concurred.

20 Cal.2d 178

SCULLY v. STATE et al.

L. A. 17810.

Supreme Court of California.

April 16, 1942.

Rehearing Denied May 14, 1942.

1. Insane persons ⟹41

Where statute under which secretary of Department of Institutions was appointed guardian of incompetent persons' estates provided that secretary should receive reasonable fees and that fees should be paid into state treasury and added to appropriation for management of department, secretary could not maintain action for judgment declaring that he was entitled to fees allowed and for judgment in amount of fees. St.1937, p. 1158, § 6660.

2. States ⟹51

Where secretary of Department of Institutions was appointed by director of department and duration of office was not fixed by law, secretary held office at pleasure of director, and secretary's discharge by director during year in which secretary was appointed was legal. Pol.Code, § 878; St. 1937, pp. 1156, 1158, 1159, 1161, §§ 6655, 6661, 6662, 6729.

3. Pleading ⟹8(6)
States ⟹57

Where secretary of Department of Institutions held office at pleasure of departmental director who appointed him, and secretary sought to be restored to office following discharge by director, allegation that discharge was without right or foundation in law and justification in fact was a mere "conclusion" and was not an "allegation of fact", and secretary was not entitled to salary or other emoluments of office. Pol.Code, § 878; St.1937, pp. 1156, 1158, 1159, 1161, §§ 6655, 6661, 6662, 6729.

See Words and Phrases, Permanent Edition, for all other definitions of "Conclusion" and "Allegation of Fact".

In Bank.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by Frank Scully against the State and others for a judgment declaring that plaintiff was entitled to certain fees, for judgment in the amount of those fees, and to be restored to the position of secretary of the Department of Institutions. From a judgment for defendants granted on their motion for judgment on the pleadings, plaintiff appeals.

Affirmed.

Lucien A. Sauvage and A. Brigham Rose, both of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for respondents.

CURTIS, Justice.

Plaintiff as secretary of the Department of Institutions of the State of California was appointed guardian of a number of estates of incompetent persons, and thereafter the probate court fixed the fees to which the guardian was entitled in the several estates, which collectively amounted to the sum of $2,650. Plaintiff instituted this action to have it declared that he was entitled to said fees and for judgment in the amount of such fees. The first and second causes of action of the amended complaint set forth the above facts. The defendants moved for judgment on the pleadings and the court granted the motion. Plaintiff has appealed from said judgment.

[1] The judgment should be sustained, as section 6660 of the Welfare and Institutions Code in force prior to its amendment in 1941, under which plaintiff was appointed and acted as such guardian of the estates of said incompetent persons, provided that "The secretary of the Department of Institutions shall act as such guardian * * * and shall receive such reasonable fees for his services as such guardian * * * as the court allows. Such fees shall be paid into the State treasury to become a part of and to be added to the appropriation or special fund in the State treasury, made available by law for the support or management of the department." St.1937, p. 1158.

[2, 3] In a third cause of action plaintiff sought to be restored to his position as secretary of the Department of Institutions from which he was discharged by the director of said department on or about the 21st day of October, 1939. In said third cause of action plaintiff alleged his appointment as secretary of the Department of Institutions for a period of four years beginning in the month of January, 1939, and that said Director of said department on or about the 21st day of October, 1939, "caused his name to be removed from the

payrolls as an officer," and that said action was without right. Defendants' motion for judgment on the pleadings applied to said amended complaint as a whole and included said third cause of action as well as the other two causes of action referred to above.

We find nothing in the Welfare and Institutions Code, or any other statutory enactment, fixing the term of the secretary of the Department of Institutions at four years or giving to any board or officer authority to appoint a person to that office for the term of four years or for any fixed term whatever. Section 878 of the Political Code provides that "Every office of which the duration is not fixed by law is held at the pleasure of the appointing power." By section 6662 of the Welfare and Institutions Code the secretary of the Department of Institutions is defined as "the employee of the department designated by the Director of Institutions to perform the duties and exercise the powers mentioned in those sections." Secs. 6655, 6661 and 6729 of the Welfare and Institutions Code. We conclude from the foregoing code sections that as plaintiff was designated (or appointed) as secretary of the Department of Institutions and as the duration of said office was not fixed by law, he held his office at the pleasure of the appointing power. The appointing power in this instance was the Director of the Department of Institutions. Plaintiff's discharge, therefore, by the Director of the Department of Institutions was legal. Plaintiff's allegation that the action of the Director of the Department of Institutions "was without right or foundation in law and justification in fact" cannot be regarded in any other light than his conclusion respecting his discharge. It cannot be considered as an allegation of fact, in view of the code section which expressly provides that he held his office at the pleasure of the appointing power. As plaintiff was legally discharged from his position, he was not entitled to the salary or other emoluments of his office.

The third cause of action contained in plaintiff's amended complaint failed therefore to state facts sufficient to constitute a cause of action, and the order of the court in granting defendants' motion for judgment on the pleadings, which in this instance consisted of the three causes of action set forth in said amended complaint, was properly made, and the judgment of the trial court should be and is hereby affirmed.

GIBSON, C. J., and SHENK, EDMONDS, HAUSER, CARTER, and TRAYNOR, JJ., concurred.

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51 Cal.App.2d 167

PEOPLE v. CONTERNO.

Cr. 3528.

District Court of Appeal, Second District, Division 2, California.

April 7, 1942.

Rehearing Denied April 16, 1942.

Hearing Denied May 4, 1942.

1. Rape ⚷52(1)

Evidence was sufficient to sustain conviction for statutory rape.

2. Criminal law ⚷1036(5), 1044

In prosecution for statutory rape, objection that diagram drawn by prosecuting witness, subsequent to date of alleged act of sexual intercourse, purporting to represent defendant's apartment where prosecuting witness testified the alleged act of sexual intercourse had occurred was inadmissible as hearsay, was "waived" and would not be considered where not urged when diagram was received in evidence and no motion was made to strike out on ground that diagram was hearsay.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

3. Criminal law ⚷1036(1)

If a general objection to the introduction of evidence is overruled, such objection cannot avail the objector on appeal, unless it appears that the evidence was inadmissible for any purpose whatsoever.

4. Criminal law ⚷1036(1)

If a specific objection to introduction of evidence is overruled, the specific objection will be effective on appeal to extent of the grounds specified and no further.

5. Criminal law ⚷1036(1)

An overruled objection to introduction of evidence naming a ground which is untenable cannot be availed of on appeal even though there was tenable ground which might have been urged unless it appears there was no purpose whatever for which the evidence could have been admitted.

On Petition for Rehearing.

6. Criminal law ⟹696(3)

Where evidence is received without objection that it is hearsay, the proper procedure to raise such objection at subsequent period in trial is by motion to strike out the evidence as hearsay.

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Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Dominic Floyd Conterno was convicted of statutory rape, and he appeals.

Affirmed.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

Morris Lavine, of Los Angeles, for appellant.

Earl Warren, Atty. Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From judgments of guilty on two counts of statutory rape after trial before the court without a jury, defendant appeals.

Viewing the evidence in the light most favorable to the people (respondent), the essential facts are:

Defendant on two occasions had an act of sexual intercourse with the prosecuting witness, a female sixteen years of age.

Defendant relies for reversal of the judgments upon two propositions which will be stated and discussed hereunder seriatim.

[1] *First: There is no substantial evidence to sustain the findings upon which the judgments were necessarily predicated.*

This proposition is untenable. An examination of the record discloses substantial evidence which, taken together with inferences which the trial judge may have reasonably drawn therefrom, sustains each and every material finding of fact upon which the judgments were necessarily predicated. For example, the prosecuting witness gave positive testimony that on two separate occasions defendant took her to his apartment and there had an act of sexual intercourse with her. Further discussion of the evidence is unnecessary. (See People v. Pianezzi, 42 Cal.App.2d 265, 269, 108 P.2d 732.)

[2] *Second: The trial judge committed prejudicial error in receiving in evidence a diagram drawn by the prosecuting witness subsequent to the date of the alleged acts of sexual intercourse, which diagram purported to represent defendant's apartment, where the prosecuting witness testified the alleged acts of sexual intercourse had occurred, for the reason that such diagram constituted hearsay evidence.*

The foregoing proposition will not be considered by this court for the reason that the objection which defendant now makes to the reception of the diagram in evidence, to-wit, that it was hearsay evidence, was not urged in the trial court. Therefore, such objection was waived.

[3-5] The law is uniformly established by a long line of decisions that (1) if a general objection to the introduction of evidence is overruled, such objection cannot avail the objector on appeal, unless it appears that such evidence was inadmissible for any purpose whatsoever, and (2) a specific objection overruled will be effective to the extent of the grounds specified and no further. An objection overruled, therefore, naming a ground which is untenable cannot be availed of on appeal, even though there was another and tenable ground which might have been urged but which was not, unless it appears there was no purpose whatever for which the evidence could have been admitted (People v. Mason, 37 Cal.App.2d 407, 409, 99 P.2d 567).

The judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

On Petition for Rehearing.

PER CURIAM.

The petition for rehearing is denied.

Defendant in his petition claims that he objected to the introduction of People's Exhibit 3 on the ground that it was hearsay evidence. People's Exhibit 3 had originally been received in evidence without objection that it was hearsay evidence. Thereafter a session of the court was held at Santa Monica, where the following occurred:

"The Court: Let the record show that the Court has convened at the premises at 2911 Fourth Street, Santa Monica, for the purpose of observing the premises and comparing the premises with the diagram contained in People's Exhibit No. 3. It is not the purpose of the Court to take any testimony or to ask any questions here. It is simply the purpose of the Court to observe the premises and compare them with this diagram as to accuracy. However, if you have any suggestions you want to make, Mr. Myers or Mr. Lavine, I would be glad to hear them.

"Mr. Lavine: I only want to interpose an objection to the consideration of the diagram heretofore made as incompetent, irrelevant and immaterial and is in effect hearsay and self-serving."

[6] It is obvious from the foregoing that the objection above set forth was not made to the reception of the questioned exhibit (People's No. 3) in evidence. The document, as stated in the opinion, was received in evidence without any objection being made that it was hearsay evidence, and therefore such objection was waived by defendant. Had he desired to raise this objection at a subsequent period in the trial the proper procedure would have been to have made a motion to strike the exhibit on the ground that it was hearsay evidence. This was not done.

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51 Cal.App.2d 241

ROCKWOOD et al. v. BROWN INTERNATIONAL INV. CO. et al.

Civ. 11994.

District Court of Appeal, First District, Division 2, California.

April 15, 1942.

1. Contracts 🔑123(1)

Evidence that notes and deed of trust required by a creditor in addition to bonds of Home Owners' Loan Corporation for release of creditor's first lien were taken without knowledge or consent of Corporation, authorized judgment declaring notes and deed of trust void.

2. Contracts 🔑123(1)

Evidence was insufficient to establish that notes and deed of trust given to creditor in addition to bonds of Home Owners' Loan Corporation were given in settlement of debtors' obligation under an original second deed of trust and, hence, would not support creditor's contention that notes and deed of trust were not void as violating its consent filed with the Corporation on ground that its consent was to accept the bonds only in satisfaction of indebtedness covered by original first deed of trust.

3. Contracts 🔑123(1)

Where creditor, upon accepting bonds of Home Owners' Loan Corporation, signed a consent which specifically mentioned release of indebtedness covered by original first deed of trust and which further provided that creditor would accept the bonds "in full settlement of the claim of the undersigned", and which provided that creditor agreed "thereupon to release all claim of the undersigned against said property", the consent was sufficiently broad to cover every claim of creditor against the property though not specifically mentioned therein.

4. Contracts 🔑123(1)

A note and deed of trust required by creditor in addition to bonds of Home Owners' Loan Corporation for release of creditor's first lien, if executed without knowledge or consent of Home Owners' Loan Corporation, were void as against "public policy", regardless whether there was sufficient consideration for their execution.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Ray L. Rockwood and another against Brown International Investment Company and International Investment Company, for cancellation of a note, the deed of trust on plaintiffs' home securing the note and a second note which was unsecured. From a judgment for plaintiff against defendant International Investment Company, the defendant International Investment Company alone appeals.

Affirmed.

John C. Campbell, of Los Angeles, for appellant.

Charles C. Stanley, Jr., of Los Angeles, for respondents.

SPENCE, Justice.

Plaintiffs brought this action seeking the cancellation of a promissory note for $400, the deed of trust on their home securing said note, and a second promissory note for $360, which was unsecured. The trial court entered its judgment in favor of plaintiffs and against defendant International Investment Company. Said defendant appeals from said judgment.

In 1933, plaintiffs were in default on a note secured by a first deed of trust and also on a note secured by a second deed of trust on their home. Said notes and deeds of trust were held by said defendant. The president of the defendant company then sought to negotiate a loan from the Home Owners' Loan Corporation on behalf of plaintiffs. These negotiations continued over a long period of time, during which defendant executed the required consent to take Home Owners' Loan Corporation bonds, which consent provided "and the undersigned hereby consents, if said refunding can be consummated, to accept in full settlement of the claim, of the undersigned, the sum of $1232 face value of the bonds * * * and thereupon to release all claim of the undersigned against said property." The above-mentioned consent was executed on September 11, 1934, and was the fourth and final consent signed by said defendant during the prolonged negotiations. The Home Owners' Loan Corporation transaction was consummated in September, 1934, pursuant to said last-mentioned consent. The several consents had been executed by defendant by reason of the refusal of the Home Owners' Loan Corporation to agree to loan the amount covered by any consent previously executed. On May 1, 1934, being the day following the execution of the third of said consents by said defendant, a note in the sum of $760 and a deed of trust on said property to secure the same were procured by said defendant from plaintiffs. This deed of trust was not recorded until October 10, 1934, being approximately one month after the closing of the Home Owners' Loan Corporation transaction. The Home Owners' Loan Corporation loan files showed no consent by the Home Owners' Loan Corporation to the taking by defendant of said $760 note and deed of trust or any reference thereto and there was testimony to show that said files would have made reference thereto if the Home Owners' Loan Corporation had had any knowledge thereof. Said deed of trust was not put through the Home Owners' Loan Corporation loan escrow nor was it mentioned therein.

On December 4, 1934, said defendant wrote a letter to the Home Owners' Loan Corporation and made a general inquiry as to whether their rules permitted the taking of a second deed of trust in a case where the Home Owners' Loan Corporation loan was insufficient to pay the entire original obligation. While this letter was not answered until January 9, 1935, said defendant apparently learned in the meantime that the $760 note and deed of trust was greater in amount than the Home Owners' Loan Corporation would have approved. It appears from the appraisal that a $400 note and second deed of trust would have been the maximum which the Home Owners' Loan Corporation would have approved under any circumstances and then only provided that the terms were such as to give to the home owner a reasonable opportunity to meet his obligations.

Said defendant then induced plaintiffs to execute the $400 note, secured by a deed of trust on their home, and the $360 unsecured note, to take the place of the above-mentioned $760 note and deed of trust. Plaintiffs executed said instruments but the deed of trust securing said $400 note was not recorded for more than ten months thereafter.

[1] In the trial court, said defendant attempted to establish the validity of the $760 note and deed of trust, and the instruments under attack which replaced the same, upon the theory that the Home Owners' Loan Corporation had knowledge of the execution of said $760 note and deed of trust. Said defendant relied upon Shiver v. Liberty Building-Loan Ass'n, 16 Cal.2d 296, 106 P.2d 4. The court there said at page 300 of 16 Cal.2d at page 6 of 106 P.2d, "As stated in the McAllister case [McAllister v. Drapeau, 14 Cal.2d 102, 92 P.2d 911, 125 A.L.R. 800], a note and deed of trust required by a creditor in addition to bonds of the Home Owners' Loan Corporation, if executed with its knowledge or consent, are valid and enforceable. However, where such instruments are secretly or fraudulently exacted by the creditor, they are void." The Shiver and McAllister cases discuss fully the rules applicable in such

cases. But the most that can be said here is that there was a conflict in the evidence on the issue of knowledge on the part of the Home Owners' Loan Corporation. The trial court found that said defendant did not at any time disclose to Home Owners' Loan Corporation the fact that it was taking or requiring the $760 note and deed of trust as a condition to its consent and that said Home Owners' Loan Corporation had no notice or knowledge of the execution of said note or of the $400 note or the $360 note or of any deed of trust securing any of them or of the terms thereof or even of the existence thereof at any time until shortly before the commencement of this action. It further found that said Home Owners' Loan Corporation did not consent to the taking by said defendant of said notes and deeds of trust or any of them, or to any plan whereby said defendant would receive any consideration except that received from said Home Owners' Loan Corporation. Our review of the record shows that there was substantial evidence to sustain these findings and, under the rules stated in the authorities above cited, we are satisfied that said findings support the conclusions of law declaring said notes and deed of trust void and the judgment ordering the cancellation of the same.

[2, 3] Said defendant now apparently contends, contrary to the position taken by it in the trial court, that the $760 note and deed of trust was given in settlement of plaintiffs' obligation under the original second deed of trust and, as only the indebtedness covered by the original first deed of trust was specifically mentioned in the recitals of its consent filed with the Home Owners' Loan Corporation, said defendant did not agree to accept the bonds in satisfaction of the indebtedness covered by the original second deed of trust. It is a sufficient answer to this contention to state that we find no evidence to sustain the claim that said $760 note and deed of trust were given in settlement of plaintiffs' obligation under the original second deed of trust. On the contrary, the evidence introduced in the trial court by plaintiffs and by said defendant showed that said $760 note and deed of trust were not given for that purpose. But furthermore, the consent signed by said defendant agreed to accept the bonds "in full settlement of the claim of the undersigned" and said defendant agreed "thereupon to release all claim of the undersigned against said property." Said consent was therefore sufficiently broad to cover every claim of defendant against the property including the original second deed of trust and any other note and deed of trust which had been taken by defendant to replace said original second deed of trust.

[4] Said defendant apparently further contends that even if the $760 note and deed of trust were void, there was a moral obligation on the part of plaintiffs to pay said $760 and that said moral obligation was sufficient consideration for the execution of the $400 note and deed of trust and the $360 unsecured note. But the fact that there may have been sufficient consideration for the execution of the instruments under attack is not decisive of this controversy. The $760 note and deed of trust, having been obtained secretly and without the knowledge or consent of the Home Owners' Loan Corporation, were void and unenforceable because against public policy. McAllister v. Drapeau, supra, 14 Cal.2d at page 109, 92 P.2d 911, 125 A.L.R. 800. It is obvious that the purpose of the legislation creating the Home Owners' Loan Corporation, as discussed in the authorities above cited, would be defeated if instruments secretly obtained by defendant to replace the void and unenforceable $760 note and deed of trust were not held to be likewise void and unenforceable as against public policy.

The judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

51 Cal.App.2d 322

LOVELL v. GRIFFIN et al.

Civ. 3026.

District Court of Appeal, Fourth District, California.

April 17, 1942.

Appeal and error 🔑781(4)

An appeal from orders terminating proceedings for reporter's transcript, and refusing to relieve appellant from default in failing to have transcript prepared and filed in time, would be dismissed on ground that question involved became "moot" in view of stipulation for reversal of judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Question".

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Appeals from Superior Court, Tulare County; Glenn L. Moran, Judge.

Action to quiet title by Caroline A. Lovell against Lillian S. Griffin and others as executors, etc., and others. From an adverse judgment, and from orders terminating proceedings for reporter's transcript and refusing to grant relief from a default, plaintiff appeals.

Judgment reversed, appeal from orders dismissed, and remittitur issued.

Victor T. Watkins, Stanley M. Evans, and F. D. R. Moote, all of Los Angeles, for appellant.

Lewis D. Collings and Edgar C. Smith, both of Los Angeles, for respondents.

MARKS, Justice.

Two appeals are presented here on the same record. The first is from a judgment entered against plaintiff in an action to quiet title. The parties and their attorneys have stipulated that this judgment may be reversed and the remittitur issued forthwith, each party to pay his own costs.

The second appeal is from an order terminating the proceedings to have prepared and certified a reporter's transcript on appeal, and from an order refusing to relieve plaintiff from her default in failing to have that transcript prepared and filed in time.

An inspection of the record on the appeal from the orders leads us to adopt the following language of the Supreme Court in denying a motion to dismiss the appeals: "The derelictions, if any, as set forth in the respective motions, were those of officers of the lower court, to wit, either its clerk or its stenographic reporter, or both." Lovell v. Deyoe, 16 Cal.2d 650, 107 P.2d 385.

As the judgment must be reversed under the stipulation, it is apparent that the questions presented on the appeal from the two orders have become moot and that the appeal from those orders should be dismissed.

The judgment is reversed. The appeal from the orders is dismissed. Neither party will recover costs of appeal. It is ordered that the remittitur issue forthwith.

BARNARD, P. J., and GRIFFIN, J., concurred.

FERRONI v. PACIFIC FINANCE CORPORATION OF CALIFORNIA et al.

FERRONI et al. v. SAME.*

Civ. 11799.

District Court of Appeal, First District, Division 1, California.

April 13, 1942.

Hearing Granted June 12, 1942.

1. Statutes 🔑225

Provision of Vehicle Code imposing liability on automobile owner for negligent operation of automobile by another, and providing that conditional seller shall not be deemed to be the "owner" of the automobile, should be construed with provision requiring dealer on transferring vehicle to give notice immediately of such transfer to department of motor vehicles, in determining whether a conditional seller having neglected to give such notice is attempting to take advantage of such omission. Vehicle Code, § 177, St.1935, p. 115; § 402, St.1937, p. 2353.

2. Automobiles 🔑244(32)

In some instances record registration of an automobile is conclusive as to liability under provision of Vehicle Code imposing liability on automobile owner for negligent operation of the automobile by another with owner's consent. Vehicle Code, § 402, St. 1937, p. 2353.

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* Subsequent opinion 135 P.2d 569.

3. Principal and agent 🔑14(2)

The relation of "agency" need not depend on express appointment and acceptance thereof, but it may be, and frequently is, implied from words and conduct of parties and circumstances of particular case.

See Words and Phrases, Permanent Edition, for all other definitions of "Agency".

4. Automobiles 🔑243(2)

On issue whether partnership dealing in automobiles or finance company was conditional seller of automobile involved in accident and was liable for negligent operation of the automobile by conditional buyer, evidence that procedure adopted by finance company, in affixing signature of partner to conditional sales contract as seller, was customary way of transacting business with partnership, was admissible as tending to overcome testimony that the execution of contract on behalf of partnership was not authorized. Vehicle Code, § 402, St.1937, p. 2353.

5. Appeal and error 🔑1056(1)

On issue whether partnership dealing in automobiles or finance company was conditional seller of automobile involved in accident and was liable for negligent operation of automobile by conditional buyer, exclusion of evidence that procedure adopted by finance company in affixing signature of partner to conditional sales contract as "seller" was customary way of transacting business with partnership, which was offered to overcome testimony that execution of contract on behalf of partnership was unauthorized, was prejudicial error. Vehicle Code, § 402, St.1937, p. 2353.

6. Appeal and error 🔑1178(6)

Where judgments for damages resulting from automobile accident determined issues of negligence, contributory negligence, and damages in favor of plaintiffs, and correctness of such determination was not challenged on appeal which involved issue whether automobile dealer or finance company was liable for negligent operation of automobile by conditional buyer thereof at time of accident, and judgment was reversed because of exclusion of evidence offered by the company on such issue, cause was remanded for new trial for sole purpose of ascertaining whether company or dealer was liable. Vehicle Code, § 402, St.1937, p. 2353.

7. Costs 🔑236

Where judgments for damages resulting from automobile accident determined issues of negligence, contributory negligence, and damages in favor of plaintiffs, and correctness of such determination was not challenged on appeal which involved issue whether automobile dealer or finance company was liable for negligent operation of automobile by conditional buyer thereof at time of accident, and judgment was reversed because of exclusion of evidence offered by the company on such issue, the costs of the appeals were all assessed against dealer. Vehicle Code, § 402, St.1937, p. 2353.

◆

Appeals from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Actions by Aurelia Ferroni, and by Serafino Ferroni and others, against the Pacific Finance Corporation of California and others, for injuries and death arising out of an automobile accident. From adverse judgments the named defendant appeals, and from the judgments insofar as they were in favor of defendant Pacific Motor Sales, the plaintiffs appeal.

Judgments reversed and causes remanded for new trial in accordance with opinion.

Dinkelspiel & Dinkelspiel and Alfred Del Carlo, all of San Francisco, for plaintiffs and appellants.

O'Connor, Neubarth & Moran and Harold H. Cohn, all of San Francisco, for defendant and appellant.

Daniel J. O'Brien, Jr., and R. H. Cormany, both of San Francisco, for defendants and respondents.

WARD, Justice.

These consolidated actions are to recover damages for the death of Gabriello Ferroni and for personal injuries to Julia Ferroni arising out of an automobile accident which occurred when an automobile in which they were riding collided with one being operated by John T. McConnville. The latter had purchased the car on November 2d, the day prior to the accident, under the following circumstances: One Houser, an independent automobile salesman, visited the premises of the Pacific Motor Sales on that day with McConnville; they selected a car; Houser was given the net price thereof, and with the permission of the motor sales company he and McConnville took it out for a demonstration. Upon their return, Houser advised the motor sales company that the purchase had been made; that it was an installment sale, and that Pacific Finance Corporation of California would finance the transaction. Pacheco, one of the partners of the sales company, in its behalf authorized by his signature the purchase order signed by McConnville, which contained the following provision: "It is understood and agreed that the Title of Ownership of car as above described does not pass to me until the final cash payment is made." On the same day the motor sales company confirmed the sale with the finance corporation, received the latter's check in its favor for $319.30 (which amount covered the net price of the car as quoted by the motor sales company to the salesman Houser, plus the salesman's commission and the sales tax), and in turn delivered to the finance company the "pink and white" certificates for the car. It should be mentioned in this connection that these certificates, duly endorsed by former respective owners of the car (neither showing registration nor ownership in the motor sales company) were received by the Motor Vehicle Department for transfer to McConnville as registered owner, and to the finance corporation as legal owner, on November 9th, six days after the accident. McConnville had endorsed the certificate of ownership as "purchaser" and the finance company as "new legal owner."

With regard to McConnville's transaction in the meantime with the finance corporation, an employee of the latter had inserted as "seller" or vendor in the body of the conditional sales contract, the name of Geis, one of the partners of the motor sales company. Such employee had also signed the contract, and an assignment to the finance corporation, "Geo. D. Geis." All details in the sale of the car appear to have been completed on November 2d, the day prior to the accident.

The consolidated actions were tried without a jury. Judgment in favor of plaintiffs Ferroni was entered in each action against defendants McConnville and the finance corporation, and against plaintiffs in favor of defendants Pacheco and Geis, copartners in the motor sales company. The finance corporation appeals from the judgment in favor of plaintiffs in each action. Plaintiffs appeal from both judgments insofar as they are in favor of the motor sales corporation. They urge that the judgment against the finance corporation stand, but the appeals are precautionary interposed for the purpose of preserving the rights of the plaintiffs. In effect, plaintiffs request that in the event the judgment against the finance corporation is reversed, they may hold the motor sales company if upon retrial the liability of the latter should be established. All points urged on appeal are primarily directed to the question of the liability of the finance corporation under Vehicle Code section 402, St.1937, p. 2353, wherein "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle * * * by any person using or operating the same with the permission, express or implied, of such owner."

The subject of conditional vendor, and the construction to be placed upon Vehicle Code section 402, have been treated in Guillot v. Hagman, 30 Cal.App.2d 582, 86 P.2d 865; Bunch v. Kin, 2 Cal.App.2d 81, 37 P.2d 744; Schmidt v. C. I. T. Corporation, 14 Cal.App.2d 92, 57 P.2d 1016; Helmuth v. Frame, 46 Cal.App.2d 372, 115 P.2d 846; Parke v. Franciscus, 194 Cal. 284, 228 P. 435.

McConnville concededly is the conditional vendee. The question is, which of the firms as vendor transferred rights to him as such. From the facts that, after negotiations with the motor sales company, the "purchase order" form of that company was used in the transaction; that such company made delivery of the car to McConnville and delivered certificates of ownership and registration to the finance corporation, an inference may be drawn that the motor sales company was the vendor, unless it appears from the evidence that the latter, on receipt of the payment made by the finance corporation, had transferred to such corporation its interest therein. There is no evidence of such sale or assignment except by the delivery to it of the "slips" and the payment by it above mentioned. As stated, the finance corporation, although it appears to be registered as the legal owner, prepared the conditional sale contract showing Geis (one of the partners of the motor sales company) as seller and McConnville as purchaser. Such contract was followed by an "Assignment," executed by the seller named in the contract, in favor of the finance corporation.

If the finance corporation was the vendor, such an assignment would appear to have been superfluous. The testimony of both partners of the motor sales company was that the execution of the conditional sales contract by an employee of the finance corporation for and on behalf of Geis as seller or vendor was unauthorized. If the finance corporation was in fact authorized to transact the conditional sale on behalf of the motor sales company, or of Geis, one of its partners, the fact that the motor sales company subsequently refused to ratify the contract would not affect its liability as conditional vendor. If it was not, the transfer by the motor sales company to the finance corporation of the certificates endorsed by their former holders would appear to make the finance company the conditional vendor to the McConnville transaction. The theory of the motor sales company is that it sold the car to the finance corporation and that the latter was in fact the conditional vendor by direct sale. The trial court found that on the date of the accident the finance company was the owner of the motor vehicle in question, and Pacheco and Geis, copartners doing business as Pacific Motor Sales, were not. Whether, by virtue of a prior course of conduct between them the finance corporation was authorized to procure McConnville's signature to a contract of conditional sale binding the motor sales company as vendor, is of importance.

Ordinarily in transactions of the kind the "dealer" is the conditional vendor, the "finance company" simply contracting with the purchaser to finance the sale. In some instances the finance company is in fact the conditional vendor, though it may, as a matter of business convenience, in the preparation of transfer instruments purport to act as the agent of the dealer, and, so far as the record indicates, appear as the vendor.

[1, 2] Vehicle Code section 402 should be construed with section 177, St.1935, p. 115, and, when applicable, other sections, in determining whether a conditional vendor, having neglected to comply with the provisions of the Vehicle Code, is attempting to take advantage of such omission. In some instances, record registration is conclusive as to liability (Helmuth v. Frame, 46 Cal.App.2d 372, at page 376, 115 P.2d 846, and cases cited), but the actual conditional vendor should not escape liability by such a strict interpretation of the sections as will thrust the burden of liability upon one who is only technically liable. Helmuth v. Frame, supra; Schmidt v. C. I. T. Corporation, supra; McCalla v. Grosse, 42 Cal.App.2d 546, 109 P.2d 358.

Appellant finance corporation sought to introduce evidence that the procedure it adopted in the matter of affixing Geis' signature as "seller" to the conditional sale contract was the normal and customary way of transacting business with the motor sales company. An objection to such evidence was sustained and an offer of proof rejected. The offer of proof of a course of dealing theretofore followed was made in an effort to overcome the testimony that the execution was unauthorized. The objection that the offer of proof was insufficient is not well founded.

[3] Previous performance of acts like the one in question, and acquiescence by the principal, is a recognition and approval of an assumed agency, particularly when the alleged principal has accepted the benefits derived from the transaction. In Smith v. Schuttpelz, 1 Cal.2d 158, 161, 33 P.2d 836, 838, the court said: "The relation of agency need not depend upon express appointment and acceptance thereof, but it may be, and frequently is, implied from the words and conduct of the parties and the circumstances of the particular case." 1 Mechem on Agency, 2d Ed., sec. 271; 2 C.J.S., Agency, § 68, pp. 1048–1049; Mischel v. Harnden, 63 N.D. 107, 246 N.W. 644; MacDonnell v. California Lands, Inc., 15 Cal.2d 344, 101 P.2d 479; Pacific Acceptance Corp. v. Jones, 95 Cal.App. 365, 272 P. 1084; Caspary v. Moore, 21 Cal.App.2d 694, 70 P.2d 224.

[4, 5] In the present record as it stands there is sufficient evidence to sustain the judgments of the court. However, under all of the circumstances herein we think it was error, prejudicial to the rights of appellant finance company, to reject the proffered testimony, the admission of which might have resulted in a contrary judgment. It is obvious that either the finance corporation or the motor sales company or both, is or are liable for the damages suffered by plaintiffs. The issues of the negligence of McConnville and the contributory negligence of plaintiffs have been determined by the judgments heretofore entered; likewise the issue of the amounts of damages has been settled by such judgments. On these appeals the correctness of these determinations is not challenged.

No useful purpose would be served by retrying those issues.

[6, 7] The judgments in favor of Aurelia Ferroni and Serafino Ferroni and Julia Ferroni, his wife, respectively entered against the Pacific Finance Corporation of California, and against them in favor of defendants Louis Pacheco and George D. Geis, copartners doing business as Pacific Motor Sales, from which appeals were taken by the plaintiffs Ferroni and the Pacific Finance Corporation of California, are and each of them is reversed, and the cause is remanded for a new trial for the sole purpose of ascertaining whether the finance corporation or the motor sales company is liable. Under the circumstances of these cases justice requires that the costs of all the appeals should be assessed against the Pacific Motor Sales. It is so ordered.

PETERS, P. J., and KNIGHT, J., concurred.

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51 Cal.App.2d 272

KROEKER et al. v. JACK et al.

Civ. 3003.

District Court of Appeal, Fourth District, California.

April 15, 1942.

1. New trial ⇨93

Prior to 1931, a trial court was without jurisdiction to grant a new trial where because of the death of the court reporter a reporter's transcript could not be prepared.

2. New trial ⇨93

Under statute authorizing new trial upon reporter's death or disability rendering it impossible to obtain full transcript, trial court had wide discretion. Code Civ.Proc. § 953e.

3. Appeal and error ⇨980

An appellate court is not warranted in disturbing the action of a trial court in denying a motion for new trial made under statute authorizing new trial upon court reporter's death or other disability rendering it impossible to obtain full transcript unless it clearly appears that trial court abused its discretion. Code Civ.Proc. § 953e.

4. Appeal and error ⇨933(1)

On appeal from an order denying a new trial, made under statute authorizing new trial upon court reporter's death or disability rendering it impossible to obtain full transcript, every presumption is in favor of the fairness and regularity of the proceedings in the trial court and party in whose favor judgment was rendered is entitled to benefit of those presumptions unless it is clear that trial court abused its discretion in denying the motion. Code Civ.Proc. § 953e.

Appeal from Superior Court, Kern County; Pat R. Parker, Judge.

Action by Jake Kroeker against George W. Jack. From an order denying a motion for new trial, plaintiff appeals

Affirmed.

H. E. Schmidt, of Bakersfield, Edwin P. Jacobsen, of Delano, and Borton, Petrini, Conron & Borton, of Bakersfield, for appellants.

George A. Westover and Higgs & Fletcher, all of San Diego, Elliott, Vedder, Sullivan & Dunham, of Los Angeles, and Claflin, Dorsey & Campbell, of Bakersfield, for respondents.

SCHOTTKY, Justice pro tem.

This is an appeal from an order denying a motion for a new trial, made under section 953e of the Code of Civil Procedure.

It appears from the evidence filed in support of said motion that said action was tried before the court on April 8, 9, 10, 11 and 12, 1940, and that judgment in favor of respondents was entered on June 13, 1940; that a notice of appeal was filed and a request and order for the preparation of a transcript made under the alternative method and that appellants paid to the reporter the sum of $515 therefor; that the evidence at the trial consisted almost entirely of oral testimony of witnesses and that the various counsel for appellants cannot recall the testimony, rulings and proceedings with sufficient accuracy to prepare a bill of exceptions; that certain oral stipulations were made in open court, the wording of which cannot be recalled by counsel with sufficient accuracy to prepare a record thereof; that after the filing of the notice of appeal, F. Roy Davis, the official court reporter, secured an order extending his time for the preparation of said transcript to November 6, 1940; that commencing about August 14, 1940, counsel for appellants contacted said reporter on numerous occasions and endeavored to have said reporter complete said transcript, but said reporter became ill in November, 1940, and was unable to complete the transcript; that said reporter died on May 20, 1941; that counsel for appellants have been informed by all of the court reporters of Kern County that they could not read or transcribe the notes of said reporter.

[1] Prior to 1931, a trial court was without jurisdiction to grant a new trial in a case where, because of the death of the court reporter, a reporter's transcript could not be prepared. Diamond v. Superior Court, 189 Cal. 732, 210 P. 36. The legislature in 1931 added a new section to the Code of Civil Procedure numbered 953e, which section reads as follows: "Impossibility of obtaining transcript because of death or disability of reporter: Vacation of judgment or granting new trial. When it shall be impossible to have the phonographic report of the trial transcribed by a stenographic reporter as provided by section 953a of this code because of the death or other disability of a reporter who participated as a stenographic reporter at the trial, the court or a judge thereof shall have power to set aside and vacate the judgment, order or decree from which an appeal has been or is to be taken and to order a new trial of the action or proceeding."

[2] As was stated by Mr. Justice Jennings in Moore v. Specialty Oil Tool Co., 128 Cal.App. 662, at page 664, 18 P.2d 82, at page 83: "The very language of this statute indicates a clear intention on the part of the lawmaking body to authorize a trial court to grant a new trial in a proper case. But this is the extent of the language employed. There is no intimation or suggestion that there is imposed upon the court a duty to grant a new trial. The words 'shall have power' are not equivalent to 'must.' We are of the opinion therefore that the statute under consideration vests in the trial court jurisdiction to entertain a motion for a new trial under the circumstances herein appearing, and a discretion to grant or refuse such motion. Nor is it a violent assumption that the discretion thus conferred is a wide discretion."

In Conlin v. Coyne, 19 Cal.App.2d 78, at page 83, 64 P.2d 1123, at page 1125, the court said: "The affidavits, as we have said, stated that defendants could appeal only upon the clerk's transcript and, again, that it was 'impossible for defendants to prosecute in any manner whatsoever the Appeal heretofore taken.' Evidently the judge believed that he knew better, and in this he was not shown to have been wrong. The generalities and conclusions in the affidavits were entirely insufficient to support the contentions of defendants, especially in view of the fact that the makers of the affidavits were stating that something could not be done which at the time the statements were made had not even been attempted. The ruling of this court must be that no abuse of discretion appears to have been committed in denying the motion for a new trial made under section 953e."

In both of the above-mentioned cases a hearing was denied by the Supreme Court.

[3] It thus appears that a very wide discretion is conferred upon the trial court in passing upon a motion for a new trial under said section, and it must be made clearly to appear that such discretion has been abused before an appellate court is warranted in disturbing its action. In the instant case, no errors on the part of the trial court are asserted to have occurred, and no statement is made in the affidavits, or otherwise, that there is any likelihood that the court would arrive at a different conclusion upon a retrial.

[4] There may be an occasional hardship in denying a motion for a new trial in a case such as this. On the other hand, an injustice may easily be worked if the rule were otherwise than to vest a wide discretion in the trial court in passing upon such a motion. Every presumption is in favor of the fairness and regularity of the proceedings in the trial court which led to the judgment. The party in whose favor the judgment is rendered is entitled to the benefit of those presumptions and should not be forced to reestablish his claim unless it is clear that the trial court abused its discretion in denying the motion. Taking the entire record in this proceeding into consideration we do not believe it can be held that the denial of the motion by the trial court was an abuse of discretion.

The order denying appellants' motion for a new trial under section 953e is affirmed.

BARNARD and MARKS, JJ., concurred.

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51 Cal.App.2d 235

VAN GAMMEREN et al. v. CITY OF FRESNO et al.

Civ. 2672.

District Court of Appeal, Fourth District, California.

April 13, 1942.

Hearing Denied June 12, 1942.

1. Appeal and error 🔑1009(2)

In suit to enjoin city and city officials from interfering with plaintiffs in their delivery of pasteurized milk within city limits, a finding that milk produced and sold by plaintiffs met all the requirements of state law and the city ordinances except an ordinance requiring pasteurization within the city limits, supported by substantial evidence, was final on appeal.

2. Food 🔑1

Ordinance declaring unlawful the sale or delivery of pasteurized milk within corporate limits unless it had been pasteurized within corporate limits and under inspection required by the ordinance was void as respects producers outside the city and within the approved county inspection district as "discriminatory" and unreasonable.

See Words and Phrases, Permanent Edition, for all other definitions of "Discriminatory".

3. Injunction 🔑108

Where milk producers had been notified by city chief milk inspector that they must stop selling milk to customers of a subdivition proposed to be annexed on annexation because producer's plant was located outside city limits and an ordinance required pasteurized milk sold within city to be pasteurized therein under city inspection system, producers were entitled to maintain action to enjoin enforcement of the order without applying for a permit to sell and deliver milk and exhausting the right of appeal to city authorities provided by the ordinance.

4. Action 🔑10

The law does not require useless acts from litigants as prerequisites to seeking relief from the courts.

5. Appeal and error 🔑1152

In action to enjoin city and city officials from interfering with plaintiffs in delivery of pasteurized milk within city limits, judgment enjoining enforcement of ordinance requiring pasteurized milk sold within city limits to be pasteurized within the city was not required to be reversed on ground that an additional portion restraining defendants from interfering with plaintiffs' carrying on their business and selling pasteurized milk to customers within the city went beyond plaintiffs' pleadings where the additional portion could be stricken.

Appeal from Superior Court, Fresno County; Stanley Murray, Judge.

Action by Elizabeth Van Gammeren, as administratrix, and others against the City of Fresno, Cal., and others, to enjoin defendants from interfering with plaintiffs in their delivery of Grade A pasteurized milk within the limits of the City of Fresno. From an adverse judgment, defendants appeal.

Judgment modified and affirmed as modified.

C. M. Ozias, City Atty., of Fresno, for appellants.

Frederick W. Docker, of Fresno, for respondents.

MARKS, Justice.

This is an appeal from a judgment enjoining appellants from interfering with respondents in their delivery of Grade A pasteurized milk within the limits of the city of Fresno.

Fresno is a chartered city. The individual appellants are the members of its board of health, its city health officer, and the city veterinarian and chief milk inspector.

In 1922, the city of Fresno adopted an ordinance regulating the sale of milk within its limits. Subsection four of section nine provided in part as follows:

"It shall be and is hereby declared unlawful for any person in said City: * * * to sell or deliver any milk or cream for drinking purposes within said City that has been pasteurized, unless it has been pasteurized within the City and under the inspection herein required."

While the ordinance has been variously amended, this subsection has remained substantially unchanged.

Respondents are processors and deliverers of milk for human consumption. They each operate a pasteurizing plant outside the limits of the city of Fresno. The distance of the farthest plant from the city limits is four miles. The closest was about one mile from those limits when this action was instituted, and only about three blocks distant after the annexation of certain territory to the city of Fresno. This annexation took place after this case was started.

In 1940, the proceedings to annex the Sierra Vista Addition to the city were had. After the annexation election, but before those proceedings became final, D. F. Coyner, as chief milk inspector of the city of Fresno, notified respondents that as soon as the annexation proceedings became final they would be required to discontinue delivery of milk to their customers within the annexed district for the sole reason that their pasteurization plants were not within the city limits. Respondents promptly brought this action to enjoin appellants from enforcing this order.

After the complaint was filed another district in which respondents had customers was annexed to the city of Fresno and a supplemental complaint was filed seeking the same relief as to this territory.

The city of Fresno has an approved milk inspection service. The county of Fresno, outside of its municipalities, also has an approved milk inspection service. By a contract between the city and county it was provided that the milk inspection service of the city of Fresno should act as the inspection service of the county. The inspection services were approved by the state department of agriculture. D. F. Coyner and his deputies made the milk inspections in the city of Fresno and D. F. Coyner himself made the inspections in the county territory. He regularly inspected respondents' dairies and each of them received scores of eighty points or higher. There were five pasteurization plants within the city of Fresno which were inspected by Coyner or his deputies. Some of their scores were higher and some were lower than the scores of respondents' dairies.

[1] It was alleged in the complaint, and found to be true, that the milk produced and sold by respondents met all of the requirements of the laws of the state and Fresno ordinances except as to the provisions of the latter requiring pasteurization to be done within the city limits. As there is substantial evidence supporting this finding, it is final here.

It is clear from the reading of the complaint that respondents' only purpose in the action was to enjoin appellants from preventing them from delivering their milk in Fresno for the sole reason that their pasteurization plants were outside the limits of Fresno, while at the same time permitting the delivery and sale of milk of equal or less grade from plants within the city limits. This view was confirmed by their counsel during the oral arguments. We therefore conclude that the sole question presented here is the validity of the quoted subsection of the Fresno ordinance and that we are not concerned with the sale and delivery of milk within the city of Fresno which falls below the quality, grade and purity specified in its ordinances.

Appellants rely principally upon the case of Witt v. Klimm, 97 Cal.App. 131, 274 P. 1039, as supporting their argument that Fresno cannot be put to the expense of inspecting pasteurization plants outside of the city limits as some of them might be many miles away and the expense could become very burdensome. In the Witt case, the ordinance involved, provided that milk brought from another inspection district must be pasteurized in San Francisco if it were to be sold in that city as pasteurized milk.

In a later case, LaFranchi v. City of Santa Rosa, 8 Cal.2d 331, 65 P.2d 1301, 1304, 110 A.L.R. 639, the facts are practically identical with the facts of the instant case. The Supreme Court distinguished Witt v. Klimm, supra, from that case and held that decision not applicable to the facts there presented. In concluding that the portion of the Santa Rosa ordinance, in every respect similar to the portion of the Fresno ordinance in question here, was discriminatory, unreasonable and void, the Supreme Court said:

"A late case along the same general lines is that of Sheffield Farms Co. v. Seaman, 114 N.J.L. 455, 177 A. 372, 375, decided in February, 1935. The board of health refused a permit because of a limited budget which prevented the making of inspections at distant places and also because their city had a sufficient supply. The court there said: 'It will serve no useful purpose to answer or further discuss the purported reason argued upon which the refusal is sought to be justified. Suffice it to say that the meager facts, relevant as to the occasion and history of the refusal, lead us to the conclusion that they are without substance. They are excuses rather than legal reasons. The city just took the position that it had enough milk dealers and that it had the situation "well in hand." Such a position is unreasonable; it is arbitrary, capricious, and discriminatory. It unlawfully curtails prosecutor's common-law right to engage in a lawful business, notwithstanding that it has fully complied with the requirements of the state and city. This the city cannot lawfully do.'

"Again in Grant v. Leavell, 259 Ky. 267, 82 S.W.2d 283, decided in April, 1935, that part of an ordinance was declared invalid which required such plants to be located within the city. In other words, it has been held quite generally that the city limits as the boundary line outside of which plants may not be located if the milk is to be sold within the city do not have a reasonable relationship to a proper legislative object and therefore ordinances fixing such a boundary are invalid.

"In line with the authorities from other jurisdictions from which we have quoted are those from our own courts declaring that ordinances designed for the purpose of erecting tariff barriers are void, such as Ex parte Frank, 52 Cal. 606, 28 Am.Rep. 642; In re Hines, 33 Cal.App. 45, 164 P. 339; In re Hart, 36 Cal.App. 627, 172 P. 610; In re Riley, 39 Cal.App. 58, 177 P. 854, and In re Robinson, 68 Cal.App. 744, 230 P. 175."

[2] For the same reason we must hold that the provisions of the subsection four of section nine of the Fresno ordinance which we have quoted is void and of no effect.

[3, 4] Appellants urge that as the Fresno ordinance gave respondents the right to apply for a permit to sell and deliver their milk in Fresno, and the right of appeal to city authorities if their applications were denied, and as they failed to do this and thus exhaust the remedies provided by the ordinance, their action was premature and the judgment should be reversed. They cite numerous well-considered authorities supporting the general principles upon which this argument is based, but we do not consider those authorities applicable to the facts here.

Respondents had been notified by a responsible officer of the city of Fresno that they must stop selling milk to their customers as soon as those customers became residents of the city of Fresno, for the sole reason of the location of respondents' plants outside the city limits and the provisions of the ordinance. The city officers had been enforcing those provisions and expressed the intention of continuing to do so. The ordinance was prohibitory and prevented the issuance of permits to respondents. As appellants had been enforcing its terms, expressed the intention of enforcing them against respondents and were bound by them, if they were constitutional, the trial court was not required to assume that appellants would violate them before they were held void by court order. When confronted by that ordinance which controlled the action of the city officials it is apparent that applications for permits, and appeals from adverse decisions, would have been useless acts. The law does not require useless acts from litigants as prerequisites to seeking relief from the courts.

[5] Appellants further urge that the judgment goes farther than merely enjoining the enforcement of subsection four of section nine of the ordinance. After enjoining the enforcement of that subsection the judgment proceeds as follows:

"* * * or from in any manner hindering, delaying, interfering with, restricting or preventing plaintiffs or any of them, their agents, servants or employees, from carrying on their respective businesses, and the sale, distribution and delivery of pasteurized Grade A milk to customers of the respective plaintiffs in the City of Fresno, State of California."

Appellants argue that should respondents' milk fall below the quality, purity or grade required by the city of Fresno, the quoted portion of the judgment would prevent the city officials from stopping its sale in Fresno. We are inclined to agree with this argument. The quoted portion of the judgment goes beyond the purpose of respondents in bringing their action as expressed in their pleadings and by their counsel. However, this does not necessitate a reversal of the judgment as it is divisible and the quoted portion may be stricken therefrom, leaving the remaining portion intact.

The judgment is modified by striking the quoted portion therefrom and as so modified is affirmed. Neither party will recover costs of appeal.

BARNARD, P. J., and GRIFFIN, J., concurred.

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51 Cal.App.2d 296

TARVIN et al. v. DAVEY et al.

Civ. 2960.

District Court of Appeal, Fourth District, California.

April 16, 1942.

1. Appeal and error 🔑612(1)

Where clerk's transcript contained evidentiary matter which was in no way authenticated, such matter could not be considered on appeal.

2. Appeal and error 🔑659(3)

Where record did not disclose that any notice had been given for preparation of transcript and there was no reporter's transcript in appellate court, motion for diminution of record asking to have stipulation added to and made a part of the clerk's transcript was denied since such matter had no place in the clerk's transcript. Code Civ. Proc. § 953a.

3. Appeal and error 🔑635(3)

Where no record was before appellate court with respect to evidence considered by trial court but clerk's transcript was sufficient for presentation of any questions which might be raised on the judgment roll alone, countermotion to dismiss appeal was denied.

◆

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Action by William C. Tarvin, and others, against K. R. Davey, and others. From the judgment defendants appeal. On motion for diminution of record and counter motion to dismiss appeal.

Motions denied.

W. E. Kalbfleisch, of Corona, for appellants.

Alphonse E. Ganahl, of Corona, for respondents.

BARNARD, Presiding Justice.

This is a motion for diminution of the record with a counter-motion to dismiss the appeal.

[1] The judgment appealed from was entered on July 10, 1941. A notice of appeal was filed on December 22, 1941. No reporter's transcript has ever been filed. A clerk's transcript was filed on October 16, 1941, containing some evidentiary matter which is in no way authenticated. This matter may not be considered on this appeal.

[2] There is nothing in the record before us to show that any notice was ever given for the preparation of a transcript under section 953a, Code of Civil Procedure. However, the notice of motion for diminution of the record has attached to it what purports to be a copy of such a notice to the clerk, stating that the only portion of the reporter's notes which was desired was a certain stipulation made during the trial. In the motion for diminution now made it is asked to have this stipulation added to and made a part of the "clerk's" transcript. It is apparent that this matter has no place in the clerk's transcript, there is no reporter's transcript here, and there is no record which might be augmented through the motion here made.

[3] While there is no record before us with respect to the evidence considered by the trial court, the clerk's transcript is sufficient for the presentation of any questions which may be raised upon the judgment roll alone. For this reason the respondent's counter-motion to dismiss the appeal must be denied.

Both motions are denied.

MARKS and GRIFFIN, JJ., concurred.

MATHER v. MATHER et al.*

Civ. 13266.

District Court of Appeal, Second District, Division 1, California.

April 15, 1942.

Rehearing Granted May 11, 1942.

1. Judgment 🔑326

In action to rescind property settlement agreement including assignment of half interest in approved claim against an estate, where answer of the administrators of such estate placed funds held by them for payment of such claims at the disposal of the court and court expressly found that half interest in claim was assigned by agreement, judgment nunc pro tunc did not deviate so materially from original findings as to render it invalid in that it directed payment to assignee of sum admittedly in hands of administrators subject to direction of the court.

2. Judges 🔑32
Judgment 🔑297

Where findings are filed, which constitute the rendition of judgment, court retains power to amend or change the conclusions of law so as to point to a different judgment and to enter a judgment different from that first pronounced, and such power continues until the entry of the judgment, and such change may be made by a judge other than the one who tried the case.

3. Appeal and error 🔑452

Trial court retains complete jurisdiction of a case until the judgment is entered and cannot be divested of such jurisdiction by any unauthorized appeal.

4. Judgment 🔑297

Where an appeal is taken prematurely before entry of judgment, the affirmance of purported judgment does not prevent the subsequent entry by trial court of another and different judgment, since no jurisdiction is acquired by the premature appeal.

5. Appeal and error 🔑460(2)

Appeal from purported judgment, which was in fact void entered upon demurrer to one of three counts contained in complaint did not effect a stay of proceedings in trial court so as to render void further proceedings had therein on the other two counts during pendency of such appeal.

6. Judgment 🔑326

Where purported but actually void judgment as to third count of complaint was entered on demurrer, failure of judgment as entered at the close of trial of first and second counts to dispose of such third count was not a judicial error but a "clerical mistake" or "misprision" only that could be corrected so as to conform judgment to findings filed by court by the entry of judgment nunc pro tunc.

See Words and Phrases, Permanent Edition, for all other definitions of "Clerical Mistake" and "Misprision".

7. Judgment 🔑326

The power to correct a clerical mistake or misprision by entry of judgment nunc pro tunc may be exercised by trial court at any time on its own motion or that of a party with or without notice.

8. Husband and wife 🔑279(2)

In action to rescind property settlement agreement, wherein court found that plaintiff should take nothing by his complaint and that defendant was entitled under agreement to a one-half interest in a claim against an estate, the administrators of which had filed answer setting forth that specified sum was being held on account of claim subject to court's direction, defendant was entitled only to judgment directing payment to her of a half of such sum held by administrators and judgment providing for payment of the whole thereof should be modified.

9. Appeal and error 🔑709

Where it was impossible to determine from the record what the proper amount of costs should be or that the amount awarded was incorrect, District Court of Appeal would not pass upon the question of costs.

10. Courts 🔑476

The fact that following the entry of purported but actually void judgments further proceedings were had in the matter in another court did not deprive trial court in which case was first tried of its power to enter final judgment "nunc pro tunc" upon the findings made therein and upon the ruling on demurrer.

See Words and Phrases, Permanent Edition, for all other definitions of "Nunc Pro Tunc".

11. Husband and wife 🔑278(1)

The fact that wife obtained an interlocutory decree of divorce in California two

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* Subsequent opinion 126 P.2d 960.

months after she and her husband entered into a property settlement agreement in Hawaii established that at the time agreement was entered into, the parties were residents of California and that situs of the property involved was also California, so that the law of that state rather than of Hawaii governed the validity of the agreement and wife's capacity to contract with husband.

12. Husband and wife ⚷278(2)

The established "public policy" of California regarding the right of married women to contract with their husbands as to property settlements formed an integral part of such an agreement between husband and wife domiciled in California and must control notwithstanding the law of the place where contract was made.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Policy".

13. Husband and wife ⚷279(2)

Court did not abuse its discretion in refusing to permit further amendment to count seeking rescission of property settlement agreement on the ground of wife's incapacity to contract with husband under law of place where agreement was made, where validity of agreement was not governed by such law but by law of the domicile of contracting parties.

14. Appeal and error ⚷78(1)

An order granting entry of judgment nunc pro tunc was an intermediate ruling of the court and not an "appealable order".

See Words and Phrases, Permanent Edition, for all other definitions of "Appealable Order".

15. Appeal and error ⚷82(3)

An appeal would not lie from an order denying motion to vacate judgment where the grounds upon which it was sought to vacate the judgment were available on appeal from the judgment and existed before the entry thereof.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by A. W. Mather against Anna Inez Mather and others for rescission of a property settlement agreement between plaintiff and named defendant wherein Edna Greenfield, as administratrix, etc., and other, filed an answer in the nature of an interpleader. From a judgment entered nunc pro tunc in favor of named defendant, from order granting motion for entry thereof nunc pro tunc, and from an order denying motion to set aside such judgment and the order granting entry thereof, plaintiff and interpleaders appeal.

Judgment modified and as modified affirmed and appeals from orders dismissed.

Marcel E. Cerf, Robinson & Leland and Gavin McNab, Schmulowitz, Aikins & Wyman, all of San Francisco, for appellants.

Don Lake and James R. Jaffray, both of Los Angeles, for respondents.

DORAN, Justice.

Plaintiff and certain defendants appeal from a final judgment, from an order granting a motion for entry thereof nunc pro tunc, and from an order denying a motion to set aside the said judgment and the order granting entry thereof. The action was one brought by plaintiff for rescission of a certain property settlement agreement between plaintiff and the defendant Anna Inez Mather, plaintiff's wife at the time. The complaint contained three counts for rescission, the first two based upon fraud and misrepresentation, and the third upon the alleged invalidity of the agreement because of its having been made in the Territory of Hawaii at a time when, according to plaintiff's allegations, the laws of that territory did not permit a wife to make a contract with her husband. The other defendants here appealing were joined in the action as administrators of the estate of Louis R. Greenfield, deceased, against which it was alleged plaintiff held an approved claim with an unpaid balance of $38,699, together with accrued interest. Part of the property transferred by the aforesaid agreement to the defendant Anna Inez Mather was a one-half interest in this claim. These defendant administrators filed an answer to the complaint herein to the effect that they held on account of the claim in question, and for whom it might concern, the sum of $12,549.60; and that various assignments and notices of assignment had been served upon these defendants affecting the said fund, defendant Anna Inez Mather, also known as Dorothy Devore Mather, being among the claimants to said fund. The defendant administrators then averred in their answer that they were holding the said sum subject to the order and direction of the court, and asked that they might be dismissed with their costs and released from all further liability toward the parties to the action and towards all claimants to the fund. This answer was in the nature of an interpleader. Successive demurrers to the third count of the complaint were sustained; and upon sustaining the fourth such demurrer the court denied plaintiff's request for leave to amend further. Thereafter, and before trial of the other counts, a purported judgment was entered January 4, 1935, upon the order sustaining the demurrer to the third count. On February 7, 1935, plaintiff filed notice of appeal from this purported judgment. On February 18, 1935, the action proceeded to trial upon the first and second counts of the complaint. At the conclusion of the trial the court found against plaintiff and in favor of defendant Anna Inez Mather. Among other facts, the court found that it was true that the plaintiff assigned and transferred to the defendant Anna Inez Mather a one-half interest in his title to the approved claim against the estate in question. The trial court also found generally that plaintiff and defendant were intermarried on December 18, 1925, separated June 10, 1933, divided their property June 16, 1933; and an interlocutory judgment of divorce of said marriage was entered August 18, 1933; that at the time of the marriage of plaintiff and said defendant each was possessed of separate property, and during their marriage each contributed to their community property; that at the time of their separation the property of plaintiff and defendant was intermingled and consisted of their separate, community and joint property; that at the time plaintiff and said defendant divided their property, June 16, 1933, such intermingled property was distributed between them by mutual consent, without fraud, undue influence or mistake on the part of either party, and such distribution was then and there wholly executed and completed. The trial court thereupon concluded that plaintiff should take nothing by reason of his complaint, that the answering defendants should have their costs, and that a temporary injunction theretofore allowed in the action should be and was dissolved. This injunction restrained the estate in question and the administrators thereof from paying any further moneys to the defendant Anna Inez Mather under the assignment made by plaintiff of the one-half interest in his claim against the said estate. The findings of fact and conclusions of law were filed March 12, 1935. Judgment was then entered March 14, 1935. However, this last document omits any reference to the previous disposition of the third count upon demurrer and on its face purports to be merely a judgment entered upon the findings and conclusions of the court at the close of the trial of the first and second counts of the complaint. Notice of appeal from this purported judgment was filed by plaintiff on March 15, 1935. The record reveals that the "purported" appeal from the "judgment" on the third count was dismissed by the Supreme Court on March 17, 1936; and that the appeal from the "judgment" on the first and second counts was dismissed by the same court on September 10, 1935. On December 7, 1939, defendants Anna Inez Mather and Lessie G. Williams made a motion for entry of a final judgment, nunc pro tunc as of March 14, 1935, which motion was granted; and such a judgment was so entered on December 12, 1939. It is from this judgment that the appeal herein is taken, as well as from the order granting the motion to enter such judgment and from the order denying the motion to set the said judgment aside.

Appellants contend that the motion for entry of the judgment nunc pro tunc was made upon insufficient notice; that the judgment was improper because the judge who ordered the same entered was not even on the bench at the time the case was tried, and made new findings and changed the findings and conclusions previously rendered by the trial judge; that a nunc pro tunc entry of judgment may not be used to correct an erroneous judgment, or to affect rights acquired in the interim; that neither the court nor the clerk may enter a judgment which does not conform to the order for judgment made by the trial court; that, moreover, the appeal taken from the "judgment" upon the demurrer sustained as to the third count stayed all further proceedings in the trial court, and proceedings thereafter taken in the trial court during the pendency of that appeal are void. Appellants also contend that the trial court erred in sustaining the demurrer to the amended third count of the complaint.

The status of the two judgments, upon the third and upon the first and second counts, has already been considered by the Supreme Court. Mather v. Mather, 5 Cal. 2d 617, 55 P.2d 1174; Greenfield v. Mather, 14 Cal.2d 228, 93 P.2d 100. These two decisions hold in substance that the entry of such separate judgments constituted an attempt to try piecemeal a single and unseverable cause; that the judgments in question were partial, not final and hence nonappealable. It is apparent, therefore, that no final judgment was ever entered in the action, though the issues including that upon demurrer, appear by the record to have been disposed of by the rulings and findings of the trial court.

[1-7] By the final judgment, entered upon motion of the above named defendants, it was adjudged that plaintiff take nothing by his complaint or any of the counts thereof; that the injunction theretofore issued should be dissolved as of February 27, 1935; that the answering defendants Anna Inez Mather and Lessie G. Williams have their costs; and that the Greenfield estate and its administrators pay to Anna Inez Mather the sum of $12,549.60, admittedly in their hands subject to the order and direction of the court. Examination of the findings originally made by the trial court reveals that the final judgment entered nunc pro tunc is substantially in accord therewith. Appellants complain that the final judgment is void because it provides for the payment to Anna Inez Mather of the sum alleged to be in the hands of the administrators of the Greenfield estate. But the answer of these administrators placed this sum at the disposal of the court; and the court expressly found that plaintiff had assigned and transferred to Anna Inez Mather a one-half interest in his title to the claim against the estate. The recitals set forth in the final judgment reveal no material deviation from the original findings of the trial court. Appellants' contentions in this respect are without merit. Likewise without merit are the contentions with respect to the changes made in the conclusions reached. "Where findings are filed, *which constitutes the rendition of judgment,* it has been repeatedly held that the court retains power to amend or change the conclusions of law so as to point to a different judgment, and to enter a judgment different from that first announced, and that this power continues until the entry of the judgment, *and such change may be made by a judge other than the one who tried the cause.* Until the judgment is entered the trial court retains complete jurisdiction of the case, *of which it cannot be divested by any unauthorized appeal,* and the mere fact that it has been affirmed on such an appeal does not prevent the subsequent entry of another and different judgment, *since no jurisdiction was acquired by the premature appeal* and the trial court still retained the power to make a different judgment." 14 Cal.Jur. 938, and cases cited. (Italics added.) The foregoing quotation serves to dispose of practically all of appellants' contentions regarding both the entry of the final judgment and a stay of proceedings claimed to have been created by the premature appeal taken from the purported judgment upon demurrer to the third count. Authority of the court to enter judgment nunc pro tunc as in the instant case is established in Kowalsky v. Nicholson, 23 Cal.App. 160, 137 P. 607, and Haug v. Superior Court, 2 Cal.App.2d 547, 37 P.2d 1048. The failure of the court to have included all the issues in the judgment entered at the conclusion of the trial of the first and second counts appears from the record to have been one of clerical mistake or misprision only and not one of judicial error. See Bank of America, etc., Ass'n, v. Radford, 7 Cal.2d 205, 60 P.2d 119. The power to enter judgment nunc pro tunc under circumstances such as here presented is inherent in the courts. Norton v. City of Pomona, 5 Cal.2d 54, 62, 53 P.2d 952; In re Pillsbury's Estate, 175 Cal. 454, 461, 166 P. 11, 3 A.L.R. 1396. And such power may be exercised by the court at any time, on its own motion or that of a party *with or without notice.* E. Clemens Horst Co. v. Federal Mutual Liability Insurance Co., 22 Cal.App.2d 548, 71 P.2d 599. Appellants' contentions as to insufficiency of the notice of the motion for entry of the final judgment are therefore immaterial.

[8] However, the court found that Anna Inez Mather had but a one-half interest in the claim against the Greenfield estate. That being so, Anna Inez Mather should be entitled to only one-half of any moneys in the hands of the administrators for payment of the claim, in the absence of anything in the record to the contrary. The record does not show that the entire sum was being held for Anna Inez Mather. The answer of the estate merely set forth that the sum was being held on account of the claim itself. It appears, therefore,

that the final judgment should be corrected to accord with the finding as to Anna Inez Mather's one-half interest. That Anna Inez Mather was entitled to but one-half of any sums payable by the estate on the claim is further borne out by the indenture attached as an exhibit to plaintiff's complaint, wherein it is stated that "one-half (½) of all sums becoming payable to said grantor from said estate, both by way of principal and interest, shall hereafter be payable to said Dorothy Devore Mather."

[9] That the amount of the costs awarded in the final judgment differs from that previously set forth in the partial judgment, entered after trial on the first and second counts, is of no concern here. The question of costs is not properly before this court, and there is no basis for a decision thereon. It is impossible to ascertain from the record what the correct amount of costs should be, or that the amount thereof as stated in the final judgment is not correct.

[10] The fact that other and further proceedings appear to have been taken in another court before entry of the final judgment in the instant case did not serve to deprive the trial court of its power to enter judgment upon the findings made herein, and upon the ruling on demurrer.

[11-13] Appellants' contention as to the sufficiency of the third count of the complaint as amended is without substantial foundation. The agreement which forms the basis of that count is alleged by plaintiff to have been entered into on June 16, 1933. Upon the face of the complaint and the third count thereof it also appears that the defendant Anna Inez Mather obtained an interlocutory decree of divorce from plaintiff in the State of California on August 16, 1933. It follows that when the agreement concerning the property was made the parties were residents of California, and the situs of the property involved was therefore California. The agreement was patently a property settlement, and, as such, vitally concerned the marital relationship of the parties. Under the circumstances, the applicable law should be that of the situs of the property and the domicil of the parties (see 5 Cal.Jur. 448 and 15 C.J.S., Conflict of Laws, § 16, p. 923); and the wife's capacity to make such an agreement should not be affected by the law of the place where the contract was made, where the parties were obviously transients. Moreover to apply the law of Hawaii, assuming the contract to have been invalid thereunder at the time, would violate the established policy of the State of California regarding the right of married women to contract with their husbands as to property settlements. The policy of this state regarding the relationship of husband and wife domiciled therein forms an integral part of any such agreement. (See 15 C.J.S., Conflict of Laws, § 16, pp. 920, 921, as to contracts where the lex loci contractus is contrary to the public policy of the forum.) The trial court did not err in sustaining the demurrer to the third amended third count, and did not abuse its discretion in refusing to allow plaintiff to make further amendment, since it is plain that no cause of action would lie on the basis of the law of Hawaii. It is also doubtful, in any event, that the third count in question set forth sufficient grounds for an action in rescission under the Civil Code (see §§ 1689 and 3406, Civ.Code; also § 3407 thereof), though this need not form the basis of the decision here.

Appellants are not correct in contending that the sufficiency of the third count was established by the decision in Greenfield v. Mather, supra. The Supreme Court in that case did not pass upon the sufficiency of plaintiff's cause of action as stated in the third count. The court merely held that there was no final judgment in the action in Los Angeles County and hence there was no valid plea in bar on that ground in an action brought in the City and County of San Francisco.

[14, 15] The order granting entry of judgment nunc pro tunc, being an intermediate ruling of the court, is not appealable. As to the order denying the motion to vacate the judgment, under the settled law of this state an appeal will not lie from such an order if the grounds upon which the moving party sought to have the judgment vacated were available on appeal from the judgment and existed before the entry thereof. Lawson v. Guild, 215 Cal. 378, 381, 10 P.2d 459; Barker v. Ackers, 29 Cal.App.2d 162, 176, 84 P.2d 264. It is obvious that appellants' attempt to appeal from the order denying vacation of the judgment merely constitutes a repetition of their appeal from the judgment.

The judgment appealed from is hereby modified to provide that the estate of Greenfield, Edna Greenfield, as administratrix, and Herman Wobber and Hugo D. Keil, as administrators, thereof, do pay to said Anna Inez Mather, otherwise known as Dorothy Devore Mather, one-half of the sum of $12,549.60, admittedly in their hands subject to the order and direction of the court in this action; and as so modified the said judgment is affirmed. The attempted appeals from the order granting the motion for entry of the final judgment nunc pro tunc and from the order denying the motion to set the said judgment aside are dismissed.

YORK, P. J., and WHITE, J., concurred.

51 Cal.App.2d 636

In re BAUER'S ESTATE.

BAUER v. WILLIAMS.

Civ. 13577.

District Court of Appeal, Second District, Division 2, California.

May 1, 1942.

Hearing Denied June 29, 1942.

1. Wills 🔑1

The right to make a will is a statutory privilege, not an inherent right, and hence a will must measure up to the requirements of the statute.

2. Wills 🔑98

A testator may incorporate an extrinsic document into a will, if such document is in existence at the time and the reference to it in the will clearly identifies it, or renders it capable of identification by extrinsic proof.

3. Wills 🔑98

An attempt to incorporate a future document in a will is ineffectual, since a testator cannot be permitted to create for himself the power to dispose of his property without complying with the formalities required in making a will.

4. Wills 🔑97

Where testatrix wrote a dated letter which constituted her holographic will, and thereafter she wrote three undated letters which were not referred to in the first letter, the three subsequent letters could not be read with the first letter as part of deceased's "holographic will". Probate Code, § 53.

See Words and Phrases, Permanent Edition, for all other definitions of "Holographic Will".

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge pro tem.

Proceeding in the matter of the estate of Kathrena W. Bauer, deceased, wherein four letters in the handwriting and signed by the deceased were introduced as the alleged holographic will of the deceased. From an order of the trial court ruling that the letters constituted a holographic will, Paul S. Bauer, Sr., as guardian, etc., opposed by Elizabeth R. Williams, appeals.

Order reversed.

Joseph Musgrove, of Los Angeles, for appellant.

Duque & McKinley and Gabriel C. Duque, all of Los Angeles, for respondent.

HANSON, Justice pro tem.

In this case the question for decision is whether four letters addressed to different individuals, all in the handwriting of and signed by the decedent, may together be classed as a holographic will merely because one was dated and all were found in a desk drawer intermingled with other papers.

Each of the three undated letters indicates not only a testamentary intent but that death was immediately impending. Death did occur by suicide. The dated letter specifically directed that upon the death of the writer all of her money in designated deposit accounts along with American Express Company checks should go to her mother. It made no reference to impending death. The other three letters were not shown to have been in existence at the time she wrote her letter of May 1, 1940. Moreover, they cut down the money bequest made to her mother in the letter of May 1st and give every indication they were drafted after that letter. This we think is persuasively shown by the fact that one of the undated letters—all of which were written on a different kind and size of paper from that of May 1st—refers to unsigned checks, all dated in June, 1940. The trial court ruled that all the letters constituted a single holographic will.

[1] By statutory definition a holographic will must be entirely written, dated and signed by the hand of the testator himself. Prob.Code, § 53. The right to make a will is a statutory privilege, not an inherent right, and so the will must measure up to the requirements of the statute. In the instant case the only document which complied with the statute was the letter dated May 1, 1940. May, then, the other letters, each of which standing alone could not be admitted to probate as a holographic will, nevertheless be admitted as being parts of the letter of May 1, 1940, in view of the fact that the letter of May 1 does not incorporate by reference or otherwise the three undated letters but is sufficient in and of itself as a holographic will?

[2-4] In Simon v. Grayson, 15 Cal.2d 531, 102 P.2d 1081, 1082, it is said: "It is the settled law in this state that a testator may incorporate an extrinsic document into his will, provided the document is in existence at the time and provided, further, that the reference to it in the will clearly identifies it, or renders it capable of identification by extrinsic proof. * * * An attempt to incorporate a future document is ineffectual, because a testator cannot be permitted to create for himself the power to dispose of his property without complying with the formalities required in making a will." See, also, to the same effect, In re Estate of Rath, 10 Cal.2d 399, 75 P.2d 509, 115 A.L.R. 836; Garde v. Goldsmith, 204 Cal. 166, 267 P. 104; In re Estate of Doane, 190 Cal. 412, 213 P. 53, and In re Shillaber's Estate, 74 Cal. 144, 15 P.2d 453, 5 Am.St. Rep. 433. Moreover, there is nothing in the three undated letters indicating that they were to be read or construed as a part of decedent's holographic will dated May 1, 1940. In re Keith's Estate, 173 Cal. 276, 159 P. 705; In re Estate of Meade, 118 Cal. 428, 50 P. 541, 62 Am.St.Rep. 244; In re Estate of Hughes, 140 Cal.App. 97, 35 P.2d 204. Even if there had been a statement in any one of these undated letters to the effect that such letter was to be read and construed with the letter of May 1, 1940, the desire of the testator could not be effectuated, as such undated letters failed to comply with the statutory requirement that they be dated.

Only the letter of May 1, 1940, should have been admitted to probate. The order is reversed.

MOORE, P. J., and W. J. WOOD, J., concurred.

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51 Cal.App.2d 286

SELINGER v. MILLY et al.

Civ. 6629.

District Court of Appeal, Third District, California.

April 16, 1942.

1. Homestead 🔑135

Statutes in force at the time of husband's death determine the devolution of homestead selected by husband from community property during coverture and recorded while both husband and wife were living. Code Civ.Proc. § 1474 (St.1880, p. 88); Civ.Code, § 1265 (St.1909, p. 972).

2. Homestead 🔑150(2)

A probate court order setting aside the homestead to surviving spouse is ineffective and serves only to withdraw the premises from administration and from further consideration by the court.

3. Homestead 🔑177(1)

Surviving widow may by conduct be "estopped" from claiming the homestead, and devisees of widow being in privity with their testatrix are bound by such estoppel.

See Words and Phrases, Permanent Edition, for all other definitions of "Estop".

4. Estoppel ⚷52

Estoppel is not favored by the courts.

5. Homestead ⚷154

Exclusive method by which the abandonment of a homestead is accomplished is provided by statute, and courts do not favor a finding of abandonment based on estoppel. Civ.Code, § 1243.

6. Estoppel ⚷54

Where both parties have the same means of ascertaining the truth, there can be no "estoppel".

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

7. Estoppel ⚷52

To constitute an equitable "estoppel" with respect to the title of property, it must appear that party to estoppel has made admissions or declarations, or done acts with the intention of deceiving the other party with regard to title, or with such culpable negligence as to amount to a constructive fraud, and that at the time he was apprised of the true state of his own title and that the other party had no knowledge thereof nor any convenient or ready means of acquiring such knowledge.

8. Homestead ⚷177(1)

The conduct of administration of testator's estate by surviving widow as executrix and distribution decree entered therein in accordance with will devising to widow only a life estate in premises that had been selected from community property and recorded as testator's homestead with remainder to children did not "estop" widow and those claiming under her from asserting that homestead vested absolutely in widow as against one who loaned money to one of testator's children and took an assignment of his interest in estate as security for renewal thereof after fact of testator's death had been established and made of record. Code Civ.Proc. § 1474 (St.1880, p. 88); § 1723; Civ.Code, § 1265 (St.1909, p. 972); Civ.Code, § 1243.

9. Judgment ⚷714(1)

Adjudication that creditor had a lien upon the portion of remainder interest in estate of testator which vested in debtor upon testator's death, and which decree of distribution directed be delivered to debtor upon death of testator's widow, was not "res judicata" as to creditor's interest in testator's homestead which notwithstanding provisions of will upon testator's death vested absolutely in his widow. Code Civ.Proc. § 1474 (St.1880, p. 88); Civ.Code, § 1265 (St. 1909, p. 972).

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

◆

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Action by Charles Selinger against Louise Milly and others for partition of certain realty, wherein defendants filed a cross-complaint seeking to quiet title in themselves. From an interlocutory decree adjudging plaintiff to be the owner of an undivided one fifth interest in the realty, defendants appeal.

Decree reversed and cause remanded with directions.

Albert J. McGuire and M. M. Getz, both of San Francisco, for appellants.

Norman Elkington, of San Francisco, for respondent.

HELD, Justice pro tem.

This appeal is from an interlocutory decree entered in an action brought by plaintiff, Charles Selinger, to obtain a partition of certain real property in the City and County of San Francisco. An answer denying that plaintiff has any interest in the premises was filed; and by cross-complaint, the appellants sought to quiet title in themselves. The trial court adjudged plaintiff to be the owner of an undivided one-fifth interest in the premises, and appellants to be the owners of the remaining four-fifths interest. The latter, claiming title to the property to the exclusion of any interest in plaintiff, have appealed.

The record discloses that Jerome Milly and Louisa Milly were husband and wife, and that Albert J. Milly, Emil F. Milly, Louise Milly (now Rothenbusch), Annie Krueckel, and Jerome M. Milly were their children. Jerome Milly died on January 26, 1911, and Louisa Milly died on June 15, 1935. Emil F. Milly pre-deceased his mother, and left surviving two children, Dorothy and Jerome Milly. During coverture, Jerome Milly and Louisa Milly acquired the premises here involved as community property, and while they were the owners thereof, the husband, on February 23, 1889, selected the same as a homestead by a declaration duly executed and recorded. No conveyance or formal abandonment of the homestead was ever made by the spouses, and it is the contention of appellants that on the death of Jerome Milly, on January 26, 1911, title to the homestead premises vested absolutely in Louisa Milly, his surviving widow, subject to testamentary disposition by her on her death.

[1, 2] Section 1474, Code of Civil Procedure, then in force, provided that "If the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, was selected from the community property * * it vests, on the death of the husband or wife, absolutely in the survivor." Stats.1880, page 88. Section 1265, Civil Code, then also in force, provided that, "From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property * * * the land so selected on the death of either spouse, vests in the survivor." Stats.1909, page 972. These sections, being in force at the time of the death of Jerome Milly, determine the devolution of the homestead. In re Wright's Estate, 98 Cal.App. 633, 277 P. 372; Patchett v. Webber, 198 Cal. 440, 245 P. 422. An order by the Probate Court setting apart the homestead to the survivor was held, in Re Simonton's Estate, 183 Cal. 53, 190 P. 442, 445, to be "wholly unnecessary and ineffective," and in Saddlemire v. Stockton Savings, etc., Soc., 144 Cal. 650, 79 P. 381, to serve only to withdraw the premises from administration and from further consideration by the court. 11a Cal.Jur. page 603.

It is the contention of respondent that, though the homestead would ordinarily have vested in Louisa Milly, she, during her lifetime, was estopped, and appellants, being in privity with her, are now estopped from so claiming. Such estoppel, it is contended, arises out of the conduct of Louisa Milly, and the record in the probate proceedings of her husband, Jerome Milly. The latter left a will, whereby he gave to his widow a life estate in the residue of his estate, with remainder over to his children, including Albert J. Milly. The will was admitted to probate, and Louisa Milly was appointed executrix thereof. No order setting apart the homestead was sought or made, and no recognition given the homestead until some years thereafter when, in 1928, a petition by the surviving widow to have the fact of the death of Jerome Milly established, was filed under section 1723, Code of Civil Procedure (now section 1170, Probate Code). A decree establishing the fact of death was entered on May 23, 1928.

During the administration of the estate of Jerome Milly, deceased, the executrix returned an inventory of the property thereof, and included therein, as a portion of her husband's estate, the premises covered by the homestead declaration. In a petition for distribution of the residue of the estate, subsequently filed, she also included the homestead premises, and a decree of distribution was made accordingly on May 6, 1912. This decree purported to distribute to the surviving widow a life estate in the property, with remainder over to the five children, among them, Albert J. Milly.

On March 1, 1925, respondent loaned to Albert J. Milly the sum of $1,500, and received a promissory note therefor. On December 1, 1929, the note remaining unpaid, Albert J. Milly executed a renewal thereof for $1,914, the amount then due for unpaid principal and accrued interest. Prior to the execution of the renewal note, respondent had threatened suit on the original obligation unless the same were paid or security given. Albert J. Milly then represented to the respondent that he was the owner of an undivided one-fifth remainder interest in the residue of the estate of his father, Jerome Milly. As security for the payment of the obligation, he executed to respondent, with the renewal note, an assignment of such remainder interest. Subsequently, respondent brought suit to foreclose the lien created by said assignment; judgment was rendered in his favor; a sale of the property here involved was had, and commissioner's deed was issued to respondent, under which he now claims title to the one-fifth interest purportedly distributed to Albert J. Milly by the decree of distribution entered in the estate of his father.

Louisa Milly died testate. Her will devised the homestead to Dorothy Milly, Jerome Milly, Jerome C. Milly, Louise Rothenbusch, and Annie Krueckel, in the following proportions: One-ninth thereof to each of the first three named, and one-third thereof to each of the last two named. Albert J. Milly was not designated as a devisee under the will. Pending administration of the estate, Annie Krueckel assigned her interest therein in equal shares to Annette Krueckel and Frank Krueckel, Jr. On September 12, 1938, a decree of distribution was entered in the estate of Louisa Milly, deceased, purporting to distribute the homestead premises to Dorothy Milly, Jerome Milly, Jerome C. Milly, Louise Rothenbusch, Annette Krueckel and Frank Krueckel, Jr., the appellants herein, and they now claim title under the terms of that decree, to the exclusion of respondent.

The question arises now whether, on the death of Jerome Milly, the homestead premises vested in his surviving widow, and, under the decree of distribution in her estate, passed to the appellants, or whether appellants, by reason of the conduct of their mother, and the decree of distribution in the estate of Jerome Milly, deceased, are estopped to claim through the homestead.

[3-5] That the surviving widow may, by conduct, be estopped from claiming the homestead, is recognized in 11a Cal.Jur., page 587, and that devisees, being in privity with the testator, are bound by such estoppel, is the rule. 21 Corpus Juris, page 1118. Estoppel, however, is not favored by the courts. Lorenz v. Rousseau, 85 Cal. App. 1, 258 P. 690; Hammond Lbr. Co. v. Weeks, 105 Cal.App. 315, 287 P. 573. Particularly is this true where the abandonment of a homestead is claimed. The statute provides an exclusive method by which an abandonment is accomplished. Civil Code, sec. 1243.

In Flege v. Garvey, 47 Cal. 371, the husband became insane after he and his wife appropriated certain premises as a homestead. A guardian of his estate was appointed. Thereafter, an order was made by the probate court directing the sale of the homestead, and it was sold by the guardian. Subsequently, the wife brought suit to recover the premises, relying on the declaration of homestead. Defendant claimed under the guardian's sale, and contended that the wife was estopped to deny its validity, because "she knew of the pendency of the proceedings in the Probate Court, urged the sale, and received from the guardian a portion of the proceeds thereof." The Supreme Court there held that the deed of the guardian was invalid to transfer the title to the homestead, because of the statutory requirement that a conveyance of the homestead be executed by both husband and wife. Of the defendant's claim that the wife was estopped by her conduct and participation in the proceeds of the sale, the court said that these matters do not amount to an estoppel in pais, and that the proceedings in the probate court did not amount to an estoppel by matter of record. The same strict application of the statute was made in Gagliardo v. Dumont, 54 Cal. 496, where a homestead had been declared by husband and wife. The husband gave to another a power of attorney to sell all the real estate which belonged to him. Subsequently, the attorney in fact of the husband sold and conveyed the homestead premises, the wife joining in the deed. Thereafter, the wife died, and the husband brought an action against the claimant under the purchaser. The supreme court held that on the death of the wife, the title to the homestead vested in the husband, and that he held as against the purchaser. In Dixon v. Russell, 9 Cal.2d 262, 70 P.2d 196, 198, the wife recorded a homestead for the joint benefit of both spouses on community property of herself and her husband. Thereafter, she conveyed the premises to the husband, who executed to the wife a deed of trust to secure an indebtedness to her. In the deed, she expressly released and waived all rights under and by virtue of the homestead laws. Thereafter, she asserted a right in the property, and the husband brought an action to quiet title. The court held that the deed of the wife was ineffective to accomplish an alienation of the homestead, and that the waiver in the deed did not constitute an abandonment. It was there said: "The appellant suggests that by her deed the wife voluntarily surrendered her interest in the homestead and that she should now be held to have waived all claim to the premises. Flege v. Garvey [47 Cal. 371, 376], supra, and Gagliardo v. Dumont [54 Cal. 496, 499] supra, are directly to the point that there can be no surrender except in the mode prescribed by the statute. If there can be no surrender of the interest by such a deed there could be no waiver of the right to assert the interest except by the manner prescribed in the statute."

To the same effect are Hart v. Taber, 161 Cal. 20, 118 P. 252, and Williams v. Williams, 170 Cal. 625, 151 P. 10, as well as Rocha v. Rocha, 197 Cal. 396, 240 P. 1010. In the last cited case, there were involved homestead premises owned by Antonio Jose Rocha and Ventura L. de Rocha, husband and wife. The husband died, and it does not appear that proceedings were taken to adjudicate the fact of his death, nor was administration had upon his estate. After the husband's death, the widow executed a deed of the premises to her son Antonio, who, some years thereafter, sought to obtain a loan on the property, and then discovered that no proceedings had been taken of record to show that the homestead had vested in his mother as surviving spouse. He thereupon prayed for letters of administration on his father's estate, and, in the inventory, he returned the homestead premises as property of the estate. Proceedings were had, culminating in an order setting apart the premises to his mother as a homestead, and thereafter she executed a second deed to him. The heirs of the father, other than defendant, sought to recover the premises. It was their contention that defendant Antonio was estopped to assert that the allegations of the petition for letters of administration and the inventory as to the ownership of the property did not truly state the facts. The supreme court held there was no estoppel arising out of such allegations.

Respondent herein, in support of his contention that appellants are estopped, cites Ions v. Harbison, 112 Cal. 260, 44 P. 572, and Raggio v. Palmtag, 155 Cal. 797, 103 P. 312. In the former case, one Bell and his wife had executed a mortgage to Flagg; thereafter, Mrs. Bell declared a homestead on the property. Subsequently, she died, and the husband was appointed administrator of her estate. A sale in probate was made to Harbison, the purchase price was paid to the administrator, and he expended the major portion thereof in the discharge of the mortgage debt. Thereafter, the husband, in his individual capacity, accepted $10.00 from Ions, the plaintiff in that action, for a quitclaim deed, and he brought suit to quiet title against Harbison, the purchaser at the probate sale. Judgment was rendered in favor of Ions in the trial court, and this, on appeal, was reversed. The Supreme Court [112 Cal. 260, 44 P. 573], cited section 1475, Code of Civil Procedure, and said that the probate court "has jurisdiction over the homestead for some purposes," but added: "But conceding, for the sake of the argument, that the court had no jurisdiction, and that the sale was void, it would seem to be beyond question that Bell would have been estopped to claim title to the land as against the defendant; and, if so, the plaintiff, claiming under Bell, with knowledge of the facts, is equally estopped. Bell asserted in a solemn judicial proceeding that the title to the property was in the estate of his deceased wife, and not in himself. He received the purchase money, and applied it to the payment of the mortgage debt, which was a valid lien upon the land for which he, as well as the estate, was liable, and to the payment of the funeral expenses and costs of administration which he had incurred, and, having conveyed the property to the defendant, put him in possession. There was no surplus arising from the sale. He was the sole beneficiary, and, upon respondent's theory, the sole owner. To retain these benefits resulting from the payment of the purchase money by the defendant, and at the same time recover the property from him, would be a fraud which a court of equity will not permit. He had full knowledge of all the facts affecting his title. His mistake was one of law, as was that also of the defendant; but to permit Bell to retain the purchase money and the property too is to give him a very profitable relief from his mistake, while it would visit upon the defendant a severe penalty for the same mistake."

Of the plaintiff in that case, the court said: "He was not a purchaser in good faith. The price paid for the quitclaim, though sufficient as a consideration between him and Bell, indicates very clearly that he was speculating in a small way upon the supposed misfortunes of another. He understood he was purchasing this lawsuit, which he commenced two days thereafter, and, having had such enjoyment as it afforded, he can not reasonably complain if he gets no more."

In Raggio v. Palmtag, supra, a homestead vested in Maria Ynezia Raggio on the death of her husband, Luis Raggio, and plaintiff was appointed administrator of his estate. Prior to the husband's death, the spouses had executed a mortgage to defendant Palmtag. Subsequently, Mrs. Raggio also died, and thereafter the administrator of the husband's estate obtained an order of court to sell the homestead premises which constituted the entire estate. The mortgagee, Palmtag, bought the property for a sum in excess of the amount due on the mortgage note. When plaintiff brought his action, she, claiming to be a mortgagee in possession, sought to have her note and mortgage reinstated and restored, and granted a foreclosure. The court in following the case of Ions v. Harbison, supra, as to jurisdiction, said: "We can see no reason for recalling or changing anything in that case, particularly in view of the conclusions reached in the decision of the later case of Burns v. Hiatt, supra [149 Cal. 617, 621, 87 P. 196, 117 Am.St.Rep. 157]." [155 Cal. 797, 103 P. 315.] The latter case held that an action will not lie against a mortgagee in possession without paying or tendering the amount due on the mortgage. It is evident that the decision in Raggio v. Palmtag was largely influenced by the conclusions reached in

Burns v. Hiatt, supra. Of the plaintiff in the Raggio case, the court said: "He can hardly be looked upon as a suitor to be highly considered by a court of equity."

[6] We have here a case in no way comparable with either Ions v. Harbison, supra, or Raggio v. Palmtag, supra. There is no evidence here that Mrs. Milly ever made any representation to respondent to induce the latter to make a loan to Albert J. Milly, or that she received the slightest advantage from said loan. There is no evidence that the original loan was made in reliance upon any interest that Albert J. Milly claimed in the estate of his father. When the renewal note and assignment were executed, an examination of the public records would have disclosed the declaration of homestead and the subsequent decree establishing the fact of the death of Jerome Milly. The respondent had the means of ascertaining the true state of the title prior to accepting the assignment as a condition to withholding suit on the original note. It has been held that where both parties have the same means of ascertaining the truth, there can be no estoppel. Jones v. Coulter, 75 Cal.App. 540, 243 P. 487. In Eltinge v. Santos, 171 Cal. 278, 152 P. 915, 918, Ann.Cas.1917A, 1143, the court said: "The rights of plaintiff depended upon matters of record which were equally open to the knowledge of both the plaintiff and the defendant. 'An estoppel cannot exist where the knowledge of both parties is equal, and nothing is done by the one to mislead the other.'" (Citing cases.)

[7] In Gioscio v. Lautenschlager, 23 Cal.App.2d 616, 73 P.2d 1230, 1232, the court denied the application of the doctrine of equitable estoppel for the reason that the party against whom it was sought to invoke the doctrine had personally never received any benefit from the money paid by the purchaser, nor made any admissions or declarations, or done any act with the intention of deceiving the other party with regard to the title. The court there quoted with approval from Davis v. Davis, 26 Cal. 23, 85 Am.Dec. 157, as follows: "In order to constitute an equitable estoppel with respect to the title of property, it must appear that the party to be estopped has made admissions or declarations, or done acts with the intention of deceiving the other party with regard to the title, or with such carelessness or culpable negligence as to amount to a constructive fraud, and that at the time of making the admissions or declarations, or doing the act, he was apprised of the true state of his own title, and that the other party was not only destitute of all knowledge of the true state of the title, but also of all convenient or ready means of acquiring such knowledge."

[8] We conclude that upon the death of Jerome Milly, title to the homestead premises vested absolutely in Louisa Milly, his surviving widow; that the provisions of the decree of distribution in the estate of Jerome Milly, deceased, did not divest her of that title; and that her conduct of the administration of the estate of her deceased husband and allegations made by her in that proceeding did not serve to create an estoppel as against her or those claiming under her.

[9] In view of the conclusion we have reached that upon the death of Jerome Milly no interest in the homestead premises vested in Albert J. Milly, it is not necessary to consider the special defense of res adjudicata raised by respondent. The judgment in the action relied on as a prior adjudication, was to the effect that respondent had a lien "upon the portion of the remainder of both the real and personal estate of Jerome Milly, deceased, which vested in said Albert J. Milly upon the death of Jerome Milly, and which is directed by the decree of distribution made and entered in the matter of the Estate of Jerome Milly, deceased, on the 6th day of May, 1912, to be delivered upon the death or remarriage of Louisa Milly, now deceased, to said Albert J. Milly." It thus appears that the judgment affected only the estate which vested in Albert J. Milly, upon the death of his father, and, as the property here involved did not so vest, title thereto was not affected by the judgment in the prior action.

It is therefore ordered that the judgment be reversed, and the trial court is directed to enter judgment in favor of appellants, quieting their title to said premises in the proportion of an undivided one-third interest to Louise Rothenbusch, an undivided one-sixth interest each to Annette Krueckel and Frank Krueckel, Jr., and an undivided one-ninth interest each to Jerome Milly, Jerome C. Milly, and Dorothy Milly.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

50 Cal.App.2d 478

BEAUDRY v. PETERSON.

Civ. 6665.

District Court of Appeal, Third District, California.

April 15, 1942.

Appeal and error 🔑612(4)

Where order granting new trial, notice of appeal, and all other pleadings and proceedings were presented to trial judge for settlement in one document attached to reporter's transcript of evidence, and judge certified to correctness of evidence and further certified that transcript was true and correct and that it was settled and allowed, "transcript" certified included everything attached to document presented to judge. Code Civ.Proc. § 953a.

See Words and Phrases, Permanent Edition, for all other definitions of "Transcript".

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

On petition for rehearing.

Petition denied.

Prior opinion, 123 P.2d 108.

Ronald D. Wolfe, of San Francisco, for appellant.

Charles L. Gilmore, of Sacramento, for respondent.

PER CURIAM.

Upon petition for rehearing the respondent suggests that the order of the trial court granting a new trial, and the notice of appeal therefrom, are not properly certified by the judge as required by section 953 a of the Code of Civil Procedure. Drummond v. Drummond, 39 Cal.App.2d 418, 422, 103 P.2d 217; 2 Cal.Jur. 607, sec. 329. No motion to dismiss this appeal was made under rule V of the rules for the Supreme Court and District Courts of Appeal, for the lack of a proper certificate of the judge, or at all. On examining the transcript on appeal it appears that the order granting a new trial, the notice of appeal, and all other pleadings and proceedings in the case were presented to the judge for settlement in one document attached to the reporter's transcript of the evidence, and that the judge certified on June 18, 1941, to the correctness of the 138 pages of evidence adduced at the trial, and further certified to the proceedings attached thereto, including the order granting a new trial and the notice of appeal, in the following language: "I further certify that the transcript is true and correct, and the same is hereby settled and allowed."

We assume the "transcript" which was certified by the judge, as required by section 953a of the Code of Civil Procedure, included everything attached to the document which was presented to him for the purpose of settling the same.

There is no merit in the suggestion that the proceedings which transpired subsequent to the entry of judgment are not properly certified by the judge.

The petition for rehearing is denied.

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51 Cal.App.2d 275

In re DOWNEY'S ESTATE.

AMERICAN TRUST CO. v. MICKEY et al.

Civ. 12104.

District Court of Appeal, First District, Division 2, California.

April 16, 1942.

Hearing Denied June 12, 1942.

1. Wills 🔑52(1)

In will contest burden of proving unsoundness of mind of testatrix sufficient to invalidate a will was on contestants.

2. Wills 🔑53(2)

In will contest, the proof as to alleged unsoundness of mind of testatrix should be directed to the time when the will was executed.

3. Wills 🔑324(1)

In will contest it was the province of jury to draw inferences of fact from evidence before them, regulated by the rules of law stated by the court and assisted in that function by the opinion of experts.

4. Wills 🔑324(1)

In will contest it was the duty of the court to determine whether there was any satisfactory evidence to justify conclusion reached by the jury.

5. Evidence ⚷571(2)

The opinion of a witness that testatrix was of unsound mind is not stronger in evidentiary weight to the reasons upon which witness bases his opinion.

6. Wills ⚷50

A testator is of "sound and disposing mind and memory", if at time of making will he has sufficient mental capacity to be able to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property, and to remember and understand his relations to the persons who have claims upon his bounty and whose interests are affected by provisions of the will.

See Words and Phrases, Permanent Edition, for all other definitions of "Sound and Disposing Mind and Memory".

7. Wills ⚷43, 45, 47

In determining alleged unsoundness of mind of testatrix, the administration of morphine, physical disability, and age are all factors to be considered.

8. Wills ⚷324(2)

In will contest based on alleged lack of testamentary capacity, whether the condition of testatrix would not and did not improve within one hour after she was last seen by attending physician prior to execution of will, as testified by physician, was a question for the jury.

9. Wills ⚷303(2)

Where the woman in charge of hospital in which testatrix was a patient signed as a subscribing witness only after questioning testamentary capacity of testatrix and being erroneously assured by scrivener that attending physician had pronounced her competent, witness did not stultify herself by testifying in will contest that testatrix was partially irrational at the time will was executed.

10. Wills ⚷386

In will contest all questions of the weight of the evidence and the credibility of the witnesses are for the jury and trial court, and if there is any substantial evidence to support the finding or verdict it cannot be set aside, even though reviewing court may believe the great preponderance of the evidence was the other way.

11. Wills ⚷31

If insanity of the testator is proved, the effect of such proof upon the validity of the will must be determined by the general rule regarding the requisites of testamentary capacity.

12. Wills ⚷55(1)

Evidence sustained finding that testatrix who was in a toxic condition as the result of kidney infection which resulted in death approximately 19 days after will was executed and dopey from repeated injections of morphine sulphate lacked testamentary capacity when will was executed approximately an hour after being returned to her room after spending two hours in surgery.

◆

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Proceeding in the matter of the estate of Alice Downey, deceased, upon petition filed by Charles Mickey and others contesting the probate of deceased's will which had previously been admitted to probate on the petition of the American Trust Company, named as executor therein. From an order revoking probate of the will, the proponent appeals.

Order affirmed.

A. W. Hollingsworth, of Santa Rosa, and Brobeck, Phleger & Harrison, of San Francisco, for appellant.

Geary & Tauser, of Santa Rosa, and A. Dal Thomson, of San Francisco, for respondents.

STURTEVANT, Justice.

The will of Alice Downey, deceased, was admitted to probate on June 23, 1939, on the petition of American Trust Company, the executor named in her will. Thereafter Charles Mickey and several other persons, claiming to be heirs of the decedent, filed a contest on the ground of testamentary incapacity. Each and all of the contestants are nephews and nieces of Dr. Wallace Downey, the deceased husband of Alice Downey. The contest was heard before the trial court sitting with a jury. At the close of contestants' case the proponent moved for a nonsuit. The motion was denied. After the conclusion of the introduction of evidence the proponent moved for a directed verdict. The motion was denied. The jury returned a verdict in favor of the contestants. The proponent moved for judgment notwithstanding the verdict. The motion was denied. Thereupon judgment was entered on the verdict and the order admitting the will to probate was revoked on December 24, 1940. From the order of revocation the proponent has appealed.

Prior to the month of May, 1939, the decedent Mrs. Alice Downey had been residing in her home at Bay in Sonoma County, California. She was a widow and lived alone. But nearby Carl Engleman and his wife resided. Mr. Engleman acted as gardener for the decedent and did chores for her. Dr. Wallace Downey, the decedent's husband, died in 1937 and by his will he left all of his property to his surviving widow. Dr. and Mrs. Downey had no children but Dr. Downey left surviving him a number of nephews and nieces.

In the morning of May 8, 1939, when Mr. Engleman called at the home of Mrs. Downey, she was ill. When he entered the house he found her lying on a couch suffering from a pain in the lower part of her abdominal cavity. The pain was so intense that she had remained on the couch all night and she was too ill to go to the door and open it or to speak loud enough for him to hear her. So he opened the door and walked in. Assisted by his wife he placed Mrs. Downey in her car, drove to Sebastopol, and took her to the office of Dr. Marsh. At that time Mr. Engleman testified she was "writhing" in pain. After making a preliminary examination Dr. Marsh directed the decedent to go immediately to Hillside Hospital in Sebastopol and he followed in a few minutes. The patient was put to bed and almost at once she was given an injection of morphine sulphate.

Dr. Marsh diagnosed the decedent's ailment as a disease of the kidneys. He found her to be in such severe pain that he could not operate. Therefore he directed such care and treatment as would build up the patient before an operation should be performed. The patient continued to suffer intense pain. Morphine sulphate was injected in one-quarter grain doses—on May 8, one dose; May 9, six doses; May 10, two doses; May 11, two doses; and on May 12, one dose at 3:30 a. m., one at 10 a. m., one at 1 p. m., one at 6:45 p. m., and one at 8:30 p. m. (As will later be noted the will in dispute was signed at about 8 p. m.)

From May 8 to May 13, the patient was at all times suffering pain and sometimes the pain was intense. The patient had severe vomiting spells commencing May 8, and continuing until after May 12. As shown by the charts she was irrational on May 10, also on May 11 and May 12. On the latter date the patient got out of bed at 3:30 a. m., and again at 6:30 a. m.

While in the operating room on May 12, 1939, at 6:45 p. m. a dose of morphine sulphate was injected by Dr. Marsh. At 7 p. m. she was taken to her bed. At 7:10 she was drowsy and bewildered when Mrs. Custard, the day nurse, left.

The contestants called Dr. Marsh as a witness. At the same time they produced and had in the courtroom the chart kept by the nurses at Hillside Hospital from the time that Mrs. Downey entered the hospital. They also had produced and had in the courtroom X-ray photographs. Among other things he testified as follows: "I first saw Mrs. Downey as a patient on May 8, 1939, at my office in Sebastopol, California. Later on the same day I saw her at the Hillside Hospital in Sebastopol. On that date I made an examination of her body. I was not her doctor but I let her in one of the side rooms and took her temperature. The next day I made a diagnosis of her physical condition. She was cystoscoped in surgery. I found that she had pus coming from the bladder, that organ was quite inflamed. The mucous membrane was very swollen and inflamed and we passed a catheter through the ureter tubes leading from the kidney to the bladder. Her urine was colored. In the kidneys we injected an opaque material which made them show up in the X-rays. There was pus coming from the right kidney also. There was blood in the urine. She was running a fever and she had pain. The right kidney was badly dilated, four or five times the normal size and the examination showed there was a bad infection of that kidney. A cystoscope has two runways where small catheters, small hollow tubes, may be passed up into the kidney pelvis. We were able to do that on Mrs. Downey. We did so on the 9th of May, the day after she entered the hospital. Mrs. Downey suffered pain as the result of this examination and treatment. The passing of the catheter is a very painful procedure. She was in very great pain to start in with and naturally passing the instrument into the bladder, the passing of a catheter up into the ureter gave more pain. A catheter was left in place on the right side for drainage purposes. I also took X-rays of her body on the 20th. The X-rays are present. I took those X-rays myself. (Here the doctor read the X-rays to the jury.) Her condition on the 20th as compared to the 12th was very much worse. Mrs. Downey died May 31. Hospital records were kept with respect to her condition commencing with the 8th of May up to the date of her death. They are the records shown me as Exhibit 2. From time to time while Mrs. Downey was in the hospital under my care I examined those records. They were kept under my supervision. I gave the nurses who cared for Mrs. Downey instructions. One nurse was on general duty for several days. On May 12 she had a special nurse. On that day Mrs. Downey was very much worse and we put special nurses on because she started to get irrational. She seemed to be very much worse, that is the reason we put special nurses on—in order to give her better care. I was the doctor in chief on her case from the 8th until the date of her demise. I looked at the records from time to time. I prescribed on the 8th of May, 1939, narcotics for Mrs. Downey. I prescribed morphine sulphate. The nurse was directed to give her a quarter grain every four hours when necessary for pain. It was to be administered hypodermically. Characterizing Mrs. Downey's illness on May 12, 1939, I would say she was desperately ill. On that date I finished surgery at 7 o'clock that evening. She was in surgery from 5 until 7. During that time she was given an injection of morphine sulphate by me about 6:45. On that occasion the cystoscope instrument which I have described was introduced into the bladder and catheters were passed. The catheters are about eighteen inches long. In diameter they range from the size of a small lead in a lead pencil to five or six times that size. So far as I could see the openings into the bladder were badly inflamed, each member was badly swollen. Putting those catheters into the bladder through the openings which were badly inflamed would cause still more pain. I don't recollect of her objecting, she kept moaning and groaning. To a person not so far advanced with this infection it is a painful process. Her condition on May 12, as compared with the 8th, 9th, 10th and 11th, was very much worse. She seemed to have more pain, she seemed to be more doped. She was taken to the surgery room and returned from it on a stretcher on wheels. She was very sick and naturally a person who has been as sick as she was, running a fever, and toxic from poisoning, and under the influence of morphine, she required aid to get back into bed. She was put to bed about 7 o'clock. At that time she was of sound mind probably but rather doped. Her condition was worse than it had been on the 8th. She was very much doped from having been in surgery. She was doped from the morphine and I would say she was rather doped and not very clear. *Her condition would not have improved within a half or three quarters of an hour after I left her.*

Mr. Tauzer: Q. Now would you say that between the hours we will say of 7 and 8 o'clock Mrs. Downey in your opinion would be able to know the character, nature and extent of her property, the persons to whom she might determine to take her property, the natural objects of her bounty, and to understand the nature of a last will and testament that she made and allegedly signed? A. She wouldn't probably know the entire extent of it. Probably her mentality was dull from the effects of the morphine, therefore I would say that she was not capable of signing a will during that time. * * *

"Mr. Tauzer: Q. Would you state the reason for your opinion, Dr. Marsh? A. In the first place the woman was very toxic and sick. By toxic I mean by poison from the infected kidney circulating in the blood stream causing a fever, headache, drowsiness. That is separate from the effects that morphine might have upon the individual. It is to start with. In the second place she was brought to surgery which is a very disturbing factor to such a sick person and led to a sort of a shocked state. It was a shock to the nervous system to be brought to the surgery. In the third place she had morphine. That would have the effect to make her drowsy. It affects the senses of sight, smell and taste and depresses the cerebrum—the centers of the intellect, the portion of the brain that we think with. She did not talk to me at all. She could have been aroused so that she could have understood a few words. In expressing my opinion I have taken into consideration the age of Mrs. Downey that would have an effect. A person as he grows older cannot withstand sickness or illness or shock like a younger person.

"On my direct examination I stated that Mrs. Downey was of sound mind. By that I meant that she wasn't crazy. The cause of the dopeyness was not entirely the morphine. Her toxic condition and morphine were some of the causes of the dopeyness. At 7 o'clock the pain was lessening, the morphine would be taking more effect. The patient would be continuing to get more dopey and the pain would lessen. On the 12th the patient had not begun to develop a tolerance for morphine. In three days no one develops a tolerance for morphine. *I have stated what was her mental condition for an hour or so after I left the hospital.* That opinion was based upon the fact that she was in a toxic condition and had been given morphine at about 6:45. That enters into the opinion also. If I assume that at about 8 o'clock a draft of an instrument was read to Mrs. Downey and that she asked that certain changes be made in it, such fact would not change my opinion. The effect of the morphine starts in ten or fifteen minutes and continues for three or four hours. During two hours after the injection of morphine it should still be in full force as to the killing of pain and deadening the senses. In asking to have the instrument changed Mrs. Downey might remember an item or two but she might not remember everything. Under the influence of morphine a person isn't mentally clear, that is they are dopey. She might remember some property she had in the state and not remember that she had some in Sonoma County. When one is in a toxic condition and having a shot of morphine she doesn't know the full extent of her property. When she asked the draftsman to make a change that does not alter my opinion. She was able to remember certain pieces of her property or parcels of property but I do not believe that she could have remembered all. *That opinion is based on my own observation of the patient. It is independent of the assumed directions given to the draftsman. If she had been aroused she might have recalled certain items of property but not the majority, character and extent of it.* At the time she gave directions to Mr. Hollingsworth she might have been capable of knowing and understanding that she was giving such directions. I would not go any further than to say she might have been. She might not even realize how much more she had. She might have known at that time that she was making that statement but under the influence of morphine she might have immediately forgotten about it. *My particular observation in this particular case had to do with my opinion.* When a doctor comes to see a patient the doctor doesn't just look at them and feel their pulse and look at their tongue and probably go in with a stethoscope. You try to get the patient in conversation. At no time during Mrs. Downey's illness was she communicative to me in any way. She was toxic during the entire illness and was more or less bad, didn't communicate to me, I couldn't even speak about the weather. She had no reply to make even about the weather. The fact that Mrs. Downey discussed trust companies and selected one to act as executor does not alter my opinion. She might have known that she was executing a will. She might not have realized that she was disposing of her property after her death. She might not have had the full realization of it. On May 12, the day the will was made, Mr. Hollingsworth did not call on me. He did call on me May 9. At that time I told him that Mrs. Downey was a very sick woman and if he wanted a will made it would have to be done very soon because she was very sick. On January 31, 1940, Mr. Hollingsworth and Mr. Burns called on me at my private office. At that time I made the statement that the nurses would in my opinion be the proper ones to state what Mrs. Downey's condition was at the time she made her will. I made that statement before reviewing the case, having it in mind. They called at the office and I didn't recall the particular case to mind. In using the expression irrational I mean it consists in disorientation as to time and place or what act the person is doing. For instance like getting out of bed, getting out of bed and running out of the hospital would be an irrational act, something that is unreasonable, no reason for doing so. That is a consideration of irrationality I think. A person that is delirious is certainly not rational.

"I mean by toxic a person absorbing the products of a poison or an inflammation in the system, the poisoning into the blood which makes them sick and causes headaches, fever, feeling of sickness. Mrs. Downey was suffering from a toxic condition May 12, 1939. That fact would have effect upon the influence of the morphine stopping her pain and dulling her other senses. *Her mental condition was based upon her toxicity due to her in-*

fection and also that she had a shot of morphine. The morphine would still have its medicinal effect upon a person whose system was toxic. All of the senses would be dulled by morphine."

In connection with the testimony of Dr. Marsh as to the disorientation of the decedent on May 12, 1939, the contestants introduced the will showing the signature thereon. They also introduced many exemplars of decedent's signature. One was a check written the day before, May 11, 1939. The latter is remarkably regular and legible. The former consists of scratches so illegible they cannot be read.

Mr. Engleman testified that for a week after May 8, 1939, he visited the hospital daily. At the time he left Mrs. Downey at the hospital she asked him to care for Bum, her cat. He called on her each day at about noon. On the day the will was made he testified, "I couldn't hardly talk to her at all. I couldn't get her to answer a question intelligently. She would talk a little, and then lapse off unconscious. I stayed there four or five minutes, I tried to ask her a few questions and she would give me a part answer and I couldn't get no satisfaction so I walked out. In appearance she was very weak. She was very much weaker than the day I took her there. I wanted to get some feed for the cat, she was out of feed. She didn't know whether I was talking about a cat or what I was talking about. I told her that the canned salmon—she always fed him canned salmon—was all gone and what should I do. She just said, 'Bum out of salmon, Bum out of salmon,' something like that. On that day she was irrational."

Mrs. Edna Elphick who had charge of Hillside Hospital had a desk in the hallway opposite Mrs. Downey's room. She was at her desk when the will was being prepared. Mr. Hollingsworth called upon her to act as a witness. She went with Mr. Hollingsworth into Mrs. Downey's room and later signed the will as a witness. She testified that at the time Mrs. Downey signed the will the latter was partly irrational.

The proponent called Dr. A. A. Thurlow as an expert and propounded to him a long hypothetical question. Without attempting to summarize his testimony it may be conceded for all the purposes of this decision that he expressed opinions at variance with some of the opinions expressed by Dr. Marsh. The proponent also called Miss C. N. Oliver, one of the nurses attending Mrs. Downey, who testified that she acted as one of the witnesses to the will and that Mrs. Downey was rational. Mr. Alex Sokol, a technician, went to the Hillside Hospital to take a blood test on the evening of May 12. He was an intimate acquaintance of the decedent. He also testified that the decedent was rational. Miss Bobst, the owner of Hillside Hospital, called at the room of Mrs. Downey between 7 and 7:30 and before the will was written. She testified that Mrs. Downey at that time was not in a stupor. John Reeder, a personal acquaintance of several years standing, called on Mrs. Downey May 10, and also on May 17. He testified that she seemed to be of sound mind on each day. Mr. Hollingsworth, the attorney who prepared the will, was an intimate acquaintance of the decedent and her husband. He also testified that at the time the will was executed the decedent was rational.

[1] In its first point the proponent claims the burden of proof is always upon contestant to prove unsoundness of mind and such unsoundness as would be sufficient to invalidate a will. The contestants do not controvert the claim but assert they assumed the burden and established the fact that the decedent was of unsound mind when she made her will. Estate of Gill, 14 Cal.App. 2d 526, 58 P.2d 734.

[2] The proponent also asserts that the time to which the proof should have been directed was the time the will was executed. Estate of Nolan, 25 Cal.App.2d 738, 78 P.2d 456. That assertion is not controverted, but the contestants call attention to the fact that from the time the decedent left the operating room until at least three or four hours later she was incompetent. But it was during that period and only about one hour after she left the operating room that she made the will.

[3, 4] The proponent then quotes from In re Redfield's Estate, 116 Cal. 637, 655, 656, 48 P. 794, 799: "It was the province and duty of the jury to draw the inference of fact from the evidence before them, regulated by the rules of law stated to them by the court; being assisted but not superseded in that function by the opinions of experts. It is equally the duty of the court to determine whether there is any satisfactory evidence to justify the conclusion they reached. * * *" No one would controvert that rule; and, from what has been said above, it is clear that the trial court followed it.

[5] In connection with the last point the proponent contends that the opinion of a witness that a person is of unsound mind can be no stronger than or superior in evidentiary weight to the reasons upon which he bases his opinion. Estate of Campbell, 46 Cal.App. 612, 621, 189 P. 812. That is so, but it is equally true that the reasons given by Dr. Marsh were most convincing.

[6] The proponent in its next point contends that the decedent had testamentary capacity. However, they admit the rule in this regard is correctly stated in Estate of Sexton, 199 Cal. 759, 251 P. 778. On page 764 of 199 Cal., page 780 of 251 P., the court said: "A testator is of sound and disposing mind and memory if, at the time of making his will, he has sufficient mental capacity to be able to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property, and to remember, and understand his relations to the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument." But, in the instant case both counsel and the learned judge of the trial court seemed to have had that book and page before them at all times. The testimony on both sides was confined to said rule as written in that decision.

[7] It is also claimed that the administration of morphine is not ground for overturning a will, nor are physical disability and age. No one in the instant case has claimed that, standing alone, they are. But it will be conceded that each is a factor to be considered.

[8] Again the proponent claims that the evidence of Dr. Marsh that the decedent's condition would not and did not improve in one hour after he saw the decedent at 7 o'clock was unwarranted. We find no merit in the claim. It was purely a question of fact to be presented and proved by competent evidence and the question was for the jury to determine after all of the evidence was before it.

[9] Because Mrs. Elphick signed the will as a witness the proponent contends that she stultified herself by giving evidence in the instant case, and that said evidence should not be considered. We find no merit in the contention. Shortly prior to the execution of the will she was at her desk in the hallway. Mr. Hollingsworth went out and asked her to come in and act as a subscribing witness. She demurred and asked him if he thought Mrs. Downey was competent. He replied that Dr. Marsh said that she was. As Mrs. Elphick testified she did not set up her opinion against the opinion of Dr. Marsh. Later it transpired that whatever Dr. Marsh had said, his statement was made and had reference to the condition of Mrs. Downey on May 9, and had no reference to her condition on May 12. Under those circumstances Mrs. Elphick did not stultify herself by appearing as a witness.

[10] In its reply brief the proponent quotes from Estate of Casarotti, 184 Cal. 73, 78, 192 P. 1085, 1087: "Evidence which standing by itself might be sufficient to sustain a verdict may, in the light of all the facts, be wholly inadequate, and that without invading the province of the jury as the judges of the weight and sufficiency of the evidence." Thereupon they apparently claim that in a will contest the rules regarding the burden of proof are different than in other actions. We think they are mistaken. On page 75 of the cited case (184 Cal., page 1085 of 192 P.) the court said: "There was no pretense that the testator was delirious, irrational, or insane or under any delusions * * *." Clearly those are not the facts in the instant case. Furthermore, in Estate of Ramey, 62 Cal.App. 413, 425, 217 P. 135, 140, the court said: "However, in will contests the rule is the same as in other proceedings, that all questions of the weight of the evidence and the credibility of the witnesses are for the jury and the trial court, and if there be any substantial evidence to support the finding or verdict it cannot be set aside by the reviewing court, although said court might believe the great preponderance of the evidence was the other way." See, also, Estate of Miller, 16 Cal.App.2d 154, 159, 160, 60 P.2d 498. The facts in the instant case are almost parallel with the case entitled Estate of Gill, supra. In that case, as in the instant case, it was claimed that the evidence was insufficient. However, the court held otherwise.

[11, 12] The proponent states facts showing the will was not "unnatural." It then quotes: "If the disposition made of his property is not 'unnatural,' or an apparent injustice is explained, the instrument is to be sustained, notwithstanding proof of insanity. * * *" 26 Cal.Jur. 632. It cites in support of the text Estate of Shay, 196 Cal. 355, 237 P. 1079; Estate of Casarotti, supra; Estate of Perkins, 195 Cal. 699, 235 P. 45; Estate of Purcell, 164 Cal. 300, 128 P. 932; In re Redfield, supra. An ex-

amination of those cases discloses that not one of them sustains the text relied on. If insanity is proved the effect of the proof is determined by the rule we have hereinabove quoted from Estate of Sexton, 199 Cal. 759, 764, 251 P. 778. Moreover there is nothing in any one of the cases cited in 26 Cal.Jur. 632 that is at all in conflict with the Sexton case.

The order appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

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51 Cal.App.2d 297

GOODMAN BROS., Inc., v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO.

Civ. 12050.

District Court of Appeal, First District, Division 1, California.

April 17, 1942.

1. Workmen's compensation 🔑2100

Under statutes, if an employee is injured in the course and scope of his employment, and the employer is uninsured, the employee may file application for workmen's compensation, and also bring action in regular courts for injuries sustained, but if employer is in fact insured, the regular courts have no jurisdiction. St.1937, pp. 270, 271, §§ 3700, 3706–3709.

2. Workmen's compensation 🔑1789

The Industrial Accident Commission proceeds judicially and its determinations, subject to the same limitations applicable to judgments of courts generally, are "res judicata" in all subsequent proceedings between same parties or those privy to them.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

3. Workmen's compensation 🔑1791

Where employee brought compensation proceeding before Industrial Accident Commission and brought action against employer in superior court for injuries on theory that the employer was not insured as required by law, compensation award granting compensation, which could have been made only on finding that employer was insured, was "res judicata" in the superior court action on question of insurance. St.1937, pp. 270, 271, §§ 3700, 3706–3709.

4. Workmen's compensation 🔑2100

Where employer is uninsured, the employee may bring an action in superior court or he may pursue relief before both the superior court and the Industrial Accident Commission at the same time. St.1937, pp. 270, 271, §§ 3700, 3706–3709.

5. Judgment 🔑948

A plea of res judicata does not oust the court of jurisdiction and at most it is conclusive evidence on an issue presented to the trial court.

6. Prohibition 🔑10(1)

"Prohibition" attacks only the jurisdiction of the court.

See Words and Phrases, Permanent Edition, for all other definitions of "Prohibition".

7. Prohibition 🔑10(2)

Prohibition would not lie to restrain further prosecution of superior court action for injuries sustained by employee on ground that a workmen's compensation award was res judicata on controlling issue in superior court action, since plea of res judicata did not oust superior court of jurisdiction, and therefore could not be enforced by prohibition.

8. Judgment 🔑958(1)

Under Code of Civil Procedure, when an answer pleads a prior judgment as a defense, the court may try that issue before trial of the main case. Code Civ.Proc. § 597.

9. Judgment 🔑958(1)

Any error of trial court in deciding issue presented by plea of res judicata is no different than error in refusing to recognize binding force of other types of evidence, and can be corrected only on appeal from the judgment.

◆

Petition for writ of prohibition by Goodman Bros., Incorporated, against the Superior Court of the City and County of San Francisco, to restrain further prosecution of a superior court action.

Alternative writ previously issued discharged and petition for peremptory writ denied.

Hadsell, Sweet, Ingalls & Carroll, of San Francisco, for petitioner.

John W. Herron, of San Francisco, for respondent.

PETERS, Presiding Judge.

Petition for a writ of prohibition.

The petitioner, Goodman Bros., Inc., is named as one of several defendants in a superior court action brought by its employee, Clemence Aho, to recover damages for his personal injuries received by him while acting in the course and scope of his employment. So far as petitioner is concerned, it is named as a defendant in that action on the theory that it was uninsured against liability for injuries to its employees as required by section 3700, Labor Code, St.1937, p. 270, and, therefore, under section 3706 of that code, an action may be brought against it in the superior court. Petitioner, by this proceeding for prohibition, seeks to restrain further prosecution of the superior court action, so far as it is concerned, on the theory that the superior court has no jurisdiction of this petitioner. This contention is predicated on the allegation that the employee recovered an award of compensation in a proceeding before the Industrial Accident Commission, in which proceeding it was found that petitioner was insured, and an award was granted its employee Aho against petitioner's insurance carrier. Petitioner contends that this finding in the action before the commission is res judicata in the superior court action as to a jurisdictional fact, that it conclusively determines that petitioner was insured, and that this adjudication deprives the superior court of jurisdiction.

Section 3706, Labor Code, provides that: "If any employer fails to secure the payment of compensation, any injured employee or his dependents may proceed against such employer by filing an application for compensation with the commission, and, in addition, may bring an action at law against such employer for damages, as if this division did not apply." Section 3707, Labor Code, permits the employee to attach the property of the employer in such action, while under section 3708, it is provided that in such action negligence on the part of the employer is presumed, and contributory negligence on the part of the employee is no defense. Under the provisions of section 3709 if an employee obtains a judgment in excess of the amount awarded in the compensation proceeding "the compensation awarded by the commission * * * shall be credited upon such judgment."

[1] Under these sections, if an employee is injured in the course and scope of his employment, and the employer is uninsured, the employee may proceed both before the commission and in the regular courts. If the employer is in fact insured the regular courts have no jurisdiction.

The petition herein alleges that while Aho was employed by petitioner, on March 4, 1941, he received an injury arising out of, and in the course of, his employment, and that on March 31, 1941, he filed his application with the Industrial Accident Commission for compensation, naming petitioner as his employer and the Fidelity & Casualty Company of New York as the employer's insurance carrier. In this petition before the commission Aho alleged, in effect, that there was a controversy over whether the employer was in fact insured, and over whether a penalty should be imposed against the employer for being wilfully uninsured. Aho filed this application on his own behalf. The petition for prohibition alleges that a hearing was had in San Francisco on Aho's application on April 14, 1941, at which Aho appeared and testified; that a further hearing was had in Fresno on May 2, 1941, at which only the employer and the Fidelity Company were represented; that on May 23, 1941, an attorney filed a notice of appearance on behalf of Aho; that on May 26, 1941, Aho filed a complaint for damages in the superior court against petitioner in which it was averred that petitioner employer was uninsured. A second count of this complaint was directed against J. G. Johnson, Inc., alleged to be the owner of the premises on which the injury occurred. It should be pointed out that the petitioner in the present proceeding only seeks to restrain the superior court action as to it. The question of the liability of J. G. Johnson, Inc., is not involved in this proceeding.

The petition for prohibition next alleges that on June 23, 1941, the attorney for Aho filed an affidavit in the proceeding before the commission in which he set forth that the insurance policy issued by the Fidelity Company was dated March 4, 1941, at noon; that the accident happened at 10:45 a. m. on that day; that from the face of the policy it was apparent that it was not in effect at the time of the accident; that it was on this theory that the superior court action against Goodman Bros., Inc., had been filed; that after the filing of that complaint affiant learned that the insurance company deems itself liable on the policy because of certain representations made to Goodman Bros., Inc., by the agent of the insurance company; that affiant does "not concede or stipulate that Goodman Bros., Inc., was covered at the time of the accident or had an insurance policy for compensation insurance in effect at the time of the accident, but under the circumstances of this case, it is very questionable whether or not plaintiff would be able to prove non-insurance on the trial of the personal injury action." The petition for prohibition then alleges that on September 8, 1941, the commission made its findings and award in the proceeding pending before it. The commission expressly found that Goodman Bros., Inc., was insured at the time of the accident, and based on this finding, made its award against the insurance company, and released Goodman Bros., Inc., from liability. Thereafter, so it is alleged, Goodman Bros., Inc., filed its answer in the superior court action denying that it was uninsured, and alleging as a separate defense, the prior decision of the commission holding that Goodman Bros., Inc., was insured; that thereafter plaintiff in the superior court action filed a demurrer to the answer and a notice of motion to strike out certain portions of the answer including the defense of res judicata; that on November 19, 1941, the trial court entered its order sustaining the demurrer and granting the motion to strike from the answer the plea of res judicata.

Aho has filed a demurrer and answer to this petition for prohibition. In the answer it is alleged that at all hearings before the commission at which Aho was present the insurance company contested its liability; that at subsequent hearings Aho was not present in person, or by agent or by attorney; that in May of 1941 the insurance company in a letter addressed to the commission stipulated to assume liability; that the findings of the commission were predicated on this stipulation.

[2] The law is settled that the Industrial Accident Commission proceeds judicially, and that its determinations, subject to the same limitations applicable to judgments of courts generally, are res judicata in all subsequent proceedings between the same parties or those privy to them. This problem has been discussed in at least two California cases. In Williams v. Southern Pac. Co., 54 Cal.App. 571, 202 P. 356, the decedent's widow as administratrix brought an action in the superior court against the employer of her husband under the Federal Employer's Liability Act, 45 U.S.C.A. § 1 et seq., on the theory that at the time of his death her husband was engaged in interstate commerce. The employer denied the allegation that the employee was engaged in interstate commerce, alleging that he was in fact engaged in intrastate commerce. Thereafter, the widow, in her individual capacity, to protect herself in the event the superior court should hold that her husband was not employed in interstate commerce, filed an application before the Industrial Accident Commission alleging all the facts, including the pendency of the superior court action, and praying that the proceeding before the commission be held in abeyance until final determination of the superior court action. Under the law, in the event decedent had been employed in intrastate commerce, sole jurisdiction was with the commission. The jurisdiction of the superior court depended on the accident having occurred in interstate commerce. After filing before the commission, the widow formally moved for a continuance of the commission proceeding to await the determination of the superior court action, which had been filed first. The motion was denied. The widow then sought a writ of prohibition from the Supreme Court to accomplish this purpose. The petition for the writ was denied. Thereafter, the commission held a hearing, found the accident had occurred in intrastate commerce, and made its award in favor of the widow. The superior court refused to recognize the award as res judicata and proceeded to trial of the action there pending. This trial resulted in a large judgment in favor of the plaintiff based on the implied finding that the employment was interstate in character. This judgment was reversed on appeal on the ground that the award of the commission was res judicata on the issue as to whether the employee was engaged in interstate or intrastate commerce. The court held that proceedings before the commission were "strictly judicial," and its findings were therefore res judicata. The court recognized that the superior court action had

been filed first, but held at page 576 of 54 Cal.App., at page 358 of 202 P., that "it is not the final judgment in the first suit, but the first final judgment, although it may be in the second suit, that renders the issues in such a case res adjudicata [sic.] in the other court." On the same page the court pointed out: "A material issue in both proceedings was the character of Williams' employment; if intrastate, the Commission had exclusive jurisdiction to award compensation; if interstate, then the jurisdiction was in the superior court. The Commission determined that the employment was in intrastate commerce, and the fact—'so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. * * *'"

The decision in this case is direct authority in the instant case. The question as to whether Goodman Bros., Inc., was in fact insured was an issue in the proceeding before the commission. The commission could not and would not have relieved the employer from liability and made its award against the carrier had a finding of insurance not been made.

A similar problem was involved in Gerini v. Pacific Employers Ins. Co., 27 Cal.App. 2d 52, 80 P.2d 499. In that case a proceeding before the commission by parents of a decedent resulted in an award in their favor based on a finding that the decedent had been an employee of Ramazzotti. Thereafter, the parents brought action in the superior court against the employer and his insurance carrier, claiming that their son was not in fact an employee and that the employer and his insurance carrier, defendants in the action, had conspired to prevent the plaintiffs from bringing a superior court action for the death of their son, and had falsely represented before the commission that the son was an employee of Ramazzotti. The court affirmed judgment entered for defendants after sustaining of their demurrers to the complaint. It was pointed out that the plaintiffs' right of recovery depended on proof that their son was not an employee, and that they would be forced to relitigate in the action the issue of his employment, in order to prove the falsity of the commission's finding. The court said that the "commission's finding was a final and conclusive determination of the fact of the son's employment," (27 Cal.App.2d page 54, 80 P.2d page 501) citing the Williams case, supra. The court was evidently of the view that the allegations of the complaint were not sufficient to state a cause of action for relief from the award of the commission on the ground that it had been procured by extrinsic fraud. Hearings in the Supreme Court were denied in both the Williams and Gerini cases.

[3, 4] It follows, therefore, that the prior decision of the commission in this proceeding, if such decision is final and not subject to attack on the ground of extrinsic fraud or mistake or other grounds permitted by law, is res judicata in the superior court action between the same parties on the question as to whether Goodman Bros., Inc., was in fact insured at the time the accident occurred. It is clear from the above decisions that, subject to the limitations above indicated, the superior court must recognize the determination of that question of fact made by the commission. None of the cases cited by respondent holds to the contrary. They merely establish that where the employer is uninsured the employee may bring an action in the superior court, or he may pursue relief before both the superior court and the commission at the same time. See Marshall v. Foote, 81 Cal.App. 98, 252 P. 1075; Grady v. Canfield, 9 Cal.App.2d 341, 49 P.2d 902; Coffin v. Bloodworth, 28 Cal.App.2d 522, 82 P.2d 953. In People v. Barker, 29 Cal. App.2d, Supp., 766, 77 P.2d 321, it was properly held that in a criminal prosecution for failure to carry compensation insurance an award of the commission finding that the defendant-employer was not insured was not admissible in evidence. The opinion notes the general rule that a judgment in a civil action is not res judicata in a criminal suit. The case is not here relevant.

Nor is the holding of Rosslow v. Janssen, 139 Cal.App. 81, 33 P.2d 705, contrary to what has been here said. In that case the commission had determined that the employer was uninsured, but this decision was being attacked by a petition to reopen when the superior court proceeded to the trial of the action there pending. The employer moved to terminate the proceedings in the superior court, which motion was denied. The appellate court properly held that it was not error to refuse to terminate—that the superior court action could be maintained "independently" of the action before the commission. While it is true that the appellate court stated that the issue of insurance was to be determined in the superior court "irrespective of the proceeding pending before the Industrial Accident Commission," that language must be read in connection with the facts there involved. There was no question of res judicata presented. Both the commission and the superior court held the employer was uninsured. The language was used in connection with the rejection of appellant's contention that having proceeded before the commission the superior court had no jurisdiction.

[5, 6] Although it is the law that the prior final decision of the commission is res judicata in the superior court action on the issue of insurance, that does not mean that the superior court can be restrained by a writ of prohibition from trying the case there pending against Goodman Bros., Inc. The law is settled in this state that the plea of res judicata does not oust a court of jurisdiction—at most, it is conclusive evidence on an issue presented to the trial court—and prohibition is, of course, a writ that only attacks the jurisdiction of the court.

There are many cases holding that the plea of res judicata does not oust the court where it is interposed of jurisdiction over the controversy there pending. In Baird v. Superior Court, 204 Cal. 408, 268 P. 640, the petitioner was seeking by prohibition to restrain the superior court from trying a proceeding there pending on the ground a prior decision was res judicata. The court held at page 412 of 204 Cal., at page 641 of 268 P., that "under no hypothesis does the writ of prohibition lie" and continued, "Res judicata must be affirmatively relied upon and shown in evidence, and in some cases must be pleaded, but in no case is the plea in and of itself sufficient to oust the court of jurisdiction. In its strongest form it is nothing more than conclusive evidence upon all or some of the issues involved. When a former judgment is pleaded either in bar or as an estoppel on some issue, there immediately arise questions as to identity of the parties, the validity of the judgment roll, the legal effect to be given it, and perhaps many other questions. Such matters are for the determination of the trial court, and, whether correctly or incorrectly determined, it is nevertheless the exercise of jurisdiction over the subject-matter and the parties."

The same factual situation was presented in Reidy v. Superior Court, 220 Cal. 111, 29 P.2d 780, where the petitioner sought by prohibition to restrain a trial on the ground that the issue involved had theretofore been decided by another court, and was therefore res judicata. In rejecting the contention that prohibition was proper the court stated at page 112 of 220 Cal., at page 780 of 29 P.2d: "While the plea of a former judgment may be a complete defense and a bar to a pending action, the court in which the second action is pending has jurisdiction to pass upon the merits of said plea and determine whether or not it is well taken. This question has been frequently before the appellate courts of this state and has been determined adversely to the contention of the petitioners. [Citing cases.]" See, also, Boullester v. Superior Court, 137 Cal.App. 193, 30 P.2d 59.

In Anglo-California Nat. Bk. v. Superior Court, 15 Cal.App.2d 676, 59 P.2d 1053, the petitioner sought by writ of mandate to dismiss an action pending in the superior court, after the trial court had denied his application for a nonsuit and for judgment on the pleadings predicated on the doctrine of res judicata. The court denied the writ on the sole ground that, even if it be assumed that the doctrine of res judicata was there applicable, error of the trial court in denying the plea could only be corrected upon an appeal.

In Brown v. Superior Court, 13 Cal.App.2d 693, 57 P.2d 965, the petitioner contended that a writ of prohibition could be used to restrain a court from proceeding where it had improperly refused to recognize a plea of res judicata. The court denied the writ and, in addition to stating the law substantially as it is stated in the quotation from the Baird case, supra, (upon which case it relied) stated at page 695, of 13 Cal.App.2d, at page 966 of 57 P.2d: "Pleas of res judicata and estoppel are defensive matter and the superior court has jurisdiction to determine the merits thereof when interposed properly by pleading or proof; and any alleged error in ruling upon such a plea being reversible on appeal, the pleader is not entitled to a writ of prohibition to restrain the superior court from proceeding with the trial of the case when the court has jurisdiction of the parties and the subject-matter of the action. [Citing cases.] As stated, any error on the part of the court in its determination of the effect of the prior judgment may be reviewed on appeal." See, also, Brown v. Brown, 26 Cal. App.2d 637, 79 P.2d 1112, where another phase of the same case was involved and where the court came to the same conclusion.

In Rideaux v. Torgrimson, 12 Cal.2d 633, 86 P.2d 826, the employee filed an action in the superior court on the theory that he had suffered injuries in the course and scope of his employment and that the employers were uninsured. The trial court sustained a demurrer to the complaint for the reason that it appeared therein that the employers had died in the same accident, the trial court holding the action did not survive. On appeal it was held that the cause of action created by the forerunner of section 3706 of the Labor Code survived. After the case had been argued in the Supreme Court, and while it was still pending therein, the respondent sought to have the Supreme Court consider a final award of the Industrial Accident Commission determining that the plaintiff was not entitled to an award of compensation because she was not an employee within the meaning of the compensation act. It was urged that this rendered the issue in the action then on appeal res judicata. In discussing this point the Supreme Court stated at page 638 of 12 Cal.2d., at page 828 of 86 P.2d: "A consideration of the nature of a plea of res judicata indicates that this question must be answered in the negative. A defense founded upon the conclusiveness of a former adjudication must be either pleaded or proved. [Citing cases.] Such defense is waived if not raised either by the pleadings or the evidence. [Citing cases.] Since the scope and validity of the prior judgment may require scrutiny, a plea of res judicata does not oust the court of jurisdiction. [Citing cases.] In view of these principles, this court cannot now consider the effect of an adjudication which may never be relied upon as a bar to the action for damages, or which the appellant may be able to show does not estop her from prosecuting this suit."

[7] These cases are conclusive on the point under consideration. The plea of res judicata does not oust a court of jurisdiction and therefore it cannot be enforced by prohibition.

[8] This rule imposes no great hardship on the parties. Under section 597, Code of Civil Procedure, when the answer pleads a prior judgment as a defense, the court may try that issue before the trial of the main case. This supplies a speedy and expeditious method of disposing of that question.

[9] It is true that the trial court may decide the issue incorrectly. If it does so, its error is no different than when it refuses to recognize the binding force of other types of evidence. Such errors can only be corrected on appeal from the judgment. In the present case, it is apparent that if the prior judgment of the commission was final, and, if such prior judgment was properly pleaded and was not subject to attack, the trial court committed error (which error is still correctible in the trial court) in sustaining a demurrer thereto, and in striking the defense from the answer. Such error, if any, however, cannot be corrected by prohibition.

The alternative writ heretofore issued is discharged, and the petition for the peremptory writ is denied.

KNIGHT and WARD, JJ., concurred.

DENIO et al. v. CITY OF HUNTINGTON BEACH.*

Civ. 2924.

District Court of Appeal, Fourth District, California.

April 10, 1942.

Hearing Granted June 8, 1942.

1. Appeal and error 🔑1002

Conflicts in evidence are settled by the trier of facts.

2. Contracts 🔑245(2)

Preliminary negotiations between special counsel and city concerning contract for legal services were "merged" into written contract which was controlling. Civ.Code, § 1625.

See Words and Phrases, Permanent Edition, for all other definitions of "Merge".

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* Subsequent opinion 140 P.2d 392.

3. Mines and minerals 🔑121
Municipal corporations 🔑658

The city of Huntington Beach owns in fee Ocean avenue, a street paralleling the shore line a few hundred feet distant, and hence can prevent operating oil companies from whipstocking wells on landward side of street, under its surface and into oil sands underlying the ocean. St.1937, p. 2975, and p. 2977, art. 1.

4. Municipal corporations 🔑214(3)

The city of Huntington Beach had authority to employ special counsel to protect city's right to oil within city boundaries. St.1937, p. 2975, and p. 2977, art. 1; Gen. Laws 1937, Act 5233, §§ 850, 862.27.

5. Municipal corporations 🔑221

Oil royalties are received by municipality in its "proprietary" and not in its "governmental capacity".

See Words and Phrases, Permanent Edition, for all other definitions of "Proprietary Capacity" and "Governmental Capacity".

6. Municipal corporations 🔑214(1)

The governing body of a municipality or quasi municipality may make contracts for special employment in cases where time in which services may be performed will extend beyond terms of office of members of the appointing body.

7. Municipal corporations 🔑214(3)

Where special counsel were employed by written contract to perform services in connection with city's recovery of oil royalties, that services to be rendered might have been but were not completed during terms of office of councilmen authorizing execution of contract did not render the contract illegal.

8. Municipal corporations 🔑220(8)

Whether special counsel abandoned contract to perform legal services in cooperation with city attorney so as to preclude recovery of attorney's fees from city was for jury under conflicting evidence.

9. Appeal and error 🔑930(1), 989

The appellate court will accept as true evidence supporting implied finding of jury and will disregard conflicting evidence.

10. Municipal corporations 🔑220(2)

A city could not disclaim liability for special counsel's attorneys' fees under contract providing for specific compensation on theory that sum paid upon execution of contract was ample compensation for services performed, since if attorneys could recover at all they must recover under contract.

11. Municipal corporations 🔑220(8)

In action against city for attorneys' fees under contract whereby special counsel undertook to secure returns to city from oil in tide or overflow lands within city boundaries, whether any of oil produced by city's lessee came from below the tide or overflow lands within city was for jury.

12. Evidence 🔑10(2)

The appellate court will take judicial notice of boundaries of municipalities.

13. Appeal and error 🔑1033(7)

A party cannot complain of a judgment more favorable to it than one justified by pleadings and evidence.

14. Mines and minerals 🔑79(1)

The word "rental" as commonly understood differs from a "royalty" received under an oil contract.

See Words and Phrases, Permanent Edition, for all other definitions of "Rental" and "Royalty".

15. Contracts 🔑346(2)

A party to contract may limit his liability to pay certain sum to funds to accrue to him from a certain source, and then recovery cannot be had without pleading and proof that funds became available from source specified.

16. Appeal and error 🔑1064(1)

In action against city to recover attorneys' fees under contract which entitled special counsel to percentage of royalties received by city from oil, gas, or other hydrocarbons produced from city property, alleged error in instruction that counsel had burden to prove that money was paid to city on account of rental and royalty was harmless where recovery was limited to percentage of royalties received by city.

17. Mines and minerals 🔑79(1)
Municipal corporations 🔑220(4)

A lease which required lessee to pay to city a percentage of oil and gas produced from described premises did not provide for "rental" for use of an easement, but provided for "royalties" so as to authorize recovery of attorneys' fees under contract whereby city obligated itself to pay to special counsel a percentage of royalties received by city for legal services performed.

A "royalty" is a right to receive periodical payment in the nature of a rental of a fraction or percentage of the production or of its proceeds.

18. Mines and minerals ⚷79(1)

The term "bonus" as applied to an oil lease means a sum of money paid by lessee to lessor in consideration for execution of lease as distinguished from return of "royalty" reserved by lessor to be paid by lessee through term of lease.

See Words and Phrases, Permanent Edition, for all other definitions of "Bonus".

19. Municipal corporations ⚷217(1)

Alleged ambiguities in contract between special counsel and city for fees for performance of legal services must be interpreted most strongly against counsel who prepared the contract.

20. Mines and minerals ⚷79(1)
Municipal corporations ⚷220(4)

Where oil company agreed to pay to city upon execution of oil and gas lease a certain sum and thereafter to pay percentage of gross amount received by company from sale of oil, gas and other hydrocarbons, the sum paid on execution of lease was a "bonus" and not a "royalty" and hence special counsel were not entitled to any portion of specified sum under contract entitling counsel to percentage of royalties received by city.

◆

Appeal from Superior Court, Orange County; George K. Scovel, Judge.

Action by E. C. Denio and others against the City of Huntington Beach to recover attorneys' fees under a written contract between plaintiffs and defendant. From a judgment for plaintiffs, defendant appeals.

Judgment reduced and as reduced affirmed.

Drumm, Tucker & Drumm, of Santa Ana, and Ray H. Overacker, of Huntington Beach, for appellant.

Forgy, Reinhaus & Forgy, of Santa Ana, for respondents.

MARKS, Justice.

This is an appeal from a judgment in the sum of $2,000 for attorneys' fees under the terms of a written contract between plaintiffs and defendant.

[1] Many of the facts of the case are in sharp dispute. As conflicts in the evidence are addressed to and settled by the trier of fact, in this case a jury, we will confine our summary to those facts tending to support the verdict and judgment and will, as far as possible, disregard conflicts in the evidence.

[2] There is much evidence of negotiations between plaintiffs, who are duly licensed attorneys at law, and the defendant city, which resulted in a contract consisting of a written proposal by plaintiffs dated February 25, 1937, and a written acceptance of this proposal under authority of a resolution of the city counsel of defendant passed on March 1, 1937. As these negotiations were preliminary to and were concerned with the terms of the contract we will not concern ourselves with them. They were merged into the written contract which must be controlling here. Sec. 1625, Civ.Code; United Iron Works v. Outer Harbor Dock & Wharf Co., 168 Cal. 81, 141 P. 917; 6 Cal.Juris., sec. 166, p. 261.

Prior to May 15, 1937, the City of Huntington Beach was a city of the sixth class. After that date it operated under a charter. Stats. 1937, p. 2975. Its uplands lie along and northeasterly of the line of mean high tide of the Pacific Ocean. Its southwesterly boundary parallels that line and is distant three miles from it. Carr v. Kingsbury, 111 Cal.App. 165, 295 P. 586. The boundaries described in the charter conform to the prior boundaries of the municipality. Art. I, Charter.

Oil in paying quantities was discovered within the city limits a number of years ago. Drilling operations approached the water line and operators became satisfied that large quantities of oil lay under the tide and overflow lands and under the floor of the ocean. A controversy arose over the right to extract this oil and over royalties from wells whipstocked into it from wells surfaced on the uplands bordering the ocean. See Carr v. Kingsbury, supra; Joyner v. Kingsbury, 97 Cal.App. 17, 275 P. 255. Defendant was one of the active claimants to this oil. A number of bills were introduced in the legislature granting this oil to defendant. Some were defeated there and others were vetoed by Governors Rolph and Merriam. Two that were approved were subsequently submitted to a referendum vote and were defeated by the people.

Ultimately the State of California took control and is receiving royalties from operating companies recovering this oil. This is under authority of the State Lands Act. Chap. 5, p. 23, Extra Session 1938. Lately the federal government has entered the controversy and legislation has been introduced in congress pointing to its claim of the minerals underlying tide lands and the ocean.

In 1934 the City of Huntington Beach entered into an oil lease with the Southwest Exploration Company which attempted to give that company the right to drill for and remove oil from these oil sands. The area described in this lease is bounded on the northeasterly by the line of mean high tide, on the northwesterly by the northwesterly boundary of the city which extends over the ocean, on the southwesterly by the southwesterly boundary of the city, and on the southeasterly by the southeasterly line of Twenty-third Street produced over the ocean. Upon the execution of the lease, the lessee paid to the city $6,000 as a bonus and agreed to pay it a one-sixth royalty of all oil and gas produced, saved and sold from the leased premises. No development work was done under this lease but, evidently, it has not been cancelled.

[3] Ocean Avenue is a public street of the City of Huntington Beach, 100 feet wide, and parallels the shore line a few hundred feet distant from it. It is believed that the city owns this street in fee (Marshall v. Standard Oil Co. of California, 17 Cal.App.2d 19, 61 P.2d 520) and can therefore prevent operating oil companies from whipstocking wells on the landward side of the street, under its surface and into the oil sands underlying the ocean.

Plaintiffs' letter which contains the terms of the contract between the parties, reads in part as follows:

"February 25, 1937.

"The Honorable, the Mayor and City Council of the City of Huntington Beach, California.

"Gentlemen:

"The firm of Denio, Hart, Taubman & Simpson will act as special counsel for the City of Huntington Beach in cooperation with your City Attorney in:

"(a) The preparation of a freeholders' charter for submission to the electors of the City of Huntington Beach for adoption or rejection as soon as reasonably possible.

"(b) In all suits and legal matters in connection with your proposed efforts to obtain the City's just control and returns from the oil, gas or other hydrocarbon substances claimed by it or to which it is entitled, in the tide or overflow lands within the City boundaries of the City of Huntington Beach.

"For the above services we are to receive the following compensation:

"1. A retainer of Twenty-five Hundred Dollars ($2500.00) in cash upon the execution hereof, which shall be, in case no recovery is had as hereinafter specified, in full for all legal services rendered or to be rendered in the above, exclusive of court costs, filing fees, printing, traveling and hotel expenses.

"2. If a recovery is had by the City of Huntington Beach, either by a Court decision or by a compromise or settlement of the City's claims, we are further to be paid out of all moneys paid to the City of Huntington Beach as royalties, or received by it out of the sale of its oil, gas or other hydrocarbon substances, if its royalties are paid to it in kind, the following:

"Ten Per Cent (10%) of the moneys so received by the City for the first two (2) years;

"Fifteen Per Cent (15%) of the moneys so received by the City for the next three (3) years;

"Twenty Per Cent (20%) of the moneys so received by the City for the next ten (10) years.

"The above payments to commence with the first returns paid to or received by the City of Huntington Beach on account of royalties, as above.

"In computing the above periods of percentage payments, the time during which the City does not receive royalty payments, directly or indirectly, either in money or in kind, shall be excluded.

"Payments to be made to this firm within ten (10) days after receipt by the City of its royalties.

"It is understood, of course, that your City Attorney will be in charge of all litigation, and that all compromises, if any, will be subject to his approval and to the approval of your Honorable body."

The $2,500 was paid to plaintiffs.

At a meeting of the city counsel of Huntington Beach held on August 29, 1938, the following resolution was passed: "That that certain Resolution No. 769 entitled: 'Resolution of the City Counsel of the City of Huntington Beach, California, Employing Special Counsel,' be and the same is repealed and the contract therein referred to is hereby cancelled and the said attorneys are hereby discharged."

Under date of October 6, 1938, the city attorney of Huntington Beach wrote a letter notifying plaintiffs of the foregoing action.

Under date of October 8, 1938, plaintiffs replied to that letter as follows:

"This day we have received a letter from your City Attorney referring to the action taken August 29, 1938, by the City Council of the City of Long Beach by Resolution No. 814.

"This is to inform you that we remain, as at all times we have been, ready, able, and willing to proceed and perform all services under our contract of employment with the City of Huntington Beach, as special counsel for said city for the purposes, and upon the conditions and compensation set forth in our said contract of employment. We do not concede your right to terminate our right to the compensation set forth in said contract, and we do not consent to any purported termination of the contract or our rights thereunder. We will continue to hold ourselves ready to act as special counsel for the City of Huntington Beach in cooperation with your City Attorney in all suits and legal matters in connection with the matters and things referred to in said contract or relating thereto, and will expect to receive the compensation therein provided."

Under date of September 26, 1938, the State of California entered into a contract called "Agreement for Easement No. 392." This instrument gave the Southwest Exploration Company the right to surface the drilling of oil wells on certain uplands in the City of Huntington Beach and drill them to the oil sands under the ocean.

Under date of November 3, 1938, the Southwest Exploration Company and the City of Huntington Beach entered into a contract called "Agreement and Easement for Right of Ways."

This agreement recited the fact of the execution of the "Agreement for Easement No. 392" by the State of California; that the Southwest Exploration Company is drilling oil wells under that agreement; that the City of Huntington Beach claims it is entitled to certain royalties by reason of those operations and claims the oil and gas underlying the lands; that these claims are disputed by the Southwest Exploration Company. The oil lease of October 4, 1934, was mentioned with the statement that Southwest Exploration Company questioned the right of the City of Huntington Beach to enter into that lease and has not operated and does not intend to operate under it except under circumstances thereafter set forth.

The contract proceeds as follows:

"Now therefore, in order to settle and compromise the claims of Huntington Beach to the payment of monies and royalties to it by Southwest, and in full settlement and satisfaction thereof, it is understood and agreed as follows:

"1. Upon the due execution and delivery of this agreement, Southwest agrees to and has herewith paid to Huntington Beach the sum of Twenty-five Thousand Dollars ($25,000.00) lawful money of the United States, receipt of which is hereby acknowledged.

"2. Southwest further agrees to pay to Huntington Beach monthly a sum equal to two per cent (2%) of one hundred per cent (100%) of the gross amount received by Southwest from the sale of one hundred per cent (100%) of all the oil, gas, and other hydrocarbons produced, saved and sold by Southwest during the preceding calendar month from the lands described in the above mentioned Agreement, said payments to be made on the 20th day of each month until, in addition to the monies provided for in paragraph 1 hereof, there has been paid to Huntington Beach the further sum of One Hundred Fifty Thousand Dollars ($150,000.00)."

It is further provided that after the City of Huntington Beach has been paid $175,000, including the $25,000 mentioned in paragraph 1, it shall receive two per cent of the total royalties paid to the State of California, and that none of the foregoing payments shall be considered made under the terms of the lease of October 4, 1934.

Paragraph 7 of the contract provides as follows: "In the event that either by the final decision of a court of competent jurisdiction or by the terms of a compromise agreement it shall be determined that Huntington Beach is the owner of the oil, gas and other hydrocarbon substances within and underlying the tide and submerged lands lying within the city limits of the City of Huntington Beach, including the above mentioned lands, then the Oil and Gas Lease dated October 4, 1934, shall become effective and the parties hereto shall thereafter operate thereunder and in accordance with the provisions thereof, and Southwest shall pay to Huntington Beach the royalties therein contained, provided further that any monies paid to Huntington Beach by Southwest hereunder shall be applied in partial or total payment and satisfaction of the monies provided for in paragraph 11 of said Oil and Gas Lease."

The first ground urged for reversal of the judgment is that the contract under which plaintiffs claim is ultra vires, is contrary to public policy and is void. This contention is based on the arguments that the execution of the contract was the result of a legislative act of the city council acting in a governmental capacity and that the attempt to extend the employment beyond the terms of office of the councilmen who adopted it rendered the entire transaction void.

[4] While there seems to be some intimation to the contrary in its opening brief, if we understand its counsel correctly, it is now conceded that the defendant city had authority to employ special counsel. Secs. 850 and 862.27, Municipal Corporation Act, Gen.Laws 1937, Act 5233; Buck v. City of Eureka, 109 Cal. 504, 42 P. 243, 30 L.R.A. 409; Buck v. City of Eureka, 124 Cal. 61, 56 P. 612; State Compensation Ins. Fund v. Riley, 9 Cal.2d 126, 69 P.2d 985, 111 A.L.R. 1503.

There is a sharp conflict of authority in various jurisdictions of the United States on the right of a board of a municipality or a quasi municipal organization to contract for services to be rendered after the terms of office of the members of the appointing body have expired. The majority rule is thus stated in 70 A.L.R. at page 799: "In most jurisdictions where a board appoints an officer, or contracts for services, and the duties of the officer or the services to be rendered are duties delegated to the supervision of the board, such appointment or contract for a period beyond the term of the board is not valid. And the same rule applies to confidential relations, such as counsel for the board."

In arguing this question defendant cites and quotes from those authorities following this majority rule. If this rule prevailed in California these authorities would be most persuasive.

The minority rule is thus stated on page 802 of the same volume, with California cases cited as following it: "In a few jurisdictions it is held that contracts of employment and appointment of officers may extend beyond the term of the board."

There is a further distinction recognized in some jurisdictions which is stated in McQuillin on Municipal Corporations, 2d Ed., volume 3, at page 952, as follows: "Respecting the binding effect of contracts extending beyond the terms of officers acting for the municipality, there exists a clear distinction in the judicial decisions between governmental and business or proprietary powers. With respect to the former, their exercise is so limited that no action taken by the governmental body is binding upon its successors, whereas the latter is not subject to such limitation, and may be exercised in a way that will be binding upon the municipality after the board exercising the power shall have ceased to exist. Consequently independent of statute or charter provisions, it is generally held that the hands of successors cannot be tied by contracts relating to legislative functions but may as to contracts relating to business affairs."

[5] It has been held in California that oil royalties are received by a municipality in its proprietary and not in its governmental capacity (C. J. Kubach Co. v. City of Long Beach, 8 Cal.App.2d 567, 48 P.2d 181) and that a city acts in its proprietary capacity in maintaining and operating certain utilities and auditoriums. Davoust v. City of Alameda, 149 Cal. 69, 84 P. 760, 5 L.R.A.,N.S., 536, 9 Ann.Cas. 847; South Pasadena v. Pasadena Land & Water Co., 152 Cal. 579, 93 P. 490; Barsoom v. City of Reedley, 38 Cal.App.2d 413, 101 P.2d 743; Chafor v. City of Long Beach, 174 Cal. 478, 163 P. 670, L.R.A.1917E, 685, Ann.Cas.1918D, 106.

There is some confusion in some of the earlier cases in California on the right of a board to make a contract which could not be performed within the terms of office of its members. Certain phases of this question were settled in affirming the power to make such a contract in the case of McBean v. Fresno, 112 Cal. 159, 44 P. 358, 31 L.R.A. 794, 53 Am.St.Rep. 191. This holding was expressly approved in Higgins v. San Diego Water Co., 118 Cal. 524, at page 554, 45 P. 824, 50 P. 670, and has been very generally followed.

[6] It now seems to be settled in California that the governing body of a municipality, or quasi municipality, may make contracts for special employment in cases where the time in which services may be performed will extend beyond the terms of office of the members of the appointing body. See Cope v. Sutter County, 206 Cal. 445, 274 P. 750; City and County of San Francisco v. Boyd, 17 Cal.2d 606, 110 P.2d 1036; Skidmore v. County of Alameda, 13 Cal.2d 534, 90 P.2d 577; Pacific Finance Corp. v. City of Lynwood, 114 Cal.App. 509, 300 P. 50, 1 P.2d 520; King City Union High School Dist. v. Waibel, 2 Cal.App.2d 65, 37 P.2d 861.

[7] We therefore conclude that as plaintiffs were employed to perform legal services in connection with matters pertaining to property affairs for defendant by a written contract, into which the city council had legal authority to enter, the mere fact that the services to be rendered might have been but were not completed during the terms of office of the councilmen authorizing its execution furnishes no ground for holding the contract illegal.

[8, 9] Defendant next urges that plaintiffs abandoned the contract. The evidence on this question is sharply conflicting, but we must accept as true the evidence supporting the implied finding of the jury that the contract had not been abandoned and disregard conflicting evidence.

There is a great deal of evidence showing the amount of work done by plaintiffs. The first work was in connection with the charter that was adopted and the investigation of the ownership of the tidelands and the oil under them and under the bed of the ocean. Mr. Simpson testified, "There was a tremendous amount of research involved." There were numerous conferences with officers of the city in plaintiffs' offices in Long Beach and some trips to Huntington Beach. There were two trips to Sacramento during the legislative session to attempt to secure legislation giving defendant title to the oil.

Mr. Simpson advised defendant that his study had led to the conclusion that the state and not the city owned the oil and that any litigation of that question would lead to a prompt defeat of the city in its claim to any interest in this oil. He further advised at least two councilmen that he had concluded that the city owned Ocean Avenue and the ground under it in fee and could prevent any whipstocking of wells through that ground. He advised that this situation be kept secret and used as a final weapon to attempt to force the operating companies to give the city some benefits from the oil.

He also investigated the legality of a zoning ordinance in force in the city and concluded that it was void. He prepared a pencil outline of a new zoning ordinance which was not used because the city attorney had prepared one to his own liking. One purpose of this ordinance seems to have been to prevent the drilling of oil wells on certain uplands that would tap the oil sands under the ocean.

After the charter was adopted a citizen of Huntington Beach applied to the attorney general for permission to bring a quo warranto proceeding to test its validity. By a formal resolution the city council requested plaintiffs to oppose this application. They held conferences with the deputy attorney general in charge of the matter and filed an extensive brief in opposition to the request to bring the action, which was not granted.

In apparent explanation of why there was not considerable activity in the matter during the first half of 1938, Mr. Simpson testified to a conversation with the city attorney, as follows: "We discussed generally the fact of the pending—of the condition of the legislation then pending concerning the Huntington Beach oil. In other words, we talked back and forth to the effect that the Legislature before its adjournment in 1937 had passed several bills affecting the Huntington Beach tideland oil matters. Two of these had been signed by the Governor. Both of those bills that had been signed by the Governor had been held up by referendum, and as I recall, I think there was also litigation filed trying to invalidate the referendum on the two. * * * That was, I believe, the main contention. In any event, we discussed the fact that everything was held in abeyance at this time because no one knew what the law would be, the statute would be that might be passed concerning the Huntington Beach tidelands proposition as a matter of legislation. * * * Yes, I told Mr. Overacker that we should not do anything on any of the other propositions we had pending, other programs, except we should go ahead with our zoning set-up. I told him that I had checked over as carefully as I could all of the zoning ordinances, restrictive ordinances of the City of Huntington Beach. As a matter of fact, I had them lying on my desk at that time, I believe, because I had procured copies of all of the zoning ordinances of the City of Huntington Beach, and still have such, as a matter of fact, and I told him I had checked those over and I had done considerable research into the legal angles involved and that I had come to the conclusion that their zoning ordinances were invalid and void."

He also testified that he continued his work on the legal problems of defendant "to a more or less extent right up to the time when they attempted to terminate our employment."

M. M. McCallen was elected a councilman of the City of Huntington Beach at the spring election of 1938. G. P. Taubman, Jr., one of the plaintiffs, testified to a conversation had with Mr. McCallen in the late summer or early fall of 1938, which Taubman detailed in part as follows: "I don't know how the subject matter came up. The substance of it was that Mr. McCallen told me—I rather imagine I made inquiry of him as to the status, and he stated that the Southwest Exploration Company, he thought, was in a position to negotiate concerning the matter of the City securing some of the proceeds from the oil production, that the time had arrived when they were ripe, so to speak, for such negotiations. * * * Q. I will ask you, Mr. Taubman, whether or not you ever refused to furnish any advice or to do anything which was requested of you by the City of Huntington Beach, or any of its officers, in connection with procuring returns from the oil on behalf of the City? Witness: A. I did not. In fact, I think on one of these occasions, I offered, when Mr. McCallen told me he was negotiating with these gentlemen, one of whom I told him I had known for many years, I offered to aid if I could and discuss the matter with him and he said no, he had the thing well in hand and he was going to get what the City was entitled to, either that, or no one else would get it."

Much of the foregoing testimony was sharply contradicted. However, the jury apparently accepted it as true and it is sufficient to support the implied finding that plaintiffs did not abandon the contract.

[10] Defendant suggests, if it does not argue, that the $2,500 paid to plaintiffs was ample compensation for the services performed by them. As we are here concerned with a written contract providing for a specific compensation we are not concerned with the reasonable value of the services rendered. If plaintiffs are permitted to recover at all they must recover under the terms of the contract. Cope v. Sutter County, supra.

[11] Defendant next urges there is no evidence showing that any of the oil produced by the Southwest Exploration Company came from below the tide or overflow lands within the City of Huntington Beach. This contention is based on the language of paragraph "b" of the contract whereby plaintiffs undertook to secure returns to defendant from hydrocarbons in the tide or overflow lands within the boundaries of the City of Huntington Beach.

We have searched the record and have failed to find, and have been cited to no parol evidence on this question. However, we believe that there are reasonable inferences to be drawn from the documentary evidence which sufficiently support the implied finding that the oil was drawn from sands below those lands within the City of Huntington Beach.

[12] That we are entitled to take judicial notice of the boundaries of municipalities cannot be questioned. The southwesterly boundary of the City of Huntington Beach lies southwesterly three miles from the line of mean high tide. Carr v. Kingsbury, supra. The lease of October 4, 1934, between the City of Huntington Beach and the Southwest Exploration Company, described the land from which oil was to be extracted as lying in the City of Huntington Beach and between the line of mean high tide and the southwesterly boundary of the city. The contract dated November 3, 1938, between the Southwest Exploration Company and the City of Huntington Beach referred to that lease and provided for its revivor under certain contingencies. That same contract referred to the Agreement for Easement

No. 392 under which the Southwest Exploration Company proposed to extract oil from certain described lands within the City of Huntington Beach lying along and seaward from the line of mean high tide. It is only on oil produced from under such lands that the drilling company promised to pay defendant royalties. The Agreement for Easement No. 392 described those lands particularly.

It is therefore clear that the only oil recovered by the Southwest Exploration Company upon which it was required to pay defendant a royalty is that recovered under property within the city lying seaward from the line of mean high tide.

There is a disputable presumption in California "That the ordinary course of business has been followed." Subd. 20, sec. 1963, Code Civ.Proc. Certainly in the ordinary course of business a drilling company would not pay royalties to a municipal corporation not entitled to receive them. Subdivision 19 of the same section establishes the presumption "That private transactions have been fair and regular." It would be neither fair nor regular for the City of Huntington Beach to wrongfully accept and keep royalties to which it is not entitled.

It is urged that the verdict of the jury is not responsive to the issues raised in the pleadings.

It is both alleged and admitted that defendant received $25,000 in cash from the Southwest Exploration Company on the execution of the contract of November 3, 1938, and the sum of $2,794.09, 2 per cent of the value of the oil produced under that contract. It is argued under this heading that the verdict for $2,000 was neither supported by the pleadings nor the evidence.

[13] It seems clear that if the $25,000 and the $2,794.09 were received as royalties plaintiffs were entitled to a judgment in the sum of $2,794.09 instead of $2,000. However, plaintiffs are not complaining and have not appealed. A party cannot complain of a judgment more favorable to it than one justified by the pleadings and the evidence. McClung v. Moore, 138 Cal. 181, 71 P. 98; Payne v. Commercial National Bank, 177 Cal. 68, 169 P. 1007, L.R.A.1918C, 328; Crocker-Huffman, etc., Co. v. Goss, 203 Cal. 233, 263 P. 802; Guitron v. Rodriguez, 105 Cal.App. 513, 288 P. 134; Archibald v. Schultz, 14 Cal.App.2d 320, 58 P.2d 233; Orfanos v. California Ins. Co., 29 Cal.App.2d 75, 84 P.2d 233.

Defendant urges error in the giving of certain instructions proposed by plaintiffs and in refusing an instruction which it proposed. We have considered these instructions carefully and have concluded that the action of the trial judge on them was proper. They present questions considered elsewhere in this opinion and it should not be necessary to repeat reasons for this conclusion.

[14-17] Defendant complains of an instruction proposed by it and modified by the trial court which in effect told the jury that the burden is on plaintiffs to prove that the money was paid to the City of Huntington Beach on account of *rental and of* royalty for oil. The emphasized words were added by the trial judge. Plaintiffs' contract gave them the right to receive percentages on royalties paid to defendant or received by it out of the sale of oil. Rental, as that word is commonly understood, differs from a royalty received under an oil contract. La Laguna Ranch Co. v. Dodge, 18 Cal.2d 132, 114 P.2d 351, 135 A.L.R. 546. However, under the view we take of the case, we regard the error, if any, as harmless.

Defendant urges that all of the money was paid to it as rentals for the use of the easement under Ocean Avenue and none of it as royalties on the oil produced; that under their contract plaintiffs, if they could recover at all, were entitled to receive percentages of the royalties but not of the rentals.

It is clear from their contract that plaintiffs are only entitled to be paid a percentage of the *royalties* received by defendant from oil, gas or other hydrocarbon substances produced from the described property. "A party to a contract may absolutely limit his liability to pay a certain sum to funds to accrue to him from a certain source [citing cases] and under such circumstances a recovery cannot be had without pleading and proof that funds became available to the debtor from the source which he specified." Martin v. Martin, 5 Cal.App.2d 591, 43 P.2d 314, 315. Therefore we must examine the definition of "royalty" and determine if the facts of this bring any of the payments made to defendant within the meaning of that term. As a preliminary we must first consider the contention that all payments were made as rental for the easement under Ocean Avenue.

In the lease of October 4, 1934, it is expressly provided the Southwest Exploration Company shall pay to defendant one-sixth of the value, or one-sixth of the oil and gas produced from the described premises, subject to certain specified deductions. Such provisions are common in oil leases and provide for payment of what are generally known as royalties to the lessor by the lessee.

The contract between the State of California and the Southwest Exploration Company provides for the payment of a "royalty" from the latter to the former. This "royalty" is defined as a variable percentage of the production of the wells dependent upon the amount of oil produced.

We have already quoted at considerable length from the contract of November 3, 1938, between Southwest Exploration Company and defendant. $25,000 was paid on the execution of the contract. Two per cent of the gross amount received monthly by the Southwest Exploration Company from the sale of oil, gas or other hydrocarbons was to be paid defendant monthly. This last provision has all of the characteristics of an agreement to pay royalties usually found in oil leases. After $175,000 had been paid defendant, the Southwest Exploration Company agreed to pay to defendant a sum equalling two per cent of the total royalties paid to the State of California. It also appears from the contract that defendant claimed the oil in the sands under the tide lands and the right to receive royalties from that oil and that the Southwest Exploration Company denied that ownership and the claim to royalties. Evidently the contract of November 3, 1938, between the Southwest Exploration Company and defendant was made, as it states, "to settle and compromise the claims of Huntington Beach to the payment of monies and royalties to it * * *," and not in payment for the use of an easement under Ocean Avenue. The ownership of that land may have provided the force that compelled the execution of the contract but nothing in it demonstrates that the payments were rentals for the easement and not a bonus and royalties.

This contract appears to have been drawn by skillful and experienced attorneys. If the sole consideration for the payments to be made to the city had been the use of the easement it would have been a simple matter to have said so. Had there been any such understanding between the parties it is hardly probable that paragraph 7 would have been incorporated in it giving the city a one-sixth royalty in the oil and gas produced in the event the city either by judgment or compromise should establish its ownership of those substances. Taken as a whole the contract negatives the idea that the payments were to be made solely for the use of the easement and that none of them represented royalties from the hydrocarbons produced.

Defendant seriously contends that at best, the $25,000 was paid to it as a bonus and not as a royalty and that the most plaintiffs can recover is ten per cent of $2,794.09, received by defendant as its share of the oil produced.

In 8 Cal.Juris.Supp., pages 690–692, we find the following:

"An owner's right to take oil or gas from his land is often a valuable one, and it is customary, when making a grant of it by way of lease, to include therein very definite provisions for the payment of compensation.

"*Royalty.*—The most common form of compensation is what is known as royalty—that is, a right to receive periodical payment in the nature of a rental of a fraction or percentage of the production or of its proceeds.

"*Bonus.*—But it is not unusual in proven territory for the lessee to pay a designated sum to the lessor upon execution of the lease, over and above the promised royalties. This form of compensation is termed a bonus.

"'Bonus and royalties are both consideration for the lease and are income of the lessor.'

"* * * *Royalties.*—A lease may fix the royalty at a designated sum per barrel, or at a prescribed proportion of the lessee's gross income, etc. But in the majority of modern leases, including governmental leases, the lessor's royalty is fixed at an agreed fraction or percentage of all oil, gas or other hydrocarbon substances produced and saved from the leased premises, or, at the option of the lessor, 'exercised whenever settlements are made' a like fraction of the proceeds of their sale." These definitions are supported by the cases cited.

[18] In Geller v. Smith, 130 Cal.App. 485, 20 P.2d 102, 104, the word "bonus" when used in an oil lease is defined as follows: "My opinion is that the term

'bonus' as applied to an oil lease has come to have a definite meaning, to-wit: A sum of money paid by a lessee to the lessor in consideration for the execution of a lease, as distinguished from the return of royalty reserved by the lessor to be paid by the lessee through the term of the lease."

The foregoing definition was quoted with approval in Elsinore Oil Co. v. Signal Oil, etc., Co., 3 Cal.App.2d 570, 40 P.2d 523, 524, and the following definition of "royalty" was given: "It is apparent that the 'rentals' which were to be reduced upon quitclaiming of the land were not the 'bonus' but the 'royalty,' for here, as in the case of a mining lease, the amounts stipulated to be thus paid as royalties are not the purchase price of the oil and gas in place, but are '"the compensation which the occupier pays the landlord for that species of occupation which the contract between them allows." * * * In mining leases, these words "rent" and "royalty" are used interchangeably to convey the same meaning.' Nelson v. Republic Iron & Steel Co., [8 Cir.], 240 F. 285, 290 [153 C.C.A. 211]. '"Royalty" is "perhaps the most appropriate word where rental is based upon the quantity of coal or other mineral that is or may be taken from the mine."' Payne v. Neuval, 155 Cal. 46, 49, 99 P. 476, 478. The same definition applies here."

Among the many cases in harmony with the foregoing definitions we cite the following: Dabney-Johnston Oil Corp. v. Walden, 4 Cal.2d 637, 52 P.2d 237; Aldridge v. Houston Oil Co., 116 Okl. 281, 244 P. 782; Robinson v. Jones, 119 Kan. 609, 240 P. 957; Byrne v. Fulton Oil Co., 85 Mont. 329, 278 P. 514; Parker v. Riley, 250 U.S. 66, 39 S.Ct. 405, 63 L.Ed. 847.

[19, 20] The contract between plaintiffs and defendant was prepared by plaintiffs who are skillful attorneys. If they intended to claim a percentage of any bonus paid to the city, as distinguished from a royalty, it would have been a simple matter to have so provided in the written instrument. If there are any ambiguities or uncertainties in the contract they must be interpreted most strongly against plaintiffs who prepared it. Bennett v. Potter, 180 Cal. 736, 183 P. 156. As plaintiffs failed to provide in the written contract that a percentage of any bonus received by the defendant should be paid to them, we must conclude that they cannot recover any part of such bonus.

Under the foregoing rules we must regard the $25,000 paid to defendant on its execution of the contract with the Southwest Exploration Company as a bonus and not a royalty, and the $2,794.09 as a royalty of which plaintiffs are entitled to recover ten per cent under their contract.

The judgment is reduced to the sum of $279.40, and as so reduced is affirmed. Neither party will recover costs.

BARNARD, P. J., and GRIFFIN, J., concurred.

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51 Cal.App.2d 245

MABRY v. SCOTT et al.

Civ. 13263.

District Court of Appeal, Second District, Division 1, California.

April 15, 1942.

Hearing Denied June 12, 1942.

1. Infants 🔑74

When litigation is between them, all beneficiaries of a trust are "indispensable parties" without whose presence trial court has no jurisdiction, except when there are remaindermen not in being and when it is apparent that it is essential in interest of justice to adjudicate the rights of living persons.

See Words and Phrases, Permanent Edition, for all other definitions of "Indispensable Party".

2. Infants 🔑74

In determining validity of judgment modifying trust, the unborn contingent remaindermen consisting of unborn issue of settlor's children were virtually represented by settlor's living children unless there was some hostility of interest between children and their unborn issue.

3. Infants 🔑74

In determining validity of judgment modifying trust, settlor's wife, who under modification obtained cash out of corpus of trust could have represented unborn contingent remaindermen where possibilities of gain to the corpus from the modification outweighed the possibilities of loss.

4. Infants ⚷74

That by modification of trust, settlor's living children received income not provided by original trust did not show an "adverse interest" as between children and their unborn issue so as to preclude children from representing the unborn contingent remaindermen, and depriving court of jurisdiction to modify the trust, where children had no interest in corpus except in contingencies which were too remote to destroy children's incentive to protect rights of their unborn issue.

See Words and Phrases, Permanent Edition, for all other definitions of "Adverse Interest".

5. Compromise and settlement ⚷15(2)

In action to cancel trust on ground of fraud, undue influence, failure of consideration and mistake, court had duty to adjudicate the case unless action of all the parties except trustee in presenting petition to approve a compromise divested court of jurisdiction.

6. Equity ⚷39(1)

When jurisdiction of equity attaches, it is duty of equity to adjust all differences arising from cause of action presented and to leave nothing for further litigation.

7. Infants ⚷77

Courts have inherent power to appoint guardians ad litem.

8. Trusts ⚷58

A court of equity may do whatever is necessary to preserve a trust from destruction.

9. Compromise and settlement ⚷15(2)

The chancellor having acquired jurisdiction in equity in suit to cancel trust, was not ousted thereof because of approval of compromise notwithstanding interests of contingent remaindermen were affected where compromise was fair and equitable and unless case was thus disposed of, entire trust might have been annulled.

10. Compromise and settlement ⚷15(2)

In action to cancel trust on ground of fraud and undue influence, where it appeared that parties did not realize results which would follow a covenant in trust relating to payments, a compromise of litigation was properly approved by chancellor as equitable.

11. Appeal and error ⚷891

Generally, testimony is taken by an appellate court only when it is necessary as a basis for an affirmance or reversal of a judgment with directions to trial court. Rules of Supreme Court and District Courts of Appeal, rule 38.

12. Appeal and error ⚷891

On appeal from judgment modifying a trust in accordance with compromise agreement of parties, motions to produce additional testimony would be denied where if additional facts shown by such testimony had been known to trial court, it would not have altered findings as to fairness and necessity of compromise. Rules of Supreme Court and District Courts of Appeal, rule 38.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Harry C. Mabry, as executor, etc., against Alzoa Scott and others for cancellation of a trust. From a judgment and from an order authorizing a compromise, the Title Insurance and Trust Company, as trustee, appeals, and moves to produce additional testimony.

Judgment affirmed, order dismissed and motions denied.

Harry C. Mabry in pro. per., Newlin & Ashburn, Gurney E. Newlin, Clyde E. Holley, Hudson B. Cox, and Allen W. Ashburn, all of Los Angeles, for plaintiff and respondent.

O'Melveny & Myers, Pierce Works, W. B. Carman, Jr., and Jackson W. Chance, all of Los Angeles, for defendant and appellant.

William C. Mathes in pro. per., Mathes & Sheppard, Gordon F. Hampton, Freeman R. Brant, and C. H. Hartke, all of Los Angeles, for defendants and respondents.

DRAPEAU, Justice pro tem.

March 25, 1931, defendant, Title Insurance and Trust Company, made a declaration of trust, acknowledging delivery to it of real and personal property of a value totaling some $1,350,000, to be held irrevocably in trust, for the use and benefit of named beneficiaries. The income from the trust estate was to be paid, and the corpus finally distributed, in accordance with the terms of the trust agreement. All of the properties placed in trust were owned by William J. Garland, settlor, and were about to be distributed to him from the estate of his deceased father.

Living beneficiaries of the trust were Alzoa Eaton Garland and William J. Garland, then husband and wife, and their four minor children.

The trust was to terminate upon the death of the last survivor of these six people, and then to go (1) to the living issue of the four children of Mr. and Mrs. Garland (grandchildren, and their descendents per stirpes), or, contingently, in the event of their death, to living spouses of these four children; or (2) if there were no living issue of Mr. and Mrs. Garland of any degree, to the heirs of Mr. Garland. Beneficiaries in these two categories must be treated as unborn, unknown, and presently unascertainable, because the four minor children were of tender years, unmarried and had no issue, and Mr. Garland was living. They are all contingent remaindermen. When it is necessary to distinguish between the two classes, issue of the living children will be referred to as unborn contingent remaindermen.

Net income from the trust was to be paid: First—$1,250 per month to Alzoa Eaton Garland. Second—Additional payments to said Alzoa Eaton Garland, or upon her death or at the direction of the settlor to their then living issue, in amounts commencing at $500 per month during the first five years of the trust and increasing each five years thereafter to $1,250 per month during the fourth five years of the trust. Third—All of the remainder of the income, if any, to be paid monthly to settlor.

It would extend this opinion unduly to set out in detail all of the provisions of the trust agreement or all of the contingencies affecting payment of income or distribution of corpus. Such only as appear to be pertinent will be referred to.

July 16, 1931, Mrs. Garland secured in the Superior Court of Los Angeles County an interlocutory decree of divorce from Mr. Garland, which was followed by a final judgment of divorce July 20, 1932. August 17, 1932, Mrs. Garland married Millard L. Scott.

In October, 1933, William J. Garland married Grace O. Hoyt. There is one minor child the issue of that marriage, Jane Mary Garland.

March 7, 1936, Mr. Garland filed a complaint in the superior court, alleging fraud, undue influence and failure of consideration, and praying that the trust be cancelled and set aside, and that title to the real and personal property involved be quieted in him. The complaint also alleged that shortly prior to the time the trust was made the plaintiff deeded to his then wife his dwelling house in Beverly Hills, and prayed that that transaction likewise be cancelled and set aside. The complaint named as defendants, Alzoa Eaton Scott, the former wife of the plaintiff, the four children, and the trustee. Other named defendants were dismissed from the case; others were brought in as will later appear.

In support of his allegations of fraud, undue influence and failure of consideration, the plaintiff alleged a confidential relationship between him and Alzoa; that he had had infantile paralysis, and as a result thereof was in continual pain and suffering, so severe that he was afraid it would impair his mental and physical ability to take care of the property which he was about to receive from the estate of his deceased father; that after discussing this situation with his wife, it was agreed it would be advisable to convey all of this property to a trustee, to manage and control it, and to pay the income to Alzoa, who would disburse it for the support and maintenance of the family; that after conveying all of his property to the trust, and deeding his home to her, he left on a trip around the world; that while on this trip, to his consternation and surprise, he was advised she had sued him for divorce; that unknown to him Alzoa was on friendly terms with Mr. Scott when the conveyances were made to her and to the trust; that she concealed from him her relations with Mr. Scott, induced him to divest himself of all of his property, for the benefit of herself firstly, for their children secondly, and for himself lastly, and then, when this was done and he left on his trip around the world, she straightway took up with Mr. Scott and filed her divorce complaint; and that because of his trust and confidence in Alzoa, and her machinations and his conveyances in consequence thereof, he found himself stripped of his income, deprived of his home, and bereft of his family.

In her answer Alzoa denied all of these allegations; she alleged it was only after her husband left her and told her he was through with her and the children that she brought her action for divorce; that she had always been willing and desirous of living with him as his wife, and making a home for him and their children. She particularly and specifically denied any wrongful conduct or association with Mr. Scott. She also alleged that the trust was coincidental with and contemplated in a property settlement agreement between her and her husband. The property settlement agreement bears the same date as the trust agreement. Some of its recitals corroborate certain of the denials and allegations of the answer.

With the issues thus framed, the plaintiff and the defendant Alzoa agreed upon a compromise of the litigation. They were each to receive from the trust $60,000 cash; the monthly payments from income were to be made on a percentage basis, 25 per cent to the children and the remaining 75 per cent equally to the plaintiff and Alzoa, payable to the latter two persons or their assigns until termination of the trust.

The complaint was amended to allege mistake of fact on the part of the settlor, in that when he conveyed all of his property to the trust, he believed that Alzoa would remain his wife and take care of him and his family out of the monthly payments to be made to her, and in that both he and Alzoa believed in any event there would be sufficient earnings to pay him at least $1,000 a month; that since the creation of the trust, there had not been sufficient income to make any payments to him for his support and maintenance, because the trust had received only enough income to make the payments required to be first made to Alzoa. The amendment further alleged that had the settlor not been acting under mistake of fact, he would have required a provision in the trust agreement for the distribution of income as stated in the compromise. These allegations were denied by answers filed by all of the defendants, including the trustee, all of the living beneficiaries, and all of the contingent remaindermen, appearing either in person or by guardians ad litem.

It is evident that neither Mr. nor Mrs. Garland realized or understood the results which would follow a covenant in the trust agreement requiring the trustee to pay out of income a fixed and definite amount of money monthly; first, to Alzoa; then, second, to her or to the children; and then, and only then, anything which might be left to the settlor for his support and maintenance. Like many a testator, who, with specific devise and bequest has unwittingly impoverished the members of his family after his death, the settlor impoverished himself when he conveyed all of his property in trust, and divested himself of the only means of livelihood he had, in return for a promise to pay income which in the nature of things would never be available because of prior payments required to be made to other persons. This could well have been a mistake, warranting the exercise of the powers of a court of equity in relieving the settlor from covenants and conditions in the trust agreement which otherwise would not have been made.

Then, with the exception of the trustee, all of the parties as thus represented, including contingent remaindermen and the presumptive heirs—the settlor's present wife, Grace O. Garland, Ida May Garland, his mother, and his brother, Grover T. Garland, and his infant daughter by his last marriage, Jane Mary Garland, by her guardian ad litem—joined in a petition to the court to consider, authorize, and approve the proposed compromise of the litigation.

Upon the hearing of the petition to compromise, the guardian ad litem for the unborn contingent remaindermen, and the guardian ad litem for the living children, testified that in their opinion the compromise was fair and equitable, and recommended its approval. Whereupon the court, first, by minute order, and then by formal written judgment, approved the compromise, and ordered the modification of the trust in the particulars named.

By appropriate pleadings, representations to the trial court, and notice of appeal, the trustee, Title Insurance and Trust Company, has raised the principal question involved in this appeal, i.e., by judgment of the court modifying the trust, was property of unborn contingent remaindermen taken without due process of law? It is insisted that the court was without jurisdiction to modify, revise, or in any manner reform the trust because the unborn contingent remaindermen were not before it, either in person or by representation; that their interests were adversely affected in that income and corpus of the trust which eventually would have gone to them were depleted in the following particulars: (a) $120,000 in cash was taken out of corpus; (b) Income in which remaindermen were entitled to share upon the death of ancestors (which in certain contingencies would go to corpus), was depleted; (c) In the event the living children are survived by spouse or issue or both, such persons receive one-fourth of the trust income; whereas, under the judgment, 37½ per cent thereof is taken away.

[1] When the litigation is between them, all beneficiaries of a trust are indispensable parties; without their presence the trial court has no jurisdiction to proceed. First National Trust & Savings Bank of San Diego v. Superior Court of Los Angeles County, 19 Cal.2d 409, 121 P.2d 729; McPherson v. Parker, 30 Cal. 455, 456, 89 Am.Dec. 129; O'Connor v. Irvine, 74 Cal. 435, 16 P. 236; Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 6 L.R.A., N.S., 275; Title Guarantee & Trust Co. v. Henry, 208 Cal. 185, 280 P. 959.

The latest expression of the rule is by Mr. Chief Justice Gibson in the case of First National, etc., Bank v. Superior Court, supra [19 Cal.(2d) 417, 121 P.2d 733]: "The law is settled in this state that, where one of several beneficiaries seeks to fix his share in a trust fund and where judgment in his favor would inevitably determine the amount available for others similarly situated, such other beneficiaries are indispensable parties. A judgment rendered in their absence and purporting to determine their rights is in excess of the court's jurisdiction. Bank of California v. Superior Court, 16 Cal.2d 516, 521, 106 P.2d 879; O'Connor v. Irvine, 74 Cal. 435, 16 P. 236."

But this rule of indispensable parties has one manifest exception. It is founded on the paramount duty of every court to see that justice be done. It takes effect when there are remaindermen not in being and when it is apparent that it is essential, in the interests of justice, to adjudicate rights of living persons.

This exception has been stated, approved, and applied by our courts in numerous cases in which future estates of unborn or unknown contingent remaindermen in real property and the relationship of such estates to rights of living persons have been under consideration. One of the best statements of it is to be found in section 182, chapter 12, Restatement of the Law, Property, Future Interests: "Prerequisites for binding effect as against interest limited in favor of an unborn person. A judicial proceeding has binding effect as against the future interest limited in favor of a person who was unborn at the time of the commencement of such proceeding when the requirements stated in some one of the clauses of this section are satisfied, but not otherwise: (a) Such person was duly represented in such proceeding in accordance with one of the rules stated in sections 183 and 186; (b) Such person was duly represented by a guardian ad litem appointed to protect the interests limited in favor of unborn persons; (c) The proceeding, duly followed, was one binding the affected thing itself, thus binding both present and future interests limited therein, without either joinder or representation of the persons in favor of whom such interests were limited; (d) The proceeding, duly followed, was one which by statute binds such future interest without either joinder or representation of the person in favor of whom it was limited."

The reason behind the exception is a simple one of human relationships, implicit in the principle that human laws, and all other temporal things, are for the living; not for the dead or for those not yet in being, if to hold otherwise would result in injustice to living persons. Because parties are not in being, and therefore cannot be brought before the tribunal, is not sufficient reason for a court to stand by, helpless and impotent, when rights of living persons, in ordinary common sense, ought to be adjudicated.

Two only of the foregoing clauses of section 182 of the restatement will be used as subdivisions in considering this problem:—Were the unborn contingent remaindermen represented in the litigation? Was the proceeding "duly followed" one binding the affected thing itself?

[2, 3] With reference to representation: The trial court was correct in its determination that there was virtual representation of the unborn contingent remaindermen by the living children of Mr. and Mrs. Garland. There were no living members of this class of unborn contingent remaindermen. The only persons next of kin who could represent the unborn contingent remaindermen were Alzoa Eaton Garland Scott or the living children of Mr. and Mrs. Garland. It is not necessary to hold that Alzoa represented the unborn contingent remaindermen, because representation of them by the living children was sufficient. But, in determining that the parties were properly before it, the trial court undoubtedly took into consideration the fact that while Alzoa was to receive $60,000 out of corpus, the possibilities of gain to the corpus from the compromise outweighed the possibilities of loss, so that she too could have represented un-

born contingent remaindermen. That this was possible has since developed by the death of the settlor and payments required by the trust agreement to corpus of moneys from insurance on his life.

Representation of unborn remaindermen by ancestors was given careful consideration in the case of County of Los Angeles v. Winans, 13 Cal.App. 234, at page 244, 109 P. 640, at page 645. In that connection in that case the court said: "The conclusion that the interests in remainder of the defendant grandchildren were and are contingent instead of vested does not preclude the application to them of the principle of virtual representation, if the proceedings in which such representation was exercised were such as to otherwise justify it. The rule as to virtual representation is stated broadly by the Supreme Court of the United States in Miller v. Texas & Pacific R. Co., 132 U.S. [662], 672, 10 S.Ct. [206], 209 (33 L.Ed. 487), by recognizing the holding of Lord Redesdale in Giffard v. Hort, 1 Schoale & Lef. 386, as follows: 'Where all the parties are brought before the court that can be brought before it, and the court acts on the property according to the rights that appear, without fraud, its decision must of necessity be final and conclusive. It has been repeatedly determined that if there be tenant for life, remainder to his first son in tail, remainder over, and he is brought before the court before he has issue, the contingent remaindermen are barred. Courts of equity have determined on grounds of high expediency that it is sufficient to bring before the court the first tenant in tail in being, and if there be no tenant in tail in being, the first person entitled to the inheritance, and if no such person, then the tenant for life.' So, also, the New York court in Kent v. Church of St. Michael, 136 N.Y. 10, 32 N.E. 704, 18 L.R.A. 331, 32 Am. St.Rep. 693, uses the following language: 'Where an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate for all purposes of any litigation in reference thereto and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand, not only for themselves, but also for the persons unborn. This is a rule of convenience, and almost of necessity. The rights of persons unborn are sufficiently cared for if, when the estate shall be sold under a regular and valid judgment, its proceeds take its place and are secured in some way for such persons.' [Citing authorities.]"

It is therefore apparent that in this case the living children of Mr. and Mrs. Garland represented their possible unborn issue, unless there was some hostility of interest as between them. In the Winans case it is said: "The interests of representative and represented must, however, be so identical that the motive and inducement to protect and preserve may be assumed to be the same in each." That case held that there was hostility of interest which precluded representation because a parent life tenant and a child remainderman had acted adversely to the interests of other child remaindermen who might later be born.

[4] Appellant contends that by the compromise in the present case the living children secured a better participation in income than in the trust as originally drawn. Indeed a close reading of the trust agreement supports a theory of the appellant that the living children were to receive no income from the original trust until the death of their mother, or upon the nomination of their father, and that it is necessary to read the property settlement agreement into the trust to give any income to the children. But, assuming that by the compromise the living children received income not provided by the original trust, we are unable to agree with either minor premise or conclusion of appellant's suggested syllogism: that this caused them to profit at the expense of their unborn issue; and that there was thereby created hostility of interest as between the living children and their unborn issue which prevented virtual representation by the living children of the unborn contingent remaindermen.

The principal argument in support of this proposition is that the interests of living children and their unborn issue became adverse when by the compromise agreement the parents of the living children (a) took $120,000 in cash from the trust estate; (b) contingently, income which otherwise would have gone to corpus could be depleted by the compromise, and (c) contingently, depending upon the death of ancestors leaving them surviving spouses and issue, income which might have gone to spouses or issue was cut down 37½ per cent; that the living children consented to these changes in the trust agreement so that they might get the better participation in income provided by the compromise, and thereby deprived the contingent remaindermen of $120,000 which otherwise would eventually have gone to them, and of contingent income. To thus hold would involve conclusions of collusion and conspiracy which the facts of this case will not sustain. The decisive fact still remains that the remaindermen had no interest in the income; the living children had no interest in the corpus, except in the contingencies above stated. These contingencies are too remote to require a decision that the incentive on the part of the living children to protect and preserve the rights of their issue was destroyed. And computations are in the briefs which indicate that should any of these contingencies come to pass, neither income nor corpus will be depleted to the disadvantage of the remaindermen. Therefore, there was no adverse interest as between the living children and their issue which prevented the living children from representing the unborn contingent remaindermen. Under the doctrine of virtual representation the contingent remaindermen were represented and the court had jurisdiction over them and their interests in the trust.

[5] Was this a proceeding binding the affected thing itself? Under the pleadings, when the issues were joined in fraud, undue influence, failure of consideration, and mistake, the court had jurisdiction to hear and determine the controverted facts. If an affirmative finding could have been made as to any such facts, supported by competent testimony, the court had power to terminate the trust. Therefore it had the right and it was its duty to adjudicate this case, unless the action of all of the parties except the trustee in presenting the petition to approve the compromise, divested the court of jurisdiction. Obviously, there is here involved all of the aspects of the case, and the terms and conditions of the compromise.

In this connection there has been presented a most persuasive argument. It is that courts should always have in mind the rights of remaindermen not in being; that by affirming the judgment in this case, there may be sanctioned a method whereby trusts may be destroyed at will by combinations of living beneficiaries; that this may be done by pleadings framing issues giving jurisdiction to courts of equity to modify trusts, and then by securing judgments based on compromises giving to living beneficiaries property of unborn remaindermen.

The answer to this argument is equally persuasive. It is that courts may be safely entrusted with the protection of rights of unborn remaindermen. And it is in cases of this sort, in which there is jurisdiction in equity of the controversy, that such rights are protected by the courts themselves. In the present case we can confidently assume that this duty was performed by the trial court.

[6] In actions for rescission, when a jurisdiction of equity attaches, it is the duty of equity to adjust all the differences arising from the cause of action presented and to leave nothing for further litigation. Walsh v. Majors, 4 Cal.2d 384, 398, 49 P.2d 598.

[7] To aid it in the exercise of its jurisdiction to hear and determine this matter, the court appointed a guardian ad litem to represent and protect the interests of the contingent remaindermen. Courts of justice as an incident of their jurisdiction have inherent power to appoint guardians ad litem. Crawford v. Neal, 1880, 56 Cal. 321; Estate of Cahill, 1887, 74 Cal. 52, 15 P. 364; Carraway v. Lassiter, 1905, 139 N.C. 145, 51 S.E. 968, 971; Reynolds v. Reynolds, 1935, 208 N.C. 578, 182 S.E. 341.

[8] A court of equity in its general jurisdiction over trusts has power to do whatever is necessary to preserve a trust from destruction, including the power to modify and change the terms of the trust. Wood v. American Nat. Bank, 125 Cal.App. 248, 261, 14 P.2d 110, concurring opinion of Justice Marks; Security-First Nat. Bank v. Easter, 136 Cal.App. 691, 697, 29 P.2d 422; Adams v. Cook, 15 Cal.2d 352, 101 P.2d 484; Young v. Young, 255 Mich. 173, 237 N.W. 535, 77 A.L.R. 963; In re North Jersey Title Ins. Co., 120 N.J.Eq. 148, 184 A. 420, 425; Cutter v. American Trust Co., 213 N.C. 686, 197 S.E. 542, 549; Gavin v. Curtin, 171 Ill. 640, 49 N.E. 523, 40 L.R.A. 776; 65 C.J., Trusts, § 549, pp. 683, 684; 26 R.C.L., Trusts, § 133, p. 1282; note, 28 Cal.Law Review, 785.

[9] In this case it was proper for the chancellor to approve the compromise agreement, having in view the preservation of the trust itself. Having once acquired jurisdiction in equity, the court was not ousted thereof because of its approval of the compromise. This is so, even though interests of contingent remaindermen were affected, it being evident that the compromise was fair and equitable and that unless the case was thus disposed of, the plaintiff had presented a bona fide contention which, if found true, would have required

the annulment of the entire trust. New York Life Ins. & Trust Co. v. Conkling, 159 App.Div. 337, 144 N.Y.S. 638; Reynolds v. Reynolds, supra; Wolf v. Uhlemann, 325 Ill. 165, 156 N.E. 334; Burgess v. Nail, 10 Cir., 103 F.2d 37; Bennett's Guardian v. Cary's Executor and Trustee, 210 Ky. 725, 276 S.W. 818, 820; Williams v. Williams, 204 Ill. 44, 68 N.E. 449, 452.

There has been considerable argument in the briefs, and citation of authority, as to whether the trustee in this case represented the interests of the unborn contingent remaindermen. In view of there being virtual representation and equitable jurisdiction, it is not necessary to go into this question to any particular extent. There is strong authority for the statement that if it were necessary in order that justice might be done to living parties, the interests of contingent remaindermen in this trust estate could be represented by the trustee. Indeed, the trustee has consistently and vigorously and ably presented to the trial court and to this court its opposition to the judgment approving the compromise and modifying the trust. There is no reason for criticism of the trustee in opposing the judgment here under review.

It is stated in 120 A.L.R. at page 886: "In many cases involving trust estates the trustee, or the trustee together with the holders of other interests, are regarded as sufficiently representing unborn contingent remaindermen."

[10] Appellant suggests that the compromise was unfair and inequitable. It should be apparent from what has already been said that it is our conclusion that the trial court, having before it all of the facts in the case, properly held the compromise to be fair and equitable.

This leaves one final thing to be considered in this case, which requires a continuance of the narrative of events in the history of the Garland family. Mr. Garland died July 25, 1940. The petition to compromise was filed August 15, 1939. Without the knowledge of any of the other parties to the compromise, and without bringing it to the attention of the court, it appears that September 17, 1937, Mr. Garland assigned to his last wife, Grace O. Garland, and to his minor child by that wife, Jane Mary Garland, his right to receive 37½ per cent of the income from the trust from and after his death. Also by his last will and testament, dated May 11, 1939, the terms of which were unknown to any of the other parties to the compromise or to the court, he disinherited his children by Alzoa and willed to Grace O. Garland and Jane Mary Garland his entire estate, including his interest in the trust. These facts first appeared in a brief filed by the guardian ad litem for the living children mentioned in the trust agreement.

The guardian ad litem for the living children, and the defendant trustee, have filed separate applications to this court for leave to produce additional evidence, in accordance with rule XXXVIII of the rules of the Supreme Court and District Courts of Appeal. In these applications the facts just stated are set forth and supported by exhibits and affidavits.

[11, 12] As a general rule, testimony is taken by an appellate court only when it is necessary as a basis for an affirmance or reversal of a judgment with directions to the trial court. Tupman v. Haberkern, 208 Cal. 256, 280 P. 970. If these additional facts had been known to the trial court, in view of all of the other facts in the case, it would not have altered the findings as to the fairness and equity and the necessity of the compromise. Inasmuch as the unborn contingent remaindermen were represented by the living children, it is not necessary to consider whether these additional facts would have rendered it impossible for presumptive heirs to represent contingent remaindermen.

All of the parties and the court were familiar with the recitals in the petition to approve the compromise. It is apparent therefrom that Mr. Garland was not forbidden to assign his interest in the payments under the trust to any one of the classes mentioned, to wit: "children, wife or mother." Among these classes were included his then wife and his youngest child. There can be no question but that everyone concerned knew Mr. Garland had the right to will his property to whomsoever he pleased.

Nothing hereunder is to be understood as approving the concealment by anyone of any essential element which a court should consider when there has been presented to it a petition to approve the compromise of pending litigation. In such cases, it is the duty of everyone concerned to advise the court to the fullest extent of every detail involved in the transaction. We are loath to believe that any of counsel in this case wilfully withheld from the court any information pertinent to a decision on the fairness and equity of the compromise. But, as indicated, if these facts had been fully presented to the trial court, they would not have changed the findings which support the judgment modifying the terms of the trust.

The motions to produce additional testimony are denied; the appeal from the minute order granting the petition to compromise is dismissed; the judgment is affirmed.

YORK, P. J., and WHITE, J., concurred.

BOWES et al. v. SUPERIOR COURT OF ALAMEDA COUNTY et al.

Civ. 12070.

District Court of Appeal, First District, Division 2, California.

April 16, 1942.

Hearing Granted June 12, 1942

1. Process 🔑65

Personal service obtained by enticing person to be served into territorial jurisdiction of court, by means of fraud and deceit or by trick or device or by use of force, is void and will be set aside.

2. Process 🔑65

The rule that personal service obtained by enticing person to be served into territorial jurisdiction of court by fraud and deceit or by trick or device or by use of force is void, applies to jurisdiction between counties of the same state.

3. Process 🔑118

Where pending plaintiff's appeal from order granting new trial in action for specific performance of option to sell capital stock of a corporation, plaintiff cited defendant to appear in county not of defendant's residence to give his deposition and in such county defendant was made a tender and thereafter plaintiff commenced a new action for specific performance of same option based upon the tender, defendant was immune from process in such county. Code Civ. Proc. § 395.

4. Prohibition 🔑10(2)

Prohibition was proper remedy to restrain superior court from proceeding in action for specific performance of an option, based upon a tender which was made to defendant when he was brought into jurisdiction upon an order to take his deposition which was procured for sole purpose of bringing him into county in order to make the tender and thus create venue in county not of defendant's residence. Code Civ.Proc. § 395.

◆

Proceeding in prohibition by E. L. Bowes, and others, to restrain the Superior Court of Alameda County and John J. Allen, judge thereof, from taking any further proceeding in an action upon a tender which was made to named petitioner when he was brought into the jurisdiction upon an order to take his deposition.

Peremptory writ of prohibition issued.

J. Paul St. Sure, of Oakland, and Bradford M. Melvin and Charles A. Christin, both of San Francisco, for petitioners.

James R. Agee, of Oakland, for respondents.

NOURSE, Presiding Justice.

The petitioners seek a writ of prohibition to restrain the superior court from taking any further proceedings in an action based upon a tender which was made to E. L. Bowes when he was brought into the jurisdiction upon an order to take his deposition, which petitioners assert was procured for the sole purpose of bringing him into the county in order to make the tender, and thus "create" venue by trick and device.

The individual petitioners are residents of the city and county of San Francisco where the corporation has its principal place of business. They were sued in the superior court in Alameda County where they appeared and filed a cross-complaint. A judgment went to the plaintiff in that action on both the complaint and cross-complaint, but the defendants' motion for a new trial was granted. The plaintiff then appealed to the Supreme Court and the defendants' motion to dismiss that appeal was denied. Connell v. Bowes, 19 Cal.2d 870, 123 P.2d 456. Pending the appeal the plaintiff commenced a new action in Alameda County growing out of the same transaction. It is this proceeding which the petitioners seek to restrain.

The theory of the petition is that the plaintiff misused the process of the superior court to bring one of the petitioners into Alameda County by trick and device in order to make a tender there which was a necessary prelude to the commencement of the second suit, and that this tender made in Alameda County made that county the proper county for the trial of the action as "the county where such obligation is to be performed * * * or * * * the county in which such obligation is incurred * * * ." Section 395, Code of Civil Procedure.

It is alleged in the petition and not denied that both suits involve the same subject matter—an action seeking specific performance of an option to sell capital stock of a corporation, for an accounting, and for an injunction. After the judgment in the first action, and pending the appeal from the order granting a new trial, the plaintiff cited petitioner E. L. Bowes to appear in Alameda County to give his deposition in the first action on October 25, 1941, though his deposition had theretofore been taken, and he had testified at length in the former trial. Suspecting that the only purpose of the citation was to compel him to enter Alameda County so that a tender might be made to him in that county, this petitioner duly appeared before the superior court and objected to the taking of his deposition upon all legal grounds. These objections were overruled by the court; the petitioner appeared in response to the citation; some frivolous and immaterial questions were asked him, and he was then made a tender of $5,000 in cash and notified that plaintiff elected to exercise the option. Thereafter, on November 15, 1941, the plaintiff commenced a new action for specific performance of the option based upon the tender made on October 25th. Summons was served upon the petitioners in San Francisco. They appeared specially in this second action and moved to quash service upon the ground that the tender under the alleged option was made while petitioner Bowes was in Alameda County solely because of the citation ordering him to appear and give his deposition, that those proceedings were all designed to lay the venue of the action in Alameda County, and were not taken in good faith, or for any legal purpose. The motion to quash was denied and the petitioners allege that, unless restrained, the superior court will compel them to stand trial in Alameda County and deny them their legal right to have the cause tried in the county of their residence.

[1] The theory upon which the petition is based rests upon the settled rule that "Personal service obtained by inveigling or enticing the person to be served into the territorial jurisdiction of the court, by means of fraud and deceit, actual or legal, or by trick or device, or by the use of force, is void and will be set aside." 50 C.J., p. 488. In accord are Hammons v. Superior Court, 63 Cal.App. 700, 219 P. 1037; Ewing v. Elliott, 51 Ga.App. 565, 181 S.E. 123; Parker v. Marco, 136 N.Y. 585, 32 N.E. 989, 20 L.R.A. 45, 32 Am.St.Rep. 770; Filer v. McCornick, D.C., 260 F. 309; Stewart v. Ramsay, 242 U.S. 128, 130, 37 S.Ct. 44, 61 L.Ed. 192, where the Supreme Court, giving the reasons for the rule, quoted from Parker v. Hotchkiss, 1849, Fed.Cas.No.10,739, 1 Wall Jr. 269, as follows: "'The privilege which is asserted here is the privilege of the court, rather than of the defendant. It is founded in the necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify. Witnesses would be chary of coming within our jurisdiction, and would be exposed to dangerous influences, if they might be punished with a lawsuit for displeasing parties by their testimony; and even parties in interest, whether on the record or not, might be deterred from the rightfully fearless assertion of a claim or the rightfully fearless assertion of a defence, if they were liable to be visited on the instant with writs from the defeated party.'"

Respondents do not question the application of the rule as it relates to "process" as that term is generally used. They contend that it does not relate to a tender upon which subsequent process rests, but they concede that they had planned and intended prior to the taking of the deposition to make the tender while the witness was in attendance under the citation, and insist that they had a right to make it at that time. They assured the superior court before the deposition was taken that they were acting in good faith, and have repeated those assurances here.

There are three questions which require consideration—(1) does the rule apply to jurisdiction between counties of the same state; (2) does it apply to a tender of this character; and (3) have the petitioners pursued the proper remedy.

[2] The first question is answered in the affirmative in State v. Superior Court, 175 Okl. 632, 54 P.2d 317; Groce v. Skelton, 206 Mo.App. 471, 230 S.W. 329. Since the fundamental basis of the doctrine is the right of the courts "to be open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them" (Filer v. McCornick, supra [260 F. 314]) there is no sound reason for a limitation of the rule to parties residing in separate states and not to those residents of the same state, but of separate counties, when the venue rests upon such residence.

[3] The second question can be answered only by analogy, since we have been unable to find any authority directly upon the subject. All the cited cases refer generally to the service of "process," and respondents contend that the doctrine should be limited to some service of a writ or summons compelling a party to appear or attend upon a judicial proceeding. But in some of the cited cases a broader use of the rule is recognized. In Ewing v. Elliott, 51 Ga.App. 565, 181 S.E. 123, 124, 125, it was said that this "immunity" is not "simply a personal privilege, but it is also the privilege of the court, and is deemed necessary for the maintenance of its authority and dignity and in order to promote the due and efficient administration of justice." Others place it upon the ground of public policy. In Wood v. Wood, 78 Ky. 624, 629, it was said that where a party induces another into the jurisdiction by fraud and device for the purpose of service he "will not be permitted to take advantage of his own wrong, and thus receive benefits that would not have accrued but for the fraud." In Filer v. McCornick, supra at page 315 of 260 F., it was said: "It is these considerations which have actuated the courts in extending the protection of the rule, so limited in the beginning, until it has come to embrace practically every one who may be called to a strange jurisdiction in connection with a cause, and *every proceeding or step in the action*, either heard before the court or any of its officers." (Emphasis ours.) In Groce v. Skelton, supra [206 Mo.App. 471, 230 S.W. 330], it was said: "Legal fraud is measured by the facts and actions of the parties *and the net result* * * * that process procured by fraud or misrepresentation cannot be permitted to stand * * *." (Emphasis ours.)

There can be no question that but for the tender made in Alameda County all the petitioners were entitled to defend the action in the city and county of San Francisco, the county of their residence. § 395, Code Civ.Proc. The respondents concede that "The new action was identical to the prior action, except that it was alleged that a new tender was made on October 25, 1941." The purpose of this tender was to fix the venue of the new action in Alameda County as "the county where such obligation is to be performed * * * or * * * the county in which such obligation is incurred * * *." as these exceptions to the general residence rule are stated in section 395 of the code. The fact that both actions involved the same contract should not affect the application of the "immunity" rule. Von Kesler v. Superior Court, 109 Cal.App. 89, 292 P. 544, and similar cases cited by respondents, where the "nonresident" was served with process while voluntarily within the jurisdiction as a suitor are not in point.

[4] The petition alleges that relief was sought in the superior court and denied. It may be assumed that any other motion based upon the same grounds will likewise be denied. The petitioners are therefore forced either to waive the attack upon the jurisdiction and defend on the merits, or stand upon the defense of lack of jurisdiction and waive their statutory right to a trial on the merits in the county of their residence since the grounds here urged do not appear to be grounds for a motion for a change of the place of the trial. In such cases prohibition is the proper remedy. Jardine v. Superior Court, 213 Cal. 301, 305, 2 P.2d 756, 79 A.L.R. 291; Davis v. Superior Court, 184 Cal. 691, 696, 195 P. 390.

Let a peremptory writ of prohibition issue as prayed.

STURTEVANT and SPENCE, JJ., concurred.

51 Cal.App.2d 260

METZ v. SOUTHERN PAC. CO.

Civ. 6671.

District Court of Appeal, Third District, California.

April 15, 1942.

Rehearing Denied May 15, 1942.

Hearing Denied June 12, 1942.

1. Appeal and error 🔑854(1)

On appeal from judgment for plaintiff, relying on res ipsa loquitur doctrine to sustain cause of action for accidental death, reviewing court is not bound by plaintiff's theory of cause of accident as disclosed in briefs, if record adequately supports judgment on another theory within issues of pleadings.

2. Death 🔑58(1)

In action for accidental death, "res ipsa loquitur" doctrine, relied on by plaintiff, is founded on theory that plaintiff does not know what caused accident.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

3. Master and servant 🔑278(20)

In action against railroad company under Federal Employers' Liability Act for death of sign painter as result of derailing of motor car, which he was operating along defendant's track, evidence *held* sufficient to show that decedent was propelling car backward at time of accident and to warrant jury's findings that car was dangerous and defective when so propelled at normal speed, that defendant and its agents knew of and failed to warn decedent of such defect and danger, and that decedent did not know thereof. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

4. Appeal and error 🔑994(2), 1003

The weight of evidence and witnesses' credibility are for jurors to determine, and appellate court may not interfere with their exclusive province in that regard.

5. Master and servant 🔑265(5)

The res ipsa loquitur doctrine applies, under proper circumstances, to employees' actions against their employers.

6. Negligence 🔑121(2)

The mere fact that one is injured from unknown cause does not raise presumption of negligence of owner of instrumentality used at time of accident, but further facts must be shown to create inference of negligence against owner of device through medium of which another person is injured.

7. Negligence 🔑121(2)

The "res ipsa loquitur" doctrine may apply when thing causing injury sued for is shown to be under defendant's management and accident is such as does not happen in ordinary course, if those having management of such thing use proper care.

8. Negligence 🔑121(2)

The "res ipsa loquitur" doctrine prescribes a mere rule of evidence, and requirement that instrumentality causing injury sued for be under defendant's management and control, in application of such doctrine, does not mean and is not limited to actual physical control, but applies to mere right of control.

9. Master and servant 🔑111(2), 150(2)

A railroad company, employing man to travel along its tracks within designated district and keep company's signs adjacent to tracks freshly painted, owed duty to supply him with motor car reasonably suitable and safe for operation in usual manner and to inform him of fact that machine was not constructed or intended to be propelled backward.

10. Master and servant 🔑280

In action against railroad company under Federal Employers' Liability Act for injuries to sign painter as result of derailment of defective motor car which he was operating along defendant's track, evidence *held* insufficient to show facts relieving defendant from liability for negligence on ground of deceased's "assumption of risk". Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

See Words and Phrases, Permanent Edition, for all other definitions of "Assumption of Risk".

11. Master and servant 🔑204(1)

The doctrine of "assumption of risk" is inapplicable under Federal Employers' Liability Act to workman injured in performance of his duties in customary manner because of dangerous and defective machine negligently provided for his use by employer without workman's knowledge of defect. Federal Employers' Liability Act § 3, subd. 4, 45 U.S.C.A. § 53, subd. 4, note.

12. Master and servant 🔑203(1)

An employee "assumes risk" of dangers normally incident to occupation in which he voluntarily engages, so far as they are not attributable to employer's negligence, but has right to assume that employer has exercised proper care to provide safe place of work and suitable and safe appliances for work and does not assume risk arising from defect attributable to employer's negligence until employee becomes aware of such defect or unless it is so plainly observable that he may be presumed to have known thereof.

13. Master and servant ⚷228(1)
Negligence ⚷101

An employee's contributory negligence does not defeat cause of action under Federal Employers' Liability Act, but merely authorizes jury to reduce damages accruing from employer's negligence in proportion to amount of negligence attributable to employee. Federal Employers' Liability Act, § 3, 45 U.S.C.A. § 53.

14. Appeal and error ⚷932(1)

In action against railroad company under Federal Employers' Liability Act for employee's accidental death, District Court of Appeal must assume, on appeal from judgment on jury's verdict for plaintiff, that if jury believed that deceased was contributorily negligent, it properly reduced ascertained damages in accordance with court's admonition and pursuant to statutory provisions. Federal Employers' Liability Act § 3, 45 U.S.C.A. § 53.

15. Trial ⚷296(3)

In action against railroad company under Federal Employers' Liability Act for death of defendant's employee, instruction merely advising jury that administratrix of estate of workman killed in course of his employment may maintain action against employer under such act for damages in behalf of deceased's widow and children, without specifically stating that defendant is liable for damages only if its negligence is proved, *held* not prejudicial to defendant, in view of court's previous admonitions and instructions to jury. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

◆

Appeal from Superior Court, Siskiyou County; James M. Allen, Judge.

Action under the Federal Employers' Liability Act by Katherine Rueb Metz, as administratrix of the estate of Emil George Metz, deceased, against the Southern Pacific Company to recover damages for intestate's death. Judgment for plaintiff, and defendant appeals.

Affirmed.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

George R. Freeman and Elmer Laine, both of Willows, and Tebbe & Correia, of Yreka, for appellant.

Hildebrand & Bills, of Oakland, J. Everett Barr, of Yreka, and Goodman & Brownstone, of San Francisco, for respondent.

THOMPSON, Acting Presiding Justice.

The defendant has appealed from a judgment which was rendered against it, pursuant to the verdict of a jury, in a suit for damages for the death of plaintiff's husband, Emil George Metz, which occurred in the course of his employment with the railroad company as a sign painter, as the result of the derailing of an alleged defective motor car which he was operating along the track in the vicinity of Tulelake. The suit was brought under the Federal Employers' Liability Act. 45 U.S.C.A. § 51.

To establish her cause of action the respondent relied chiefly on the doctrine of res ipsa loquitur. The appellant contends that the judgment is not supported by the evidence; that the principle of res ipsa loquitur has no application to the facts of this case, since the deceased person was in actual control and operation of the motor car at the time of the accident, and that the court erred in giving to the jury certain instructions.

The Southern Pacific Company is engaged in interstate commerce. It maintains a branch track from Klamath Falls, Oregon, in a southeasterly direction through the northeastern corner of California, to Sparks, Nevada. The accident occurred at a point between the stations of Tulelake and Alturas, in Modoc County, California, where the track is comparatively level. Mr. Metz was an able-bodied man forty-six years of age. He left surviving him the plaintiff, his widow, and a nineteen-year-old son who is enlisted in the United States Army at Honolulu. Mr. Metz had been employed by the railroad company, as a painter, for seventeen years. It was his duty to travel along the track within a designated district and to keep the railroad signs, adjacent to the track, freshly painted. For that purpose he was supplied by the company with a light motor car which he personally operated, and upon which he carried his equipment and materials. His motor car required replacement. June 1, 1939, two weeks before the accident occurred, the company supplied him with a used Adams Motor Car, No. 2-A, which had been formerly operated by another employee in the vicinity of Black Butte. It was a gas-engine car weighing 385 pounds. It was of a type different from the one he was accustomed to use. There is no evidence the deceased was familiar with that model of machine. Before delivering this car to Mr. Metz, it was overhauled and repaired under the direction of Ernest W. Carlton, the company's motor car mechanic. There is some evidence this particular car was defectively constructed or adjusted and dangerous to operate. Although Mr. Carlton denied the statements, Mr. Sam Aldrich, a retired section foreman, who had formerly been employed with the company for forty-two years, testified that he had a conversation with Carlton at Dunsmuir on June 21, 1939, a few days after the accident occurred, in which he said the motor car which was used by Mr. Metz at the time of his accident "should have been put out of service because of its dangerous and defective condition." He further said that the car on that occasion had caused a lot of trouble and was not a safe car to operate. There is no evidence the deceased had any knowledge of that fact.

The evidence which was adduced at the trial very satisfactorily shows that the motor car which was involved in this accident was so adjusted as to render it dangerous to operate the machine backward. While it could be slowly run in reverse at a rate of three or four miles an hour, evidently the car was designed to be propelled forward only, at a rate of speed not to exceed fifteen or twenty miles per hour. The machine is constructed to carry the main portion of the load over the heavier right-hand wheels which are seventeen inches in diameter. The left-hand wheels are only fourteen inches in diameter and serve to guide the machine and keep it running on the track with the flanges of the right-hand wheels close to the adjacent rail. The left-hand guide-wheels are adjusted by means of bolts and nuts, at a slight angle from the line of the rail. On that account, the operation of the car in the reverse direction tends to cause the small guide-wheels to jump the rail along which they travel, especially when the car is run at a normal rate of speed. Mr. Carlton testified in that regard:

"In running this motor car forward, the weight is distributed so that if you keep the front main wheel running against the rail it will run steady and it will stay there and the car will run constantly ahead and it won't run backwards at all. They found that out very soon after we got these cars, some of them tried it, and found out it didn't work. If anybody would run that car backwards the Lord would have to have his arms around them, but they wouldn't get far. * * * The wheels were just aligned for the car to go in one direction, and that was forward."

Mr. Carlton claimed that he cautioned Mr. Metz against running the machine backward. He said: "I also cautioned him about running the car backwards, because the wheels were just aligned for the car to go in one direction, and that was forward."

Mr. Harry C. Crawford, an assistant railroad inspector, testified in behalf of the defendant that he told Mr. Metz about June 1st, just before the accident occurred, that the company "was going to send up a side-load motor car and to be careful when he operated it and not to operate it backwards. * * * They will leave the track if you run them backwards very fast." However, Mr. Francis M. Hrubanik, an investigator belonging to the Brotherhood of Railway Trainmen, testified that he had a conversation with Mr. Crawford at his home in Dunsmuir sometime after the accident occurred, in which Crawford told him that he never instructed Mr. Metz or any other person with regard to the manner of operating the motor car, and that the first time any orders were ever issued to anyone regarding the manner of operating motor cars was on June 26, 1939, after the accident occurred.

The motor which furnishes the power with which to operate the car in question is attached to the axle which connects with the rear right-hand drive-wheel. Extending along the entire right-hand side of the machine there is a frame which is built to about sixteen inches in height above the level of the floor, enclosing the right-hand wheels. This frame is covered with boards to serve as a seat. The rear end of the bench is supplied with a cushion where the operator of the machine sits directly over the drive-wheel. Beneath this seat there is a box in which the battery is installed. The motor and crankcase are at the driver's feet, inside the rear drive-wheel. The motor is controlled by means of a lever and an electric-contact device accessible from the rear seat. When the contact is tightly grasped by the operator it develops sparks causing combustion from which the power is derived. When the grasp on this device is released the power is automatically disconnected. At this rear seat there is also a lever which controls the brake. It should be recalled this driver's seat is stationary at the rear right-hand side of the car over the drive-wheel. Resting on the frame of the machine there is a tool-tray fourteen inches in width and fifty-seven inches in length extending from front to rear. In this box the paint cans, materials and equipment of Mr. Metz were carried.

In the vicinity of the place where the accident occurred, on the southerly side of and adjacent to the railroad track, between Tulelake and Alturas, there is a stock corral and cattle chute. About two hundred feet northwesterly from that chute, Mr. and Mrs. Charles H. Reynolds and their two children lived in a small house situated on the same side of the track. Mr. and Mrs. Kenneth E. Thomas and their two children lived in another house nearby. It was also situated on the same side of the track. These two families were engaged in raising potatoes in that locality.

About ten o'clock on the morning of June 14, 1939, Mrs. Reynolds, who was then standing in the front doorway of her home, saw Emil Metz sitting alone on the seat at the rear right-hand side of the motor car as he drove it southerly along the track in the direction of Alturas. After he passed from sight and had been gone about twenty minutes, she again stepped to the door and saw him returning. She said "He was on the *left front* going towards Tulelake." This clearly indicates that he had not turned the machine around, but was driving it backward toward Tulelake. The machine was moving slowly. She said "I wouldn't say he was going fast."

It appears that during the twenty minutes which elapsed after Mr. Metz passed the Reynolds' house driving southeasterly toward Alturas, he painted one railroad crossing sign and a whistling sign, both of which were within a distance of about 600 feet from her house. After Mrs. Reynolds observed Mr. Metz pass her home upon his return toward Tulelake, she turned away from the door. Almost instantly she heard the children scream. They were then playing in front of the house, near the track. She also heard an unusual commotion and realized that the chug of his motor had ceased. She rushed back to the door and saw that the motor car had jumped the track on the northerly side and stood close to and at an acute angle from the northern rail. The body of Mr. Metz lay upon the embankment close to his machine. He was badly injured, helpless and suffering great pain. Mrs. Reynolds ran to the home of her neighbor, Mrs. Thomas, for assistance. Both women immediately went to the scene of the accident. Within a few moments Mr. Reynolds arrived. He said that he found Mr. Metz lying in a semi-conscious condition "between the track"; that the motor car stood on the northerly side of the rails "with the wheels flush against the track parallel so that one end of his speeder would be facing directly north." Mr. Reynolds proceeded to roll the motor car onward five or six feet farther away from the rail. The car remained in that position for several days. Mr. Reynolds assisted in conveying Mr. Metz to the motor car upon which he was placed, and then drove down the road a short distance where he had seen a section crew at work. He found Carl Tonole, a section track foreman, and notified him of the accident. Tonole soon arrived at the scene of the accident and made a careful inspection of the track and car to try to ascertain the cause of the accident. Mr. Metz was unable to talk. He never recovered his speech so as to tell anyone how the accident happened. He was soon removed to a hospital, and died the following day from the effect of his injuries.

There is no dispute over the fact that the flanges of the heavy wheels of the motor car left a distinct crease across the surface of each wooden tie in a curved line from the point where the car evidently left the rail, a distance of about twenty-four feet, directly to the place where the car jumped the northern rail and came to a stop. All witnesses agree to that fact. Since the car was found directly at the end of that mark with the front wheels nearest the track, we are convinced it must have been traveling backward when it was derailed. This conclusion is corroborated by the fact that the small guide-wheels were adjusted at an angle to crowd the flanges of the heavy wheels against the rail on the opposite side of the track, when the machine was running forward. It seems reasonable to assume that, on the same principle, when the machine was running in the opposite direction, the slant of the guide-wheels would tend to make them jump the rail upon which they rolled just as it did on this occasion. We have no doubt that is exactly what occurred.

However, that does not necessarily mean this judgment should be reversed. Notwithstanding the fact that the respondent strongly urges in her briefs that there are circumstances and inferences in the record from which the jury was warranted in concluding the deceased was running his motor car in a forward direction when the accident occurred, we assume that if the evidence supports a finding that the defendant was guilty of negligence in furnishing their employee with a defective and dangerous motor car, without informing him of that fact, and that he was not charged with knowledge of his danger and did not assume the risk of those defects under the circumstances of this case, then the judgment should be affirmed.

[1, 2] The plaintiff relied on the doctrine of res ipsa loquitur for her cause of action. In effect, she asserted she did not know how the accident occurred. On appeal, a reviewing court is not bound by the respondent's theory of the cause of accident as disclosed in the briefs, when he relies on the doctrine of res ipsa loquitur, provided the record adequately supports the judgment on another theory which is contained within the issues of the pleadings. The very theory upon which res ipsa loquitur is founded is that the plaintiff does not know what caused the accident.

[3, 4] We are of the opinion the record does not contain substantial evidence that Emil Metz was engaged in running his motor car in a forward direction at the time of the accident. On the contrary, we are satisfied he was then propelling it backward. There is, however, ample evidence from which the jury was warranted in determining that the car was dangerous and defective when it was propelled backward at a normal rate of speed; that the defendant and its agents knew that fact, and failed to warn the deceased against such defect and danger; that the deceased was not acquainted with that particular type of car, and that there is no evidence Mr. Metz knew of the defect of the motor car or of the danger of propelling it backward. It is true that both Mr. Crawford and Mr. Carlton testified they warned the deceased against driving the machine backward, but evidence in rebuttal was adduced by the plaintiff tending to impeach those witnesses and the jury was therefore warranted in disbelieving them in that regard. The weight of their evidence, in that respect, and the credibility of these witnesses were matters for the determination of the jurors. We may not interfere with their exclusive province in that regard.

[5-8] The California cases, and the weight of authorities in most jurisdictions, hold that the doctrine of res ipsa loquitur applies, under proper circumstances, to actions by employees against their employers. Nolen v. F. O. Engstrum Co., 175 Cal. 464, 166 P. 346; O'Connor v. Mennie, 169 Cal. 217, 146 P. 674; Ronconi v. Northwestern Pac. R. Co., 35 Cal.App. 560, 170 P. 635; Lippert v. Pacific Sugar Corp., 33 Cal.App. 198, 164 P. 810; 6 Thompson's Comm. on Negligence, 632, §§ 7649, 7650. It is true the mere fact that one is injured from an unknown cause does not raise the presumption of negligence on the part of the owner of the instrumentality which is used at the time of the accident. 38 Am. Jur. 989, § 295. Further facts are required to be shown to create the inference of negligence against the owner of a device through the medium of which another person is injured. California cases have frequently stated that the doctrine of res ipsa loquitur may apply "when a thing which causes injury is shown to be under the management of the defendant and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." 19 Cal.Jur. 704, § 123. This doctrine prescribes a mere rule of evidence. The requirement that the instrumentality must be under the management and control of the defendant, in the application of the doctrine of res ipsa loquitur, does not mean, nor is it limited to, actual physical control. It has been held to apply to the mere *right of control* of the instrument which causes the injury at the time of the accident. Van Horn v. Pacific Refining & Roofing Co., 27 Cal.App. 105, 109, 148 P. 951; McCloskey v. Koplar, 329 Mo. 527, 46 S.W.

2d 557, 92 A.L.R. 641; 38 Am.Jur. 997, sec. 300. In the Van Horn case, supra [27 Cal.App. 105, 148 P. 953], it is said in that regard:

"The rule declared in this and the other cases cited by appellant, to the effect that the exclusive control and management of the appliance causing the injury must be shown to have been in the defendant, must be taken to refer *to the right of such control*; otherwise, as we have seen, the doctrine of res ipsa loquitur could seldom if ever be given application." (Italics added.)

And in the text of 38 American Jurisprudence, at page 997, it is likewise said in that regard: "The requirement that the instrumentality be under the management and control of the defendant does not mean, or is not limited to, actual physical control, but refers rather to the right of control at the time of the accident."

[9] In the present case the railroad company had continuous exclusive control over the motor car. The defendant's motor car mechanic, who was employed for that express purpose, actually repaired and adjusted that particular machine before it was delivered to Mr. Metz. It was the mechanic's duty to keep it in suitable repair. The deceased had no duty or authority to repair or keep that machine in proper mechanical condition. The real cause of the accident was the defendant's adjustment of the guide-wheels on that car in such a manner as to render it dangerous to operate it backward. We assume the jury found that the car was turned over to the deceased in that defectively adjusted condition without warning him of the danger. It was the duty of the railroad company to supply Mr. Metz with a motor car which was reasonably suitable and safe for operation in the usual manner that such cars are used. If the machine was not constructed or intended to be propelled backward the workman should have been so informed.

We find no substantial evidence to support respondent's theory that the accident was caused by the existence of a low joint of the rails or any other defective condition of the track.

[10-12] We are satisfied the evidence does not show facts which will relieve the defendant from liability for negligence on the ground of the assumption of risk on the part of the deceased. The doctrine of assumption of risk has no application when the workman is injured in the performance of his duties in the customary manner, through a dangerous and defective machine which is negligently provided for his use by the employer, if the workman has no knowledge of the defect. Gila Valley, G. & N. R. Co. v. Hall, 232 U.S. 94, 34 S.Ct. 229, 58 L.Ed. 521; 45 U.S.C.A. § 53, subd. 4, note; Crabtree v. Western Pac. R. Co., 33 Cal.App.2d 35, 43, 90 P.2d 835. In the case last cited the court quoted with approval from the Gila Valley, G. & N. R. Co. case, supra [232 U.S. 94, 34 S.Ct. 231, 58 L.Ed. 521], as follows:

"An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, *so far as these are not attributable to the employer's negligence*. But the employee has a right to assume that his employer has exercised proper care with respect to providing a safe place of work, *and suitable and safe appliances for the work*, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employee becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it." (Italics added.)

[13, 14] The alleged contributory negligence of the deceased is not a defense to this action, which is maintained under the Federal Employers' Liability Act. Contributory negligence does not defeat the cause of action. If the deceased was guilty of contributory negligence in operating the motor car backward, and recovery is not barred by the doctrine of "assumption of the risk," then the jury was authorized to merely reduce the damages accruing from defendant's negligence "in proportion to the amount of negligence attributable to such employee," on account of his contributory negligence. 45 U.S.C.A. § 53. The jury was fully and fairly instructed in that regard. We must assume that if the jury believed the deceased was guilty of contributory negligence, it properly reduced the ascertained damages, in accordance with the admonition of the court, and pursuant to the provisions of section 53 of the act above cited.

[15] The appellant was not prejudiced by the giving of plaintiff's instruction number sixteen which, in effect, merely advises the jury that the administratrix of the estate of a workman who has been killed in the course of his employment, under the provisions of section 51 of the U.S.C.A.

Federal Employers' Liability Act, may maintain an action for damages against the employer in behalf of the widow and children of the deceased person. The appellant complains of that instruction because it omits to specifically state that the railroad company is liable for damages only in the event of proof of its negligence.

The jury was previously repeatedly and clearly told the burden was on the plaintiff to show by a preponderance of evidence that the deceased was killed in the course of his employment by the Southern Pacific Company as the proximate result of the negligence of the company or its agents, or their verdict must be rendered in favor of the defendant. Following these admonitions several instructions were given in a group upon the specific application of the Federal Employers' Liability Act to the facts of this case. These instructions were separated only by Roman numerals which, we assume, were not even read to the jury. The jury had no means of knowing these charges upon the subject of the application of the Federal Employers' Liability Act were not all a part of one instruction on that general subject. The context of those instructions clearly identifies them as a continuous charge on the same subject-matter. The jury could not have been misled by the challenged instruction. Immediately preceding that criticised instruction the jury was charged as follows:

"Plaintiff's cause of action is based upon the act of Congress known as the Federal Employers' Liability Act and the statute of the United States governing the same reads as follows:

"'Every common carrier by railroad while engaging in commerce between any of the several states or territories * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury or death *resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier,* or by reason of any defect or insufficiency *due to its negligence,* in its cars, engines, appliances, machinery, track, roadbed, works, * * * or other equipment.'" (Italics added.)

The foregoing instruction clearly and unequivocally informs the jury that liability exists only when the injury or death results from the *negligent* acts of the defendant in supplying the dangerous or defective machine or appliance to the workman. All that the criticised instruction adds to that statement of principle is that the administratrix or other representative of the estate of the dead man may maintain the action for damages in behalf of the widow or children.

We find no reversible error in the charge to the jury.

The judgment is affirmed.

STEEL, J. pro tem., and TUTTLE, J., concurred.

BOLLINGER v. NATIONAL FIRE INS. CO. OF HARTFORD, CONN.*

Civ. 11810.

District Court of Appeal, First District, Division 1, California.

April 17, 1942.

Hearing Granted June 16, 1942.

1. **Insurance** ⊂⇒622(2)

Contracting parties may agree to fix a period within which an action on a fire policy must be filed, and such period may be less than that provided by the statute of limitations, as long as the lesser period is not unreasonable.

2. **Insurance** ⊂⇒622(2)

A period of 15 months, within which action on a fire policy is required by the fire policy to be filed, is not unreasonable.

3. **Insurance** ⊂⇒146(3)

Fire policy was required to be construed most strongly against insurer.

4. **Insurance** ⊂⇒622(3)

Where fire policy provided that insured must give insurer preliminary proof of loss within 60 days after fire, that insured should have 20 days to approve or disapprove the loss, that loss was payable 30 days thereafter, and that no action could be maintained until after compliance by insured with such requirements nor unless action was begun within 15 months after commencement of fire, insured had 15 months from time he could first file action on

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* Subsequent opinion 147 P.2d 611.

policy within which to file action on policy, rather than 15 months from date of fire.

5. Insurance ⚷146(3)

When contractual provisions shortening the statutory period for bringing action on a fire policy appear in the policy, they must be strictly construed against the insurer.

6. Courts ⚷91(1)

Where there was a conflict between two Supreme Court decisions, and the later case did not purport to overrule the earlier case, the District Court of Appeal was free to follow the rule of the prior case, which the District Court of Appeal thought was the sounder rule, and which was the rule supported by the weight of authority.

WARD, J., dissenting.

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Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Action by Fred M. Bollinger, as trustee in bankruptcy, etc., against the National Fire Insurance Company of Hartford, Connecticut, to recover for fire loss under fire policy issued by defendant to the bankrupt. From a judgment in favor of the defendant following an order sustaining defendant's demurrer without leave to amend, the plaintiff appeals.

Judgment reversed, and trial court instructed to overrule demurrer.

Jack J. Miller, of Stockton, and Kenneth M. Johnson, of San Francisco, for appellant.

Long & Levit, of San Francisco, for respondent.

PETERS, Presiding Justice.

Plaintiff appeals from a judgment for defendant entered following an order sustaining defendant's demurrer without leave to amend.

So far as pertinent here, the complaint alleges that a fire, partially destroying property insured by the defendant, occurred on September 27, 1939; that prior to that date plaintiff had been appointed trustee in bankruptcy of the insured's bankrupt estate; that on November 18, 1939, plaintiff and the insured furnished the defendant with proof of loss as required by the policy; that by such proof of loss plaintiff claimed the sum of $1,333; that on December 22, 1939, plaintiff entered into an agreement with the Fire Companies' Adjustment Bureau, agent of defendant, fixing the amount of loss at $1,160.25; that shortly thereafter the defendant notified the insured that it denied all liability under the policy upon the grounds that at the time of the fire the original insured was not the sole and unconditional owner of the insured property, and that under the terms of the policy such a change has made the policy void; that on January 15, 1940, plaintiff commenced an action on the policy in the Superior Court of San Joaquin County; that on motion of the defendant, that action was transferred to the Municipal Court of the City and County of San Francisco; that said case proceeded to trial on January 8, 1941; that after plaintiff had completed the presentation of his evidence, defendant moved for a nonsuit upon the ground that the action had been prematurely brought in that it had been commenced before the expiration of thirty days from the date the loss payable under the policy had been ascertained, and that under the policy the commencement of any action thereon was prohibited for thirty days after the loss had been fixed; that the trial court on February 20, 1941, granted the motion for a nonsuit and judgment was entered on February 21, 1941. The present action was brought in the Superior Court of Contra Costa County on February 25, 1941. The policy upon which this action is predicated is pleaded as an exhibit to the complaint.

The policy contained a provision requiring the insured to comply with all provisions of the policy, and to bring any action based thereon "within fifteen months next after the commencement of the fire." The theory of the trial court in sustaining the demurrer was that, inasmuch as this action was brought more than fifteen months after the commencement of the fire, it was barred by this contractual provision. On this appeal it is the contention of appellant, that when this clause is interpreted with the other provisions of the policy, the action was commenced in time, and, in any event, certain facts pleaded in the complaint are sufficient to estop respondent from relying on this clause.

The policy provides that when a loss occurs the insured must give to the company written notice thereof without unnecessary delay; that within sixty days after the fire the insured must render a preliminary proof of loss; that the company has twenty days thereafter to approve or disapprove the loss; that the loss is payable thirty days after the loss has been ascertained; and that "No suit or action on this policy for the recovery of any claim shall be sustained, until after full compliance by the insured with all of the foregoing requirements, nor unless begun within fifteen months next after the commencement of the fire." Various provisions concerning arbitration of the loss could extend the period before suit could be instituted for over another one hundred days.

It will be noted that the insured has up to sixty days to file proof of loss, the company has twenty days to pass on such proof, and the loss is not payable until thirty days thereafter. No action may be commenced until full compliance with these requirements. It follows, therefore, that, under the policy, a period of one hundred and ten days—over three and one-half months—may expire before suit may be commenced. If arbitration is resorted to, an additional period of over one hundred days could expire before suit may be brought. In the present case the relevant dates are as follows:

September 27, 1939—Fire occurred.

December 22, 1939—Loss agreed upon.

January 15, 1940—First action commenced.

February 21, 1941—Judgment entered dismissing first action.

February 25, 1941—Present action instituted.

It will be noted that the present action was instituted within fourteen months from the date the loss was agreed upon, about eighteen months from the date of the fire, and about thirteen months from the date suit could have first been instituted—i. e., January 21, 1940, thirty days after the loss was agreed upon. Appellant did not sit back and allow the contractual period to expire without action on his part. He immediately instituted the first action—in fact, that action was filed on January 15, 1940, some six days before such an action could properly be filed. For over a year this action was pending. On February 21, 1941—more than fifteen months "next after the commencement of the fire"—that action was dismissed because prematurely filed. The present action was filed four days later.

[1-4] There can be no doubt that in this state contracting parties may agree to fix a period within which an action must be filed, and that such period may be less than that provided by the statute of limitations, as long as the lesser period is not unreasonable. Tebbets v. Fidelity & Casualty Co., 155 Cal. 137, 99 P. 501; Fitzpatrick v. North American Accident Ins. Co., 18 Cal. App. 264, 123 P. 209; Harlow v. American Equitable Assur. Co., 87 Cal.App. 28, 261 P. 499; Beeson v. Schloss, 183 Cal. 618, 192 P. 292; Fageol T. & C. Co. v. Pacific Indemnity Co., 18 Cal.2d 748, 117 P.2d 669; see Annotation 121 A.L.R. 758. There is also no doubt that fifteen months is not an unreasonable period. But in every case there is always presented the question as to when the contractual period is to start. In the instant case, if the fifteen months' provision concerning the bringing of an action on the policy stood alone there can be no doubt but that the fifteen-month period would start to run from the date of the fire. The provision reads that no suit or action on the policy may be sustained "until after full compliance by the insured with all of the foregoing requirements, nor unless begun within fifteen months next after the commencement of the fire." But that provision does not stand alone. It refers back to other provisions of the policy and requires "full compliance" with those provisions in reference to the fixing of the loss before an action may be commenced. The question is immediately presented as to the proper interpretation of these seemingly conflicting provisions in the policy. The policy purports to give the insured a fifteen-month period after the fire to commence his action. Actually, under other clauses of the policy which had to be complied with before suit could be commenced, the action in this case could not be filed until January 21, 1940—some four months after the date of the fire. If the position of respondent is sound, then appellant did not have fifteen months from the date of the fire to file his suit—he had but eleven months. Although the provision that the action must be commenced within fifteen months "next after the commencement of the fire" standing alone is clear and unambiguous, when that provision is read with the other provisions of the policy, an ambiguity is created. That clause implies that the parties have contracted that the injured party shall have a full period of fifteen months within which to file his action in place of the usual four years provided by the statute of limitations. But when that

clause is read with other clauses referred to in the very clause under construction, it is seen that in this very case it was held in the prior action that the insured had no legal right to file his action until four months "next after the commencement of the fire," thus cutting down the fifteen-month period apparently contracted for to eleven months. Had resort been had to arbitration, this eleven-month period could have been reduced another three and a half months. Thus, instead of permitting the insured a period of fifteen months within which to file his action, if respondent is correct, in this case he had but eleven months, and under some circumstances would have had but seven and a half months. Keeping in mind that this is a provision in an insurance policy which must be construed most strongly against the company, and also keeping in mind that by this provision the normal period of the statute of limitations is greatly reduced, it seems quite clear that when the policy is construed as a whole the only reasonable construction is that the insured is granted fifteen months from the time he could first file his action to file his complaint.

[5] This is not the first time this problem has been presented to the appellate courts of this and other states. Although there is a definite conflict in the authorities, according to the weight of authority, such policy provisions are interpreted as excluding from their operation the period that must expire before suit properly may be commenced. Stated another way, regardless of the language used in such clauses, the majority of courts have held that the contractual period does not start to run until suit may be first filed. The rule is thus stated in 29 Am.Jur., page 1043, section 1397: "There is a sharp conflict in the cases on the question when the time begins to run within which a suit is required to be brought under the usual policy provisions. It is usually provided that the insurer shall have a certain time within which to pay the loss, postponing the time of payment, and that no action shall be sustained unless commenced within a certain time. Whatever may be the term employed in the latter provision, whether it is within a certain time 'after loss,' 'after the fire,' or 'after death,' many courts hold that the provision for immunity from suit and the one of limitation must be construed together and that the period of limitation does not begin to run until the loss is payable and an action might be brought against the insurer." Cases from many jurisdictions are cited in support of the rule. The reasons for this rule are obvious. While contractual provisions shortening the statutory period, if reasonable, are valid, they do give one of the contracting parties an advantage over the other. When such provisions appear in insurance policies they must be strictly construed against the insurance company. By providing that suit may not be commenced until after thirty days from the date the loss is agreed upon, if that period is deducted from the fifteen-month period, obviously the period fixed by contract has been shortened to that extent. This raises an ambiguity. Did the parties intend that the contractual period should thus be shortened? In answering that question the majority of courts have held that the policy should be interpreted most strictly against the company, and for that reason have held that the parties intended that the insured should have the full contractual period during which he could file his action. These courts hold, therefore, that the contractual period does not start to run until the insured could first file the action—in the present case thirty days after the loss was ascertained, or January 21, 1940.

This rule has been expressly adopted by the Supreme Court of this state in the only case where that court has fully discussed the problem. In Case v. Sun Insurance Co., 83 Cal. 473, 23 P. 534, 8 L.R.A. 48, the policy compelled compliance with the provisions requiring the fixing of the loss before suit could be commenced and also provided that such suit "shall be commenced within twelve months next after the fire shall occur." The fire occurred September 12, 1884, and suit was not commenced until November 22, 1885. Compliance with the other provisions of the policy was not completed until October 16, 1885. After reviewing the pertinent authorities at length, the court squarely held that the provisions requiring proof of loss as a condition precedent to bringing suit, created an ambiguity as to the proper meaning of the twelve-month provision, and that properly construed, the contractual period did not start to run until the insured could first file the action. The court based its decision directly upon the reasoning of the early case of Spare v. Home

Mut. Ins. Co., C.C., 17 F. 568, 9 Sawy. 142, from which it quoted at length. In that quotation, it is first pointed out that the clause fixing twelve months as the period within which suit must be commenced was valid, and then the court referred to the contentions of the plaintiffs in that action concerning that clause, as follows: "'* * * they contend that it must be read in connection with that other clause which provides that a loss does not become payable until 60 days after the proof of that fact is made; and that, taken together, the reasonable construction of them is that, the right to sue on the policy being postponed until the loss is payable, namely, sixty days after proof thereof, the twelve-months limitation upon such right does not commence to run until that time. This construction is supported by the decided weight of authority, and, in my judgment, is correct in principle.'" The court then cites many cases from other jurisdictions approving that rule. The court then quotes from Steen v. Niagara F. Ins. Co., 89 N.Y. 315, 42 Am.Rep. 297, as follows: "'We think the intention of the defendant was to give the insured a full period of 12 months, within any part of which he might commence his action, and having, by postponement of the time of payment, secured itself from suit, it did not intend to embrace that period within the term after the expiration of which it could not be sued. In other words, the parties cannot be presumed to have suspended the remedy and provided for the running of the period of limitation during the same time. Indeed, the actual case is stronger; not only was the remedy postponed, but the liability even did not exist at the time of the fire, nor until it was fixed and ascertained according to the provisions of the policy. Having thus made the doing of certain things, and a fixed lapse of time thereafter, conditions precedent to the bringing of an action, the parties must be deemed to have contracted in reference to a time when the insured, except for that contract, might be in a condition to bring an action. Under any other construction, the two conditions are inconsistent with each other.'" The court expressly refused to follow the case of Garido v. American Cent. Ins. Co. of St. Louis, 2 Cal.Unrep. 560, 8 P. 512, recognizing that its holding was "not altogether in harmony with the cases which we follow in this case." It should also be noted that the court did not hold that the company was estopped to plead the contractual provision because the loss had not been ascertained until after the contractual period had expired, as it could have done. Instead, it elected to and did place its decision squarely upon the sole ground that, properly construed, such contractual provisions do not commence to run until suit can first be filed. It will thus be seen that the Supreme Court as early as 1890 adopted the rule that was then, and still is, the so-called majority rule. See Annotations, 83 A.L.R. 748, particularly at page 760; 112 A.L.R. 1288, particularly at page 1297.

The respondent contends, however, that a later case of the Supreme Court, and one in the appellate court, have adopted the minority view, and that the Sun Insurance Co. case, supra, has been overruled. It must be conceded that these two later decisions have applied the minority view, but in neither of them was the problem here involved fully discussed, nor was the real holding of the Sun Insurance Co. case at all analyzed. The first case that is relied upon as establishing the minority rule in this state is Tebbets v. Fidelity & Casualty Co., 155 Cal. 137, 99 P. 501, 502, a department decision of the Supreme Court. That case involved an interpretation of a life-accident policy. The insured died September 4, 1904. Action was commenced April 5, 1905. The policy provided that proof of death must be furnished within two months of its occurrence, and that action could not be brought until three months after filing such proofs, "nor brought at all unless begun within six months from time of death." The opinion does not state when proof of death was made. It is to be noted that under this policy a period of five months could expire before suit could be commenced. If the six-month period started from death, this would leave but one month in which to file the action, a period so short that it is very doubtful if it would be upheld as reasonable. The court did not note or discuss this fact. The opinion is two pages long. All but six lines of the decision are devoted to a discussion of the validity of the contractual provision shortening the statutory period of limitation. The contention of the insured was that the contractual provision was void as against public policy, relying on certain cases from other states so holding. The court properly held that such a provision, if reasonable, was valid. Then, at the very end of its opinion, the court, without recognition of the fact that such rule was directly contrary to its earlier decision in the Sun Insurance Co. case, supra, stated (page 139 of 155 Cal., page 502 of 99 P.): "The six months' period was not in itself unreasonable. It began to run from the date of the death, and was not affected by the provision that legal proceedings could not be brought before the expiration of three months from the date of filing proofs," citing an Ohio case [Appel v. Cooper Ins. Co., 76 Ohio St. 52, 80 N. E. 955, 10 L.R.A.,N.S., 674, 10 Ann.Cas. 821], that state being one of the states that has adopted the minority view. The court had cited the Sun Insurance Co. case, supra, with approval, in its discussion of the validity of the contractual provision, but it nowhere recognized that, by its decision, it was overruling that well-reasoned case. Although, it must be conceded that the rule of this case is directly contrary to its prior decision, in my opinion, it should not be held that the court intended to and did overrule, in this cavalier fashion, its prior holding. The court not only did not discuss its earlier decision, but did not mention the many convincing, and, to my mind, compelling, arguments in favor of the majority rule. In fact, the later decision did not recognize that there was a conflict on the important principle involved.

The second case relied upon as establishing the minority view in this state is Fitzpatrick v. North American Accident Ins. Co., supra. The case involved a policy of accident insurance. The insured was injured January 18, 1909. He died on January 23, 1909. Suit was commenced February 16, 1910. The policy provided for notification to the company of any injury within ten days of an accident; that proof of claim must be made within two months after death; and suit must be brought within twelve months of the date of the accident. The opinion does not mention whether suit could be commenced prior to filing of proof of loss—the very clause which creates the ambiguity in the instant case. The court first holds that contractual clauses fixing the time for commencement of the action are valid. It then holds that under this policy the period started to run from the date of the accident. It places this holding squarely upon the holding above-quoted from the Tebbets case, supra. In addition, it cites, in support of its holding, the case of Garido v. American Cent. Ins. Co. of St. Louis, supra—a case that had been disapproved in the Sun Insurance Co. case, supra. The court discusses the Sun Insurance Co. case, supra, and holds that the real basis of that case was estoppel. The appellate court obviously misinterpreted the earlier Supreme Court decision. The Supreme Court, as demonstrated from the quotations above set forth, placed its decision solely upon the proper construction of the policy. It should be mentioned that no hearing was asked in the Supreme Court from the appellate court decision. Other cases cited by respondent on this issue are not in point. Neither the Tebbets case nor the Fitzpatrick case has been cited in any subsequent California case on the point here under discussion.

[6] We are thus faced with a situation where there are three California cases where the problem here involved was discussed. One of these is the Sun Insurance Co. case, supra, which is the only case where an appellate court of this state has fully discussed the problem, and where the Supreme Court clearly and unequivocally adopted what we consider to be the reasonable and proper rule, and the rule adopted by the majority of courts of this country. Another of the cases—the Tebbets case, supra,—is one where the Supreme Court admittedly laid down a rule contrary to its prior decision, but failed to discuss its prior decision, failed to discuss the arguments in favor of the majority rule, and failed to recognize that there was a conflict in the authorities on the subject. The third decision is by the intermediate appellate court in which no hearing by the Supreme Court was asked. It blindly followed the brief holding of the Tebbets case, and not only misinterpreted the holding in the Sun Insurance Co. case, but cited, in support of its holding, a case that had been disapproved in that case. Although, of course, this court, as an intermediate appellate court, is bound to follow prior decisions of the Supreme Court, under the circumstances here disclosed the least that can be said is that there is a conflict in the Supreme Court decisions, and that the later case did not purport to overrule the earlier one. Under such circumstances, I think this court is free to follow what we consider to be the sounder rule, and the rule that is supported by the weight of authority.

This conclusion makes it unnecessary to consider or discuss appellant's contention that under the facts pleaded, regardless of the above-discussed rule, respondent is estopped from contending the action was not filed in time.

For the foregoing reasons the judgment appealed from is reversed, and the trial court is instructed to overrule the demurrer of defendant.

E. P. MURPHY, Justice pro tem., concurred.

WARD, Justice (dissenting).

I dissent.

Appellant urges (1) that the complaint states a cause of action; (2) that a proper application of the doctrine of estoppel shows that a cause of action was stated, and (3) assuming the complaint was faulty, it was error not to grant leave to amend. Appellant's position is stated in the opening brief as follows: "From the complaint as it now stands it is ascertainable that there was a delay of four (4) months from the date of the fire to the time when an action could be brought. If during trial it should be shown that any portion of this delay was occasioned by the acts of the defendant * * * the fifteen (15) month period would be extended by such time." Appellant relies upon the doctrine of estoppel.

The majority opinion holds that when the several provisions relating to the time when an action may be filed are read together "an ambiguity is created." This point was not raised by appellant in his statement of questions involved on appeal nor does it appear to have been called to the attention of the trial court as is evidenced by its opinion which appears in the transcript. I fail to find any doubtful, indistinct or equivocal language (Kraner v. Halsey, 82 Cal. 209, 22 P. 1137) in the provisions of the policy with reference to the time within which suit may be brought. A definite maximum time is fixed; the minimum period may be uncertain depending upon compliance with designated requirements. Whether read together or separately no ambiguity appears. In Fitzpatrick v. North American Accident Ins. Co., 18 Cal.App. 264, 265, 123 P. 209, referring to a policy somewhat similar in its terms, the court said: "The provision in this policy limiting the time within which suit might be brought, is free from ambiguity." Contracts, particularly insurance policies containing provisions that suits must be filed within specified periods but not until the happening of certain events, have been upheld in this state. The rule is stated and insurance cases cited in Beeson v. Schloss, 183 Cal. 618, 622, 192 P. 292, 294 as follows: "It is a well-settled proposition of law that the parties to a contract may stipulate therein for a period of limitation, shorter than that fixed by the statute of limitations, and that such stipulation violates no principle of public policy, provided the period fixed be not so unreasonable as to show imposition or undue advantage in some way. Tebbets v. Fidelity [& Casualty] Co., 155 Cal. 137, 99 P. 501; Case v. Sun Insurance Co., 83 Cal. 473, 23 P. 534, 8 L.R.A. 48; Fitzpatrick v. North American [Accident Ins.] Co., 18 Cal.App. 264, 266, 123 P. 209; Garido v. American Ins. Co. [2 Cal.Unrep. 560], 8 P. 512; 1 Wood on Lim. (4th Ed.) 145; 25 Cyc. 1017." The majority opinion relies upon Case v. Sun Insurance Co., 83 Cal. 473, 23 P. 534, 8 L.R.A. 48. Referring to that case, the majority opinion states: "* * * the court squarely held that the provisions requiring proof of loss as a condition precedent to bringing suit, created an ambiguity."

The Sun Insurance Co. decision does not hold that an "ambiguity was created." It sets forth certain provisions of a policy including one that any action "shall be commenced within twelve months" etc., the court at page 477 of 83 Cal., at page 535 of 23 P., 8 L.R.A. 48, saying: "In this case it was more than 12 months after the fire before an action could be commenced." In Steen v. Niagara F. Ins. Co., 89 N.Y. 315, 42 Am.Rep. 297, quoted with approval in Spare v. Home Mut. Ins. Co., C.C., 17 F. 568, 9 Sawy. 142, it was held that the distinct and definite conditions in the policy "are inconsistent." This is the holding in Case v. Sun Insurance Co., supra, based upon the facts of that case. The court in the Sun Insurance Co. case further said, page 477 of 83 Cal., at page 535 of 23 P., 8 L.R.A. 48: "This case is distinguishable from Garido v. [American Cent.] Ins. Co. [of St. Louis, 2 Cal.Unrep. 560], 8 P. 512, in which the plaintiff had ample time after his right of action accrued to have commenced it within 12 months after the loss occurred." This seems to be a clear recognition of the fact that if in the Sun Insurance Co. case the insured, after compliance with certain conditions in the policy had remaining to him a reasonable time to file the action, a contrary conclusion would have been reached.

The majority opinion holds that there is a "conflict on the important principle involved" in the Sun Insurance Co. decision and that of Tebbets v. Fidelity & Casualty Co., 155 Cal. 137, 99 P. 501. When analyzed such seeming conflict disappears. In each case the clause or clauses in the policy limiting the period within which an action may be commenced is or are valid. In the Sun Insurance Co. case such clause, when read with others, demonstrates not ambiguity in language, but rather an incongruous or inconsistent condition as applied to the facts of that case. In the Tebbets case no such difficulty arose. It was stated at page 138 of 155 Cal., at page 502 of 99 P.: "The general rule, supported by the great weight of authority, is that a condition in a policy of insurance, providing that no recovery shall be had thereon unless suit be brought within a given time, is valid, if the time limited be in itself not unreasonable." Citing the Sun Insurance Co. case as recognizing this principle. And, as applied to the facts of the Tebbets case, it was held that "The six months' period was not in itself unreasonable. It began to run from the date of the death, and was not affected by the provision that legal proceedings could not be brought before the expiration of three months from the date of filing proofs."

The rule, "supported by the great weight of authority" (Tebbets v. Fidelity & Casualty Co., supra, 155 Cal. page 138, 99 P. page 502), that such conditions in insurance policies are valid "if the time limited be in itself not unreasonable," was followed in Fitzpatrick v. North American Accident Ins. Co., supra. The majority opinion depreciates and attempts to minimize the value of this decision as an authority upon the ground that "no hearing was asked in the Supreme Court." Conceding such fact, and that a denial of a petition therefor would have added weight, still the failure of a losing litigant to request such hearing does not diminish the soundness of the reasoning or the logical conclusion reached in the Fitzpatrick opinion. In Perry v. Magneson, 207 Cal. 617, 279 P. 650, an action upon a surety bond, it was agreed by the parties that the amount of the liability should be paid when the exact sum was ascertained. The court under the facts of that case held that a surety cannot hold out hope of amicable adjustment and thus delay action against it, further saying at page 621 of 207 Cal., at page 652 of 279 P.: "The provision for the limitation of time for the commencement of suit upon the bond was no doubt reasonable in point of time under ordinary circumstances, and, had the surety merely insisted upon a strict compliance with the provision, its position here would be tenable. Fitzpatrick v. North American Accident Ins. Co., 18 Cal.App. 264, 123 P. 209. But the appellant here did not do that."

The principle laid down in the Tebbets case, that if the limitation is not unreasonable the parties may stipulate as to conditions and the time within which an action may be brought, has been generally or specifically upheld in Beeson v. Schloss, supra; Colma Vegetable Ass'n, v. Bonetti, 91 Cal.App. 103, 267 P. 172; Harlow v. American Equitable Assur. Co., 87 Cal.App. 28, 261 P. 499; Frankini v. Bank of America Nat. Trust & Sav. Ass'n, 31 Cal.App.2d 666, 88 P.2d 790. In Fageol T. & C. Co. v. Pacific Indemnity Co., 18 Cal.2d 748, 117 P.2d 669, 672, the court said: "Such a covenant shortening the period of limitations is a valid provision of an insurance contract and cannot be ignored with impunity as long as the limitation is not so unreasonable as to show imposition or undue advantage. One year was not an unfair period of limitation." When the conditions are practically impossible of fulfillment, in the interest of administering substantial justice a rule in consonance with the rights of the parties is invoked. Case v. Sun Insurance Co., supra; Bennett v. Modern Woodmen, 52 Cal.App. 581, 199 P. 343.

The majority opinion concedes that "there is * * * no doubt that fifteen months is not an unreasonable period." Admittedly the present action was not filed within the fifteen months' limitation stipulated in the policy. It is also admitted that appellant, after compliance with the provisions of the policy relative to proof of loss, etc., had over eleven months in which to file the complaint. Under ordinary circumstances that would be a reasonable period and the record shows that a proper complaint was not filed within that period. The majority opinion does not hold that the filing of the complaint within the eleven months was practically impossible. Such opinion is based upon the fact that "If arbitration is resorted to, an additional period * * * could expire before suit may be brought." No such fact of resort to arbitration appears in this case. An appellate court is not permitted to speculate on what might have occurred. Roy v. Smith, 134 Cal.App. 240, 25 P.2d 251, 26 P.2d 650. The facts of the Sun Insurance Co. case are entirely dissimilar to those herein.

The main contention, estoppel, urged by appellant, is not decided in the majority opinion. The contention that the doctrine of estoppel should be applied is without merit. Where the insurer's conduct renders it impossible for the insured to file suit within the period stipulated in the policy, or the latter is lulled into a sense of security by deception or a violation of duty, the doctrine of equitable estoppel may be invoked. Miles v. Bank of America, etc., Ass'n, 17 Cal.App.2d 389, 62 P.2d 177. There is no claim that the respondent company or its legal representatives ever stated or indicated that their differences might be settled, or that for any reason, legal or factual, it would be to the advantage of appellant to delay the trial of a previous action to recover the loss. Neither is it claimed that the attorneys by unethical or irregular procedure imposed upon the court or counsel to the disadvantage of appellant. Albert v. Patterson, 172 Mich. 635, 138 N.W. 220.

Appellant argues that the trial of the first action was delayed through motions, extensions of time, etc., and that the defendant did not disclose its actual defense to that action, resulting in nonsuit, until after fifteen months from the date of the fire. It would be a harsh rule that would estop a party from raising a jurisdictional question based upon stipulations extending time, or considered in relation to motions or orders, particularly where, as in the present case, the record indicates that the motion for change of venue in the first proceeding was made in good faith and, as appears, was meritorious. It is appellant's contention that the above facts constituted misrepresentation. Appellant's contention with reference to defendant's defense of premature filing of the first action is answered in Wilhelmi v. Des Moines Ins. Co., 103 Iowa 532, 72 N.W. 685, 686, wherein the court said: "It is said that the defendant did not, in the original action, plead that it was prematurely brought, until after the time for bringing an action on the policy, as fixed by its terms, had expired. The thought expressed is that the defendant was guilty of bad faith in thus delaying to plead that defense, for the reason that, had it been urged sooner, the action could have been dismissed, and a new one commenced within the time allowed by the policy. We do not know of any duty upon the part of the defendant to protect the interest of the plaintiff by pointing out the defects in his proceedings before the case was reached for trial." See Howard Ins. Co. v. Hocking (Hocking v. Howard Ins. Co.), 130 Pa. 170, 18 A. 614; Arthur v. Homestead Fire Ins. Co., 78 N.Y. 462, 34 Am.Rep. 550.

The trial court determined that the facts presented were not sufficient to constitute a misrepresentation which would bar respondent from the right to a nonsuit. I believe the conclusion reached to be correct. An estoppel to claim the benefit of a contractual or statutory limitation provision may not be based upon legal and proper proceedings taken in good faith.

Appellant's final contention is that, assuming the complaint in the present action to be faulty, it was error not to grant leave to amend. In his brief he states: "Obviously it would have been an idle act for plaintiff to make an offer to amend in the lower court," and he thereupon seeks an order from this reviewing court to reverse the judgment and direct that he be permitted to amend the complaint. He states that he desires to amend by pleading facts showing the reason for the "delay" between the date of the fire and the commencement of the present suit; that is, the facts and circumstances surrounding requests for continuances of the first action, etc. The "reasons" or the "facts and circumstances" other than as above outlined are not disclosed to this court, and they were not presented to the trial court. The allegations of the complaint show that there was no "delay" or at least no unusual delay on the part of the respective parties in reaching an "agreement" on the amount of loss. All acts on the part of the insurer and the insured were within the periods fixed in the policy of insurance. If appellant desired to amend the complaint relative to stipulations or otherwise, there was ample opportunity to do so. The complaint in the present case was filed February 25, 1941. The demurrer thereto was filed March 26, 1941, subsequently argued and submitted on briefs, and sustained on May 2, 1941. That careful consideration was given to the points is indicated by a three-page opinion which appears in the record. Judgment was entered five days later. The record indicates that appellant cannot plead sufficient facts, and the law precludes the maintenance of this action.

Section 472c of the Code of Civil Procedure, adopted in 1939, provides: "When any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal even though no request to amend such pleading was made." This section does not permit plaintiff to stand on his complaint, then, when on appeal he discovers the possibility that the complaint is fatally defective, urge to the appellate court that the trial court abused its discretion by not giving him leave to amend because he has now discovered that he can amend by setting up a new theory, or by changing materially the original allegations, which new theory or changes were never disclosed to the trial court. In order to avail himself of the section, the burden is on the appellant to show that the trial court "abused its discretion" in making the order sustaining the demurrer without leave to amend. That burden has not been sustained by this appellant. In my opinion the law and the facts require an affirmance of the judgment.

EVERTS v. MATTESON et al.*

Civ. 12985.

District Court of Appeal, Second District,
Division 2, California.

April 13, 1942.

Rehearing Denied May 8, 1942.

Hearing Granted June 12, 1942.

1. Guaranty 🔑9

Where purchasers of land encumbered by trust deed executed instrument reciting that in consideration of extension of maturity of note, executed by vendors, purchasers guaranteed payment of note together with interest, the agreement constituted a "guaranty of payment" of the note rendering the purchasers liable as guarantors.

See Words and Phrases, Permanent Edition, for all other definitions of "Guaranty of Payment".

2. Guaranty 🔑85(1)

In action, after sale under trust deed, against maker of note and against guarantors, failure of original complaint to allege compliance with statute prescribing procedure for obtaining deficiency judgment could not be urged by guarantors as ground for reversal of judgment against them. Code Civ. Proc. § 580a.

3. Guaranty 🔑85(1)

In action founded upon a contract of guaranty, it is unnecessary for plaintiff to allege compliance with statute prescribing procedure for obtaining deficiency judgment, in order to state a cause of action against a guarantor. Code Civ.Proc. § 580a.

4. Appeal and error 🔑880(1)

A party cannot on appeal urge errors which affect only his nonappealing codefendants.

5. Guaranty 🔑85(1)

In action after foreclosure sale under trust deed, against makers of the secured note and against guarantors, statute restricting obligation of guarantor to that of principal was inapplicable notwithstanding complaint did not state cause of action against the makers of note because of failure to allege compliance with statute prescribing procedure for obtaining deficiency judgment. Civ.Code, § 2809; Code Civ.Proc. § 580a.

6. Evidence 🔑441(12)

In action, after foreclosure sale under trust deed, against guarantors, refusing guarantors leave to file proposed amended answer that at time they executed guaranty they were informed that they would not be called on to pay note and that they would not be liable for any deficiency, was not error since parol evidence would not have been admissible to establish the allegations.

7. Evidence 🔑429

"Parol evidence" of fraud to establish invalidity of an instrument must tend to establish some independent fact or representation in the procurement of the instrument or some breach of confidence concerning its use and not merely a promise directly at variance with the promise contained in the writing.

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* Subsequent opinion 132 P.2d 476.

See Words and Phrases, Permanent Edition, for all other definitions of "Parol Evidence".

8. Appeal and error ⟹1170(10)

In action against guarantors where pleadings did not raise issue of fraud or mistake, conclusion of law that execution of guaranty was neither induced, obtained nor procured by false or fraudulent representations or by reason of any mistake of law or fact was not prejudicially erroneous where appropriate conclusions based on findings supported judgment against guarantors since the conclusion was "surplusage". Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Surplusage".

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by H. W. Everts against C. A. Matteson and another on a note and against Raymond H. Vanderbush and another on a guaranty. From an adverse judgment, Raymond H. Vanderbush and another appeal.

Affirmed.

See, also, 46 Cal.App.2d 14, 115 P.2d 207.

A. P. G. Steffes, of Las Vegas, Nev., for appellants.

Edmund Nelson, John E. Walter, and Freston & Files, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff predicated upon a guaranty executed by Raymond H. Vanderbush and Mamie H. Vanderbush of payment of a note of which their codefendants were makers, the defendants Vanderbush appeal.

The essential facts are:

In August, 1934, the Mattesons executed a note in favor of the Bank of America in the sum of $22,500, which note was secured by a deed of trust covering certain real property. In February, 1935, defendants Vanderbush purchased the real property described in the trust deed from the Mattesons, at which time the note which the Mattesons had executed was in default. At the time of this transaction defendants Vanderbush executed a guaranty of payment of the above mentioned note. In June, 1938, the note being in default, the property secured by the deed of trust was sold, pursuant to the power of sale contained therein. Prior to the commencement of the present action the note was assigned to plaintiff. The amount of the judgment, $2,635.28, represents the unpaid balance.

On July 20, 1938, plaintiff filed an original complaint in the above entitled action and service was made upon all defendants. A default judgment on August 15, 1938, was entered against defendants Matteson. On October 4, 1938, plaintiff filed an amended complaint which was never served upon defendants Matteson. The amended complaint contained the following allegation which did not appear in the original complaint:

"That the reasonable value of said real property on June 24, 1938, was the sum of $19,000.00."

Thereafter defendants Vanderbush filed an answer which contained among others, the following denial:

"Deny that the reasonable value of said real property on the 24th day of June, 1938 was the sum of $19,000.00 and allege that said property upon said date was reasonably valued at the sum of $28,000.00."

Subsequently the trial court granted plaintiff's motion to strike the foregoing paragraph of defendants Vanderbush's answer. During the course of the trial the trial judge refused to permit defendants Vanderbush to file a proposed second amended answer which in effect alleged that appealing defendants had been told by the defendant Bank of America, when they executed the guaranty above mentioned, that they would not be called upon to pay the note they were guarantying and that under the law they would not be liable for any deficiency if the security for the note was actually worth more than the indebtedness.* [See page 688 of 124 P.2d for pleading.]

It is necessary for us to determine four questions, which will be stated and answered hereunder seriatim.

[1] *First: Were defendants Vanderbush liable to plaintiff as guarantors?*

This question must be answered in the affirmative. The document executed by the appealing defendants read in part thus:

"FOR AND IN CONSIDERATION of the extension for two (2) years and four (4) months of the maturity of the last installment, said maturity date being October 28, 1935, of that certain promissory note dated August 28, 1934, executed by C. A. Matteson and Martha Daley Matteson, which extension is hereby granted by Bank of America National Trust and Savings Association, *I hereby guarantee the payment of the aforesaid note,* together with all interest due or to become due thereon, and any renewal or extension thereof, and this guaranty shall not be affected by any forebearance to any successors in interest of the undersigned." (Italics added.)

It needs no argument to demonstrate that the foregoing provision in the agreement executed by the appealing defendants constituted a guaranty of payment of the note in question.

[2] *Second: Since the original complaint did not allege compliance with the provisions of section 580a of the Code of Civil Procedure and thus did not state a cause of action against defendants Matteson, may defendants Vanderbush urge this omission as reversible error?*

This question must be answered in the negative, and is governed by the following rules:

[3] (1) In an action founded upon a contract of guaranty it is unnecessary for the plaintiff to allege compliance with the provisions of section 580a of the Code of Civil Procedure in order to state a cause of action against a guarantor (Security-First Nat. Bank. v. Chapman, 41 Cal. App.2d 219, 221, 106 P.2d 431; see, also, Hatch v. Security-First National Bank, 19 Cal.2d 254, 120 P.2d 869.)

[4] (2) A party cannot on appeal urge errors which affect only his nonappealing codefendants. (Nichols v. Nichols, 135 Cal.App. 488, 491, 27 P.2d 414.)

[5] Since the appealing defendants were guarantors, the alleged error in the instant case affects only their nonappealing codefendants and are therefore not available to appellants. In view of the holding in Loeb v. Christie, 6 Cal.2d 416, 419, 57 P.2d 1303, section 2809 of the Civil Code is inapplicable to the facts of the instant case. The case of Bank of America v. Sanchez, 3 Cal.App.2d 238, 38 P.2d 787, is factually distinguishable from the instant case and, therefore, is not in point.

[6, 7] *Third: Did the trial court err in refusing appealing defendants leave to file their proposed second amended answer?*

This question must be answered in the negative. The proposed amended answer in substance offered as a defense that appealing defendants were told by the officers of the Bank of America at the time they executed the guaranty in question that they would not be called upon to pay the note which they were guarantying to pay and that under the law they would not be liable for any deficiency if the security for the note was actually worth more than the indebtedness. Evidence of such allegations would have been inadmissible, for the law is established that parol evidence of fraud to establish the invalidity of an instrument must tend to establish some independent fact or representation in the procurement of the instrument or some breach of confidence concerning its use, and not merely a promise directly at variance with the promise contained in the writing. (Bank of America, etc., Ass'n v. Pendergrass, 4 Cal.2d 258, 263, 48 P.2d 659; W. Ross Campbell Co. v. Sears, Roebuck & Co., 136 Cal.App. 765, 769, 29 P.2d 910.)

It is evident from a reading of the allegations of the proposed amended answer that any evidence tending to support such allegations would fall within the inhibition of the foregoing rule.

[8] *Fourth: As there was no issue raised by the pleadings of fraud or mistake, was the following conclusion of law of the trial court prejudicially erroneous:*

"The execution of the instrument described in the findings of fact herein as a guaranty by defendants Raymond H. Vanderbush and Mamie H. Vanderbush was neither induced, obtained, nor procured by any false or fraudulent representations or by reason of any mistake of law or fact."?

This question must likewise be answered in the negative. The conclusion was surplusage. It was not in response to any issue after the special defenses of fraud and mistake had been stricken. Such surplusage is harmless. The appropriate conclusions derived by the court from the findings abundantly justify and support the judgment. (Art. VI, sec. $4\frac{1}{2}$, Const. of Cal.)

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

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* The proposed pleading read as follows:

"SECOND AMENDED ANSWER OF DEFENDANTS RAYMOND H. VANDERBUSH AND MAMIE H. VANDERBUSH TO AMEND COMPLAINT.

"Defendants, Raymond H. Vanderbush and Mamie H. Vanderbush, having obtained leave of court, file this, their second amended answer to amended complaint, and admit, deny, and allege:

"I

"Answering paragraph IV of said amended complaint, these defendants admit signing the instrument, a copy of which is set forth in said paragraph IV, but deny generally and specifically that they or either of them guaranteed the payment of the promissory note set forth in paragraph II of said amended complaint.

"Allege that these defendants were induced to sign and did sign said instrument set forth in Paragraph IV, as the result of certain representations and promises made to them for the purpose of inducing them to sign said instrument, as will more particularly hereinafter be alleged.

"II

"Answering Paragraph V, these defendants deny generally and specifically each and every allegation contained therein.

"These defendants deny generally and specifically that the reasonable value of the real property mentioned in said paragraph V was on the 24th day of June, 1938, the sum of Nineteen Thousand ($19,000.00) Dollars, and allege in this respect that said real property upon said date was reasonably worth not less than the sum of Twenty-four Thousand ($24,000.00) Dollars.

"III

"Answering Paragraphs VI, VII, VIII, and IX, of said amended complaint, these defendants allege that they have not sufficient knowledge, information or belief to enable them to answer the allegations contained in said paragraphs, and upon that ground deny, generally and specifically each and every allegation contained therein.

"IV

"Answering Paragraph X, these defendants deny, generally and specifically each and every allegation contained therein and allege in this respect that said promissory note has been fully paid.

"AND FOR A SECOND, FURTHER AND SEPARATE ANSWER AND DEFENSE, THESE DEFENDANTS ALLEGE:

"I

"That at all times hereinafter mentioned, and at all times mentioned in plaintiff's amended complaint, H. L. Perry was an officer, agent, servant, and employee, to wit, vice-president and branch manager of plaintiff's assignor, Bank of America National Trust and Savings Association, in its branch bank at Whittier, California.

"II

"These defendants are informed and believe, and upon such information and belief allege that H. W. Everts, plaintiff herein, was at the time of the commencement of the above-entitled action, and now is an officer and employee of said Bank of America National Trust and Savings Association; that said H. W. Everts paid no consideration to said bank for assignment to him of the promissory note mentioned in plaintiff's complaint, and took the same with notice of any and all defenses thereto; that the said H. W. Everts became the owner and holder of said promissory note after its maturity.

"III

"That for many years prior to the 7th day of February, 1935, these defendants and particularly the defendant Raymond H. Vanderbush, enjoyed friendly business relations with the Bank of America National Trust and Savings Association and its predecessors in interest; that said friendly business relations commenced in the year 1924 when the defendant Raymond H. Vanderbush opened an account with the Hellman Bank, one of the predecessors in interest of the bank of America National Trust and Savings Association; that said defendant continued to carry his bank account with said Hellman Bank, and its successor in interest, the Bank of America National Trust and Savings Association, until after the 7th day of February, 1935; that said defendant always had a substantial amount of money on deposit with said bank and at various times borrowed money from said banks in sums ranging from Five Hundred to Five Thousand Dollars.

"That at all times prior to the 7th day of February, 1935, and on said date, the business relations of said defendant with banks were most friendly; that said defendant on numerous occasions consulted with various officers of said banks about financial and estate matters which concerned said defendant and his business affairs; that on one occasion said defendant paid to said Bank of America National Trust and Savings Association the sum of Twenty-five Hundred ($2,500.00) Dollars in payment of the balance due on a certain promissory note which had been executed by a corporation which became insolvent; that at said time the officials of said bank expressed great gratitude and thanks to said defendant for his payment of said note, and by reason thereof said defendant felt and believed that said Bank of America National Trust and Savings Association would at all times treat him fairly and would not attempt to take advantage of him in any business transactions that he might have with said bank.

"That during said entire period of time these defendants, and particularly the defendant, Raymond H. Vanderbush, placed great confidence in the integrity and honesty of said Bank of America National Trust and Savings Association, its officers, agents, servants, and employees, and placed great confidence in the truth of whatever representations said Bank of America National Trust and Savings Association, its officers, agents, servants, and employees, made to defendants with regard to transactions had between them.

"That by reason of the knowledge and belief acquired by said defendant during said period of time and by reason of the numerous transactions involving promissory notes secured by mortgages and trust deeds in which said Bank of America National Trust and Savings Association was interested and involved, said Bank of America National Trust and Savings Association obtained and had superior means of information and possessed a knowledge of law superior to the knowledge possessed by these defendants; that by reason thereof these defendants believed that said Bank of America National Trust and Savings Association, its officers, agents, servants, and employees, had a superior knowledge of the law and these defendants sincerely believed that said Bank of America National Trust and Savings Association, its officers, agents, servants, and employees would correctly state said law to these defendants and would not mislead them in any manner or to any extent with respect to the law applicable to the transaction existing between these defendants and said Bank of America National Trust and Savings Association.

"IV

"That on or about the 7th day of February, 1935, these defendants desired and intended to purchase the real property described in the trust deed mentioned in paragraph III of plaintiff's amended complaint, on condition, however, that a certain extension of time for the payment of certain installments provided for by the promissory note be granted; that the Bank of America National Trust and Savings Association, through its vice-president and branch bank manager, H. L. Perry, agreed to the extension of time that was requested, but stated that it would be necessary for these defendants to sign the instrument which is set forth in Paragraph IV of plaintiff's amended complaint.

"That these defendants refused to sign said instrument if by doing so they would render themselves, or either of them, liable under any deficiency judgment based upon said promissory note.

"V

"That for the purpose of inducing these defendants to execute said instrument, the said H. L. Perry, while acting within the scope of his employment for plaintiff's assignor as aforesaid, made the following representations to these defendants, to wit:

"1. That he was familiar with the law with respect to deficiency judgments and with recent changes in said law.

"2. That if these defendants would execute said instrument, neither of them would be liable to pay any deficiency judgment under the law as it then existed. And that the present law provided that persons executing similar instruments, could not be held liable for any deficiency judgment in the event of a foreclosure of any trust deed securing a promissory note.

"3. That in any event, if there was a foreclosure, a court of law would appoint an appraiser and that it would be necessary for the property to be bid in at the price which the court appraiser would fix as the reasonable market value of the property at the time of sale; that such appraisal would not be less than the sum of Fifty-four Thousand ($54,000.00) Dollars.

"4. That the Bank of America National Trust and Savings Association had had an appraisal made of said property for its own use and that by virtue thereof said bank showed the property on its books to be worth not less than the sum of Fifty-four Thousand ($54,000.00) Dollars.

"VI

"That by reason of the foregoing, a misapprehension of the law by all parties resulted, all supposing that they knew and understood it and all believing that said law was substantially the same as the said H. L. Perry had represented to these defendants said law to be; that if the said H. L. Perry did not at said time and place understand and believe said law to be as he represented the same to these defendants then the said H. L. Perry was aware at the time he induced these defendants to sign said instrument, that these defendants were laboring under a misapprehension of the law and that said H. L. Perry did not rectify or attempt to rectify such misapprehension on the part of these defendants.

"VII

"That these defendants, had they known or believed that the law was different than as represented to them by the said H. L. Perry, and had they known or believed that they would become liable to a deficiency judgment by signing said instrument, they would not have signed the same, nor would they have purchased the property in question.

"VIII

"That these defendants believed each and every representation and statement made by said H. L. Perry and Bank of America National Trust and Savings Association as aforesaid, and these defendants relied upon such representations and were induced to sign said written instrument as the result of such reliance thereon.

"IX

"That if the said H. L. Perry was not laboring under the same misapprehension of law as these defendants, then the said H. L. Perry made the representations set forth above falsely and fraudulently, and himself did not believe the representations and statements made by him, to be true.

"That as part of the same transaction these defendants received a grant deed from C. A. Matteson and Martha Daley Matteson, husband and wife, conveying the property in question to them, which said grant deed was prepared by the escrow department of the Bank of America National Trust and Savings Association, and said grantors above named acknowledged their signature before R. A. Downing, a notary public, who was also an escrow officer of said Bank of America National Trust and Savings Association.

"AND FOR A THIRD, SEPARATE, AND FURTHER ANSWER AND DEFENSE, THESE DEFENDANTS ALLEGE:

"I

"And refer to Paragraphs I to IX inclusive, of their second affirmative defense and incorporate the same and each and every allegation thereof, herein, as if herein fully repeated and set forth.

"II

"That the said H. L. Perry and Bank of America National Trust and Savings Association, by their acts, declarations, and omissions above mentioned, intentionally and deliberately led these defendants to believe that the law of the State of California was such that if they signed the instrument set forth in Paragraph IV of plaintiff's amended complaint they would not render themselves liable to a deficiency judgment, and that in the event of a foreclosure sale an appraiser would be appointed by the court who would fix the reasonable value of the property sold, at the time of such sale and that such appraisal would exceed the balance due on the promissory note in question.

"III

"That these defendants believed this to be true and acted thereon; that as the result of such belief and in reliance on the truth of the foregoing, these defendants executed the instrument in question.

"IV

"That the said Bank of America National Trust and Savings Association, H. L. Perry, and plaintiff herein are now estopped to deny or falsify the statements and representations made to these defendants as aforesaid.

"V

"That if the plaintiff or the said Bank of America National Trust and Savings Association or the said H. L. Perry are permitted to falsify said representations and statements to these defendants then these defendants will be greatly and irreparably damaged and plaintiff and the said Bank of America National Trust and Savings Association will obtain an unconscionable advantage over these defendants.

"WHEREFORE, these defendants pray that plaintiff take nothing by his action for costs incurred herein, and for such other and further relief as to the court may seem just and proper."

51 Cal.App.2d Supp. 779

PEOPLE v. HAWKINS.

Cr. A. 1864.

Superior Court, Appellate Department,
Los Angeles County, California.
April 21, 1942.

1. Automobiles ⚷335

A pedestrian who finds himself on his way across a street when a traffic signal changes from "go" to "stop" is not compelled to retrace his steps to safety of nearest curb, and by continuing on his journey to opposite curb he may be guilty of "negligence" but not of a "crime". Vehicle Code, § 83, St.1935, p. 98; § 476, St.1939, p. 1607; § 563, St.1935, p. 188.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence" and "Crime".

2. Automobiles ⚷335

A construction of a statute prohibiting pedestrians from crossing intersections against red or "stop" traffic signals which would result in danger to trapped pedestrians and in a snarl of traffic was to be avoided, if another solution was reasonably possible. Vehicle Code, § 83, St.1935, p. 98; § 476, St.1939, p. 1607; § 563, St.1935, p. 188.

3. Automobiles ⚷335

Under statute providing that pedestrians shall not "cross" roadway against a red or "stop" signal at intersections where traffic is controlled by a traffic control signal device, the word "cross" means to pass from side to side. Vehicle Code, § 563(a), St.1935, p. 188.

See Words and Phrases, Permanent Edition, for all other definitions of "Cross".

4. Automobiles ⚷335

Under statute prohibiting pedestrians from crossing roadway against a red or "stop" signal at intersections where traffic is controlled by a traffic control signal device, a pedestrian who has advanced into roadway, even though but a few steps, before appearance of "stop" signal does not "cross" roadway against signal, whether pedestrian returns to curb from which he came or continues on to opposite curb. Vehicle Code, § 563(a), St.1935, p. 188.

5. Automobiles ⚷335

A pedestrian may not, where traffic control signals are in operation, enter upon roadway until green or "go" signal is shown, but when it is shown pedestrian may not only enter upon but proceed across to opposite side of roadway, even though signal changes to red or "stop" before pedestrian completes his passage. Vehicle Code, § 83, St.1935, p. 98; § 476, St.1939, p. 1607; § 563, St.1935, p. 188.

Appeal from Municipal Court of City of Los Angeles; Leo Aggeler, Judge.

W. S. Hawkins was convicted of an offense, and he appeals.

Reversed and remanded for new trial.

Hiram T. Kellogg, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., W. Jos. McFarland, Asst. City Atty., and David Hoffman, Deputy City Atty., all of Los Angeles, for respondent.

BISHOP, Judge.

[1] A pedestrian who finds himself on his way across a street when the traffic signal changes from "Go" to "Stop" may be impelled by his common sense to retrace his steps to the safety of the nearest curb, but he is not compelled by the law to do so; by continuing on his journey to the opposite curb he may be guilty of negligence, but not of a crime.

The charge upon which the defendant was convicted was that he "being a pedestrian crossing the roadway of Hill Street * * * at an intersection where traffic was then and there controlled by a traffic control signal device and by police officers, did wilfully and unlawfully cross said roadway against a red and stop signal." This charge was based upon the provisions of law which first appeared (in 1931) as a part of section 131½ of the California Vehicle Act, and which now appear, an immaterial alteration having been effected in 1935, as paragraph (a) of section 563, Vehicle Code, St.1935, p. 188, reading: "At intersections where traffic is controlled by a traffic control signal device or by police officers, pedestrians shall not cross the roadway against a red or stop signal." At the intersection involved in this case the roadways were those parts of the streets between curbs, for by section 83 of the Vehicle Code, St. 1935, p. 98, "roadway" is defined as being: "* * * that portion of a highway improved, designed or ordinarily used for vehicular travel."

The evidence discloses that at the time the defendant was arrested traffic was being controlled at the intersection of Sixth and Hill Streets by traffic control signal devices. It further appears, without conflict, that the defendant did not cross Hill Street, as charged, but crossed Sixth Street. Without pausing to consider whether or not this variance between charge and proof amounts to a failure of proof, we note that it also appears, without dispute, that the defendant began his journey across the roadway while the traffic was advised by the signal devices in operation that it could "Go" and that he was already several steps into the roadway when the signal changed. Two or more persons who had progressed as far as had the defendant before the signal changed to "Stop," ventured no further in the direction they had been going, but turned about and returned to the sidewalk they had lately quitted; the defendant walked on to the opposite sidewalk.

[2] In order to avoid being classed as a criminal, what is a person caught in progress across a roadway, when the traffic signal changes from "Go" to "Stop," to do? Is he to stop in his tracks (and possibly in those of the street car company also) and await the release of a "Go" signal? Such a construction of the code provisions would result in so much danger to the trapped pedestrian and in such a snarl of traffic that it is to be avoided if another solution of the question is reasonably possible. Department of Motor Vehicles v. Ind. Acc. Comm., 1939, 14 Cal.2d 189, 195, 93 P.2d 131. Equally absurd would be the requirement that he turn at right angles to the course he had been following, so as to proceed with the new flow of traffic and in the path of the vehicular traffic. Only two alternatives are left him; either to retrace his steps or to go on. But if either of these choices violates the injunction that "pedestrians shall not cross the roadway against a red or stop signal," both do, for movement in either direction would be against the signal.

[3, 4] There is a construction of the code provision which avoids the absurdities noted, and does so without placing any strain upon the words the legislature selected. Of the many meanings in which the word "cross" may be employed, there is one in common use that aptly fits the word as it appears in the section we are considering. It is the first definition of "cross" as a verb given in 25 C.J.S. p. 10: "To pass from side to side." It is among the definitions given in Webster's New International Dictionary, 2d Ed.: "To pass or extend from one side to the other of; * * * as, to cross a stream * * *." Within this definition, a person born in the Middle West does not cross the continent if he journeys either to the Pacific Coast or to the Atlantic Seaboard. Nor does one cross the continent by plane between sunrise and sunset, if the first hundred miles of the trip is made before sunrise, or the last hundred miles is made after sunset. So also, one who has advanced into the roadway, even though but a few steps, before the appearance of the "Stop" signal, cannot be said to cross the roadway against that signal, whether he returns to the curb he has just left or continues on to the opposite curb.

Support of some strength is found for our conclusion in cases holding that it is not a violation of an ordinance prohibiting the crossing of roadways except in crosswalks for one alighting from a street car in a safety zone to cross from the zone to the curb outside a crosswalk. In Croxall v. Broadway Department Store, 1932, 127 Cal.App. 153, 156, 15 P.2d 546, 547, the court stated: "* * * the pedestrian crossing from the safety zone to the curb does not come within the strict letter of the ordinance relating to those who are crossing the roadway from curb to curb." (The ordinance, whose pertinent provisions are quoted, uses no such term as "curb to curb"; that appears to be the court's interpretation of what it means to cross a roadway.) See, also, Brockway v. Western Union Tel. Co., 1938, 29 Cal.App.2d 244, 247, 84 P.2d 524, and Western Union Tel. Co. v. Hudson, 1936, 82 F.2d 992, 995.

[5] Further support for our conclusion is found in the provisions of section 476, added to the Vehicle Code in 1939, St. 1939, p. 1607. This section deals with the respective conducts of vehicular traffic and of pedestrians as affected by green or "Go," yellow or "Caution" and red or "Stop" signals. So far as pertinent to our problem it is provided that when the green or "Go" signal appears, "Pedestrians facing the signal may proceed across the

roadway within any marked or unmarked crosswalk," but that when the red or "Stop" signal is shown, "No pedestrian facing such signal shall enter the roadway until green or 'Go' is shown alone." Reading sections 563 and 476 together, they appearing as parts of the same code, we conclude that a pedestrian may not, where traffic control signals are in operation, enter upon the roadway until the green or "Go" signal is shown, but that when it is shown, he may not only enter upon but proceed across to the opposite side of the roadway, even though the signal changes to red or "Stop" before he completes his passage.

The judgment of conviction is reversed and the cause is remanded to the Municipal Court for a new trial.

SHAW, P. J., and FOX, J., concur.

20 Cal.2d 191

PEOPLE v. WELLS.

Cr. 4404.

Supreme Court of California.
April 20, 1942.

1. Criminal law ⚿741(1)

It is exclusive province of jury to weigh and resolve contradictions in evidence.

2. Homicide ⚿253(1)

Evidence supported conviction of first-degree murder.

In Bank.

Appeal from Superior Court, San Bernardino County; Frank A. Leonard, Judge.

Alfred Horace Wells was convicted of murder, and he appeals.

Affirmed.

Theodore G. Krumm, of San Bernardino, for appellant.

Earl Warren, Atty. Gen., Gilbert F. Nelson, Deputy Atty. Gen., and Jerome B. Kavanaugh, Dist. Atty., of San Bernardino, for respondent.

PER CURIAM.

In an information filed by the District Attorney of San Bernardino County, the appellant Wells was charged with the murder of three persons. He entered pleas of not guilty and not guilty by reason of insanity. Following the trial on the general issue, the jury returned a verdict on each count, finding appellant guilty of murder of the first degree without recommendation. He thereupon withdrew his insanity plea. Judgment was entered imposing the death penalty on each of the three counts and motion for new trial was denied. This appeal from the judgment and order is an automatic one under section 1239 of the Penal Code.

No brief has been filed on behalf of appellant. We have nevertheless examined the entire record and find substantial evidence of appellant's guilt.

Wells, approximately 31 years old, had been living for several months with his half-sister, aged 20, in an illicit relationship. She testified that appellant frequently threatened to kill anyone who might attempt to interfere with their relationship, and made such threats to his brother, Raymond, aged 25. Appellant's employer testified that appellant confided that his brother and sister-in-law "were endeavoring to break up his relationship with Violet and that if they succeeded in doing that he would get a gun and kill them." In time Raymond and his wife Jean persuaded Violet to leave appellant. Her mother, appellant's stepmother, testified that appellant immediately sought to locate the girl, stating that he could not get along without her. The owner of the premises where appellant had lived with his half-sister testified that Wells had blamed his brother Raymond and sister-in-law Jean for taking the girl from him and had threatened to "get" them for it. In later conversations, appellant told the witness that he would kill his brother and sister-in-law "as soon as he could get a gun." Several other witnesses testified that appellant arranged to procure a gun from one of them stating, "I have been out of the penitentiary for two years. * * * I might as well go ahead and get my revenge." Several of these witnesses saw appellant in the company of two of his victims just before their deaths.

Following his apprehension in Spokane, Washington, approximately one month after the triple homicide, appellant made a voluntary confession in the presence of a deputy district attorney, a court reporter and certain law enforcement officers. He admitted procuring a gun, calling at his brother's home on May 7, 1941, and inquiring of his sister-in-law as to his brother's whereabouts. She told him that her husband was working late that evening and offered to drive appellant to his place of employment. She took her baby, and a young woman, Rose Destree, who was visiting her at the time, in an automobile with appellant to take him to his place of employment. Appellant directed them into the hills where he ordered the car stopped. He thereupon directed his sister-in-law to write a note to her husband, and when that was done he admittedly shot her in cold blood. She died almost instantly. Rose Destree, a comparative stranger to appellant, was shot by him as she attempted to flee, and died several hours later. Appellant wrapped his coat about the baby and left.

Appellant, by his own admission, then returned to his brother's home and awaited his arrival on the front porch where he was observed by certain neighbors who appeared as witnesses at the trial. Some of these witnesses also saw appellant's earlier departure with the two women and the baby and his return alone. When his brother arrived appellant greeted him and gave him the note from his wife. As the brother finished reading, appellant commanded him at the point of a gun to get into the automobile, and they proceeded into the hills. Again in cold blood appellant shot and killed his victim. In his statement appellant related how he then fled the scene in his dead brother's car and drove it to Las Vegas, Nevada, where he parked it in a garage. The garage attendant identified appellant as the person who had left the car. Thereafter he moved from place to place until his apprehension in Spokane. He further stated that he had murdered his victims in this "raw" fashion as the possible foundation for an ultimate insanity defense.

There is much additional evidence definitely linking appellant with the homicides. A friend who had seen appellant, apparently between the time he shot the women and the time he saw his brother, testified that appellant was "perspiring awfully heavy and seemed nervous" and had asked the witness to go to his house and pick up some things for him because he had "left [his] coat wrapped around a baby" and wanted to get his "business attended to before they catch me," adding "I don't want the police to get me before I get him."

The convincing character of the evidence pointing to appellant's guilt warranted the jury in rejecting as wholly lacking in credence his testimony as a witness in his own defense that "I don't remember shooting nobody no place." It is significant, however, that when on the stand he admitted the illicit relationship with his half-sister and the fact that she ultimately left him. He related that after unsuccessfully seeking her return he had done some drinking and smoked some marihuana cigarettes. He admitted obtaining a gun from one of the prosecution witnesses, driving to Las Vegas in his brother's car, which he parked in a garage, and leaving that town by freight train. He testified that he had "rigged" up his statement to the authorities in order to secure permission to see his half-sister privately and to keep her name clear. The prosecution produced witnesses who saw appellant on the day of the homicides in a sober condition and other witnesses who testified that he had told them subsequent to the homicides that he had never used narcotics of any kind.

[1, 2] It was the exclusive province of the jury to weigh and resolve the few contradictions that exist in the evidence. As we read the record the jury had no alternative but to return a verdict of guilty on each of the three charges. We have found no errors in the rulings on the evidence or in the giving of instructions, which were full and fair. The verdicts and judgment are amply supported by substantial and credible evidence.

The judgment and order denying a new trial are therefore affirmed.

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20 Cal.2d 195

CAMPBELL v. REALTY TITLE CO., Limited, et al.

L. A. 17835.

Supreme Court of California.

April 21, 1942.

1. Usury 🔑76

The inclusion in note secured by trust deed of an amount allegedly usurious with correct amount due did not render the whole note "usurious".

See Words and Phrases, Permanent Edition, for all other definitions of "Usurious".

2. Usury 🔑76

Where, in consideration of discharging property from lien of deed of trust, mortgagor executed a second deed of trust to secure a note which included an allegedly usurious item, mortgagor as condition of redeeming property from second deed of trust was properly required to pay the amount which discharged first deed of trust and expenditures for fire insurance, taxes, attorney's fees, and foreclosure costs, which expenditures were authorized by second deed of trust and were not affected by alleged usury.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by A. Campbell against the Realty Title Company, Limited, and another, to enjoin a sale of realty under a deed of trust. From an adverse judgment, plaintiff appeals.

Affirmed.

Charles J. Kelly, of Los Angeles, for appellant.

Ben Gould, of Los Angeles, for respondents.

CURTIS, Justice.

The plaintiff is the owner of a parcel of real property situated in the city of Los Angeles on which there was a deed of trust given to secure the payment of a promissory note. He defaulted in the payment of said note and his property was being advertised for sale in pursuance of the terms of said deed of trust. The day before the date of sale he met an associate of the defendant Weisbrod and offered to pay him $1,500 if he could "save the property and arrange a new loan." The matter was taken up with defendant Weisbrod the next morning and Weisbrod agreed to advance the money and did so before the sale of the property. The proceedings under the deed of trust were stopped and the property was discharged from the lien of said deed of trust. Subsequently a loan was obtained and a deed of trust given on said real property to secure the loan. The loan was sufficient, after deducting certain expenses incurred in securing it, to pay Weisbrod in full for the amount of money he had advanced to plaintiff to discharge the deed of trust under which the property was to be sold, except the sum of $145.24. This amount, together with the sum of $1,500 which plaintiff agreed to pay for saving the property from the sale under the earlier deed of trust, was included in a new note which was executed by plaintiff in favor of defendant Weisbrod and secured by a second deed of trust upon said real property.

Claiming that plaintiff was in default in the payment of said last mentioned promissory note, the defendant Realty Title Company, Ltd., the trustee named therein, gave notice of default and was proceeding to sell said real property pursuant to the terms of said last mentioned deed of trust. Plaintiff instituted this action to enjoin said sale, contending that the transaction of which said last mentioned note and deed of trust were a part and the said note and deed of trust were usurious and therefore unenforceable against the plaintiff. The action came up for trial before the court upon a stipulation of facts and without further evidence.

[1] We are satisfied from a study of the stipulation of facts that the implied finding of the trial court, that there was due and unpaid to defendant Weisbrod from plaintiff the sum of $145.24 as hereinbefore set forth, was correct. Conceding that the agreement of plaintiff to pay defendant Weisbrod the sum of $1,500 for the services rendered as above stated was usurious, the inclusion in one promissory note of that amount with the item of $145.24 did not render the whole note usurious. Haines v. Commercial Mortgage Co., 200 Cal. 609, 622, 254 P. 956, 255 P. 805, 53 A.L.R. 725; Rice v. Dunlap, 205 Cal. 138, 139, 270 P. 199, and Wolpert v. Gripton, 213 Cal. 474, 483, 2 P.2d 767.

The case of Rice v. Dunlap, supra, is squarely in point. In that case the defendant had executed a note for $5,550. Previous to the execution of said $5,550 note, plaintiff held defendant's note for $5,000 which had become due and which defendant desired plaintiff to renew. Plaintiff exacted an additional sum of $550 for the renewal and the note in suit was then executed which included said bonus of $550. The trial court concluded that the consideration exacted by plaintiff for the execution of said note was usurious and that plaintiff should recover nothing in the action and that defendants should recover their costs. This court stated: "The judgment is erroneous under the rule laid down in the case of Haines et al. v. Commercial Mortgage Co. et al., 200 Cal. 609, 622 [254 P. 956], 255 P. 805, 806, (53 A.L.R. 725), wherein it was said: 'Even a casual reading of the statute itself shows that the legislative intent was not to declare the whole contract void, but only the portion thereof relating to interest.' Judgment should have been entered for plaintiff for the amount of the original note, $5,000, plus attorney's fees and costs *, * *."

Evidently the trial court followed the rule announced in the authorities just cited, as it rendered judgment that before the plaintiff secure a release of said deed of trust he should make certain payments, and when said payments were made, the deed of trust should be released of record, but in the event of failure to make said payments as directed therein, the injunction against the foreclosure of said deed of trust was "thereupon to be at once dissolved, without the further order of the court."

[2] The payments which the court ordered plaintiff to make before said deed of trust was to be released, amounted to the sum of $1,780.21. Plaintiff has appealed from the judgment as a whole, which includes of course the portion thereof respecting said payments. The consideration of the questions raised thereunder requires a further statement of the facts in the case. As noted before, the deed of trust here involved is a second deed of trust on said property of plaintiff. The first deed of trust was given to secure a promissory note for $5,000 and interest payable $75 per month. The one here involved, which we will refer to as the second deed of trust, recited the fact that it was subject to the deed of trust given to secure the sum of $5,000, and then provided that plaintiff should pay the taxes and all encumbrances and liens which appear to be part of the second deed of trust, and in case of his failure to do so, the beneficiary or trustee could make said payments and the sum so paid would be deemed secured by said deed of trust.

It might be well to here state that while there is no direct statement in the stipulation of facts, nor any finding, nor any conclusion of law, nor any declaration in the judgment that the $1,500 charge for procuring funds to pay the original deed of trust under which plaintiff's real property was noticed for sale was usurious, yet it is evident that the trial court did not include this amount in the payments which it required plaintiff to make in order to redeem his property from the second deed of trust.

In the "Findings and Judgment" entered by the court in this case is the statement and finding that "This court finds * * * that there is now due to defendant Peter O. Weisbrod from the plaintiff * * * $1,780.21 advanced by said defendant * * * for the purpose of paying principal and interest on the deed of trust (the $5,000 deed of trust) set forth on page 7 of said stipulation, and fire insurance premiums and taxes * * * and other charges." The stipulation of facts shows that defendant Weisbrod paid out the sum of $1,400.97 on account of taxes on said real property and installment payments of principal on the $5,000 note secured by said first deed of trust, and that he paid out other miscellaneous amounts, all of which together with said sum of $145.24, hereinbefore discussed, less a credit of $140 paid by plaintiff, amount to the sum of $1,780.21, the amount the court required plaintiff to pay in order to secure a release of said deed of trust.

Plaintiff objects to the five miscellaneous items amounting to $374, made up of attorney's fees and foreclosure costs. These expenditures were all authorized by the second deed of trust and their payment secured by its terms.

Therefore, it appears from this discussion of the judgment that none of the payments which the plaintiff was required thereby to make in order to obtain a release of his property from the lien of the second deed of trust was a part of nor was any of them in any way affected by any usurious contract to which the parties hereto may have agreed. It also satisfactorily appears that all items of expenditure to which plaintiff has objected were authorized by said deed of trust and covered by said stipulation of facts.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, HOUSER, CARTER, and TRAYNOR, JJ., concurred.

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20 Cal.2d 223

HIZAR v. STATE BAR OF CALIFORNIA.

L. A. 18123.

Supreme Court of California.

April 22, 1942.

1. Attorney and client 🔑53(2)

In proceeding to disbar attorney, handwriting experts' testimony and inconsistencies in attorney's testimony *held* to justify finding of local administrative committee of state bar that attorney affixed signatures of certain persons to deeds and other instruments, on which he acted as notary, without such persons' authorization.

2. Attorney and client 🔑42

An attorney's false testimony, with intent to mislead bankruptcy referee, that certain deeds and other instruments were signed by persons whose signatures were affixed thereto by witness without their au-

thorization, *held* ground for disbarment, though no creditors of bankrupt were injured thereby.

3. Attorney and client ⚿52

In proceeding to disbar attorney, who contended throughout that he did not affix signatures of certain persons to deeds and other instruments in bankruptcy trustee's possession, as charged, but that such persons appeared before him and signed instruments, his contention, first made in reply memorandum, that it was not shown that he had no power of attorney or authority otherwise to sign instruments for such persons, is without merit.

4. Attorney and client ⚿54

In proceeding to disbar attorney, where his prior conviction of felony in federal court was not referred to at hearing before local administrative committee of state bar, board of governors thereof did not accord such conviction any controlling significance, and state bar's brief in proceeding to review board's recommendation of disbarment does not mention such conviction, disbarment will be ordered as against contention that undue emphasis was placed on such conviction.

◆

In Bank.

Proceeding by J. C. Hizar to review a recommendation of the Board of Governors of the State Bar that petitioner be disbarred from the practice of law.

Order that petitioner be disbarred.

Dempster McKee, of San Diego, for petitioner.

W. Eugene Craven, of Merced, for respondent.

PER CURIAM.

This is a proceeding to review the recommendation of the Board of Governors of The State Bar recommending disbarment.

Petitioner, J. C. Hizar, is about seventy years of age and has been practicing law in California since 1894. He is charged with the commission of acts involving moral turpitude and with the violation of his oath as an attorney. The Local Administrative Committee in San Diego found that the petitioner was guilty of the offenses charged. On August 16, 1941, following a hearing the Board of Governors adopted the findings of the Local Administrative Committee and recommended that the petitioner be disbarred.

On the first charge the petitioner was found guilty of having forged numerous documents and of having falsely acknowledged these instruments for the purpose of deceiving the public. The findings show that Joseph W. Murphy, a client of the petitioner, died in 1929. He had been doing business as the Joseph W. Murphy Mortgage Company. He left considerable property and mortgages to his wife and petitioner became attorney for the estate and for the widow Bertha Murphy. Early in 1930 Forest C. Walden, a brother-in-law of Mrs. Murphy, came to San Diego from St. Louis where he had been living, to assist Mrs. Murphy in the management of her affairs. The business of the mortgage company had been inactive. It was decided to continue it so Walden caused a certificate to be filed showing that he was doing business under the fictitious name of the Joseph Murphy Mortgage Company and that he was the owner thereof. Mrs. Murphy turned over certain mortgages and property and capital to Walden to be used in conducting the business.

In 1933 both Walden and Mrs. Murphy were sued by C. A. Carlson and Eva Carlson in a wrongful death action. To avoid financial responsibility Walden and Mrs. Murphy transferred the real estate and mortgages to one Graybill, a nephew of Mrs. Murphy who had come to San Diego from Wichita, Kansas, to work for the mortgage company as a salesman. In 1934, Graybill decided to go back to Kansas and Walden asked the petitioner if he could secure some one to hold the assets in the place of Graybill. James Jackson and William Kehoe were selected by the petitioner and a certificate was filed showing Jackson to be the owner and doing business as the Joseph P. Murphy Mortgage Company. Most of the property was transferred to Jackson and Kehoe. After this transfer it was necessary from time to time to have deeds executed by the legal title holders. The practice at the office of the mortgage company was to prepare these instruments for signature and to send them to petitioner's office. Petitioner would return them after the signature and the acknowledgment had been made and attached. A judgment was entered against Mrs. Murphy and Walden in the wrongful death action but the judgment was reversed. Carlson v. Murphy, 8 Cal.App.2d 607, 47 P.2d 1100.

In 1939 Walden was declared a bankrupt. The trustee in bankruptcy took into his possession certain documents which purported to be grant deeds and other instruments signed by Jackson and Kehoe. The effect of these deeds was to re-transfer to Mrs. Murphy or to her nominee all the property which had been previously transferred by her to Jackson and Kehoe. The petitioner acted as notary on these instruments and it was found that neither Jackson nor Kehoe appeared before him and acknowledged their signatures and that the signatures of Jackson and Kehoe were affixed to the instruments by the petitioner. It was established by the testimony of the petitioner that Jackson and Kehoe were not fictitious persons and there was no claim made by petitioner that he had authority to sign their names.

On the second charge it was found that the petitioner swore falsely before the referee in bankruptcy in that he testified that these instruments were signed by Jackson and Kehoe as they purported to be and that they had in fact appeared before him when in fact they had not. It was found that this testimony was given for the purpose of deceiving the referee and misleading a judicial officer.

[1] The petitioner testified that the documents in question were signed before him by Jackson and Kehoe and that the only testimony to the contrary was the testimony of two handwriting experts employed by The State Bar. Petitioner contends that the whole case against him depends upon the evidence given by these experts and that their testimony should not be permitted to be effective to support the findings as against his own testimony to the contrary, because such experts were, he asserts, more likely to favor the party who employed them. The petitioner concedes that the testimony of the experts, if credited, is sufficient to support the findings.

The record fails to disclose any satisfactory reason why such evidence should not be credited. Moreover, the committee based its findings not only on the testimony of the experts but also on the inconsistent statements by the petitioner as to the whereabouts of Jackson and Kehoe, the times and places where the instruments were purportedly signed, and other inconsistencies which indicated that he had forged the instruments. Undoubtedly the attitude and demeanor of the petitioner as he appeared and testified had an important bearing on his credibility. The committee was justified in finding that the petitioner had affixed the signatures of Jackson and Kehoe to the instruments without their authorization.

[2] In answer to the second charge, regarding the alleged false testimony of the petitioner before the referee in bankruptcy, petitioner contends that even conceding his testimony to be false no one was hurt or deceived thereby; that the Carlsons had lost their suit, were not creditors, and were not injured; that the trustee had in his possession all of the property that was owned by the bankrupt and that it could not be said that any creditors were injured.

Conceding that no one suffered any pecuniary loss the fact remains that the petitioner upon oath falsely testified before the referee in bankruptcy with intent to mislead that public officer. The forging of the documents and the giving of false testimony were unlawful and dishonest acts and unquestionably involved moral turpitude. They were committed for the purpose of deceiving those who might examine the public records and to deceive a public officer. The fact that it might develop that no one had been injured in no way justified the artifice and false practices of the petitioner.

[3] In his reply memorandum petitioner for the first time makes the contention that it was not shown that he did not have a power of attorney or authority otherwise to sign the instruments for Jackson and Kehoe and that it cannot therefore be said that he was guilty of forgery. The contention is without merit in view of the position of the petitioner throughout the proceeding that he did not affix the signatures and that Jackson and Kehoe appeared before him and signed the instruments.

[4] Petitioner finally contends that undue emphasis has been placed upon his prior conviction of a felony in 1918 in the federal court for a violation of the Neutrality Act. However, it does not appear that any weight at all has been given to this conviction. The conviction was not referred to at the hearing before the local administrative committee. It was mentioned at the hearing before the Board of Governors, but it does not appear that any

controlling significance was accorded to it by that body. The brief presented by The State Bar does not even mention this prior conviction and the case against the petitioner is based entirely on the two charges considered herein.

The petitioner has not sustained the burden of showing that the findings and recommendations of The State Bar are unsupported by the record.

It is therefore ordered that the petitioner be disbarred from the further practice of law in this state, and that his name be stricken from the roll of attorneys and counselors at law of the State of California at the expiration of thirty days from and after the filing of this order.

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20 Cal.2d 199

EGGERT v. PACIFIC SAVINGS & LOAN CO. et al. (EVANS, Building and Loan Com'r, et al., Interveners).

L. A. 18079.

Supreme Court of California.

April 21, 1942.

1. Appeal and error 🔑148

Only a party to the record can appeal.

2. Appeal and error 🔑148

In class action by holder of certificate issued by loan company, other certificate holders who were not named as parties to the action and who did not take appropriate steps to become parties to the record could not appeal, and fact that their names and extent of their interest in the action appeared in exhibit attached to complaint and judgment did not make them "parties" to the record.

See Words and Phrases, Permanent Edition, for all other definitions of "Party".

3. Appeal and error 🔑792

The Supreme Court may dismiss an improper appeal on its own motion.

4. Appeal and error 🔑478

Where appellants had no right to appeal, application for writ of supersedeas to stay execution of order pending appeal was denied.

In Bank.

Appeal from Superior Court, Los Angeles County.

Class action by John Eggert, as holder of a fidelity definite term certificate, against Pacific Savings & Loan Company and others, wherein Ralph W. Evans, as Building and Loan Commissioner, etc., and others intervened. From an order regarding allowances for attorneys' fees, Jessie C. Kelley and others appeal

Appeals dismissed.

Otto A. Ehlers and John C. Campbell, both of Los Angeles, for appellants.

Hugo H. Harris, David E. Field, Richard W. Katerndahl in pro. per., Vincent Morgan, Hill, Morgan & Bledsoe, Guy Richards Crump, Wood, Crump & Rogers, Christian H. Hartke, and H. W. Hoag, all of Los Angeles, for respondents.

TRAYNOR, Justice.

On October 28, 1938, John Eggert, as a holder of a Fidelity Definite Term Certificate commenced this action against the Pacific States Savings and Loan Company and the State Guaranty Corporation, on behalf of himself and some 1,500 other certificate holders. The complaint included a prayer that plaintiff's attorneys of record be allowed attorneys' fees for filing and prosecuting the action. The court held the suit a proper class action, and in its judgment for Eggert and the other certificate holders whom he represented decreed that they recover from the defendant Pacific States Savings and Loan Company the sum of $1,851,740.95 to be apportioned pro rata among them after deduction of expenses and fees. The court expressly reserved jurisdiction to determine the fees to be paid plaintiff's attorneys. The complaint and the judgment incorporated by reference an exhibit containing the names of the holders of the outstanding certificates and the number and face value of the certificates held by them. The names of Jessie C. Kelley and Dorothy C. Given appeared in the exhibit. The court appointed a receiver to facilitate the collection and payment of the judgment. The court also made an order, directed to plaintiff and all other persons interested, to show cause why it should not make an order fixing reasonable attorneys' fees. Notice of the order was published daily until the return date. The court fixed the fees of plaintiff's attorneys at 15 per cent of the total recovery, excluding the share of the Building and Loan Commissioner. Subsequently Eggert petitioned for an order directing the receiver to obtain and turn over the balance of the money due to him and the other certificate holders after deducting the 15 per cent allowed the attorneys. At the hearing on this petition John C. Campbell, representing Jessie C. Kelley and Dorothy C. Given, Definite Term Certificate Holders, appeared and objected to the granting of the petition insofar as it concerned the payment to the attorneys. The court made an order granting the petition, however, and Jessie C. Kelley and Dorothy C. Given filed a notice of appeal for themselves and all other holders of Fidelity Definite Term Certificates not otherwise represented by counsel from the order fixing the amount of the attorneys' fees and from the order directing the receiver to pay to plaintiff's attorneys 15 per cent of the amount recovered by the holders of the Fidelity Definite Term Certificates. They also petitioned this court for a writ of supersedeas to stay the execution of these orders until the determination of their appeal. Plaintiff Eggert and his attorneys have moved that the appeal be dismissed as to all certificate holders other than Jessie C. Kelley and Dorothy C. Given.

[1, 2] The motion to dismiss the appeal is properly made, for it is a settled rule of practice in this state that only a party to the record can appeal. Elliott v. Superior Court, 144 Cal. 501, 77 P. 1109, 103 Am.St. Rep. 102; Braun v. Brown, 13 Cal.2d 130, 87 P.2d 1009; Estate of McDermott, 127 Cal. 450, 59 P. 783; Estate of Crooks, 125 Cal. 459, 58 P. 89; Altpeter v. Postal Telegraph-Cable Co., 22 Cal.App. 63, 66, 133 P. 329. Appellants were not named as parties to the action nor did they take any appropriate steps to become parties to the record. The fact that their names and the extent of their interest in the action appeared in an exhibit attached to the complaint and the judgment did not make them parties to the record. See Estate of McDougald, 143 Cal. 476, 77 P. 443; Estate of Kent, 6 Cal.2d 154, 57 P.2d 901. Although their attorney appeared at the hearing on the petition for the payment of the money to plaintiff's attorneys and objected to such payment, he did not ask that appellants be made parties, nor did the court order them brought into the action. See Pomeroy, Code Remedies, 5th Ed., 445, § 293. Appellants had ample opportunity even after the court had made its orders to become parties of record by moving to vacate the orders to which they objected. They could then have appealed from the order denying the motion. Elliott v. Superior Court, supra.

[3] Since appellants have no standing to appeal, it is unnecessary to consider their right to appeal in a representative capacity on behalf of other certificate holders. The motion to dismiss the appeal was made only as to certificate holders other than Jessie C. Kelley and Dorothy C. Given, but this court may dismiss an improper appeal on its own motion. See cases cited in 2 Cal.Jur. 765; 4 C.J.S., Appeal and Error, § 1368, p. 1981. The appeal is therefore dismissed as to all appellants.

[4] As appellants have no right to appeal, the application for a writ of supersedeas to stay the execution of the orders for the payment of attorneys' fees to respondents pending the appeal is denied.

GIBSON, C. J., and SHENK, EDMONDS, and CARTER, JJ., concurred.

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20 Cal.2d 218

WHEELAND v. RODGERS.

L. A. 17900.

Supreme Court of California.

April 22, 1942.

1. Husband and wife 🔑14(3)

Where husband purchases real property with funds from a joint tenancy account and takes such property in his own name, the property is owned by the parties as a "tenancy in common", the husband holding the legal title to one-half interest therein in trust for the wife.

See Words and Phrases, Permanent Edition, for all other definitions of "Tenancy in Common".

2. Husband and wife 🔑14(5)

Where property purchased by husband with funds held in joint tenancy is personal property, in the absence of an agreement to the contrary the property so purchased is held in "joint tenancy" rather than "tenancy in common".

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Tenancy".

3. Joint tenancy ⚷3

A joint tenancy in real property cannot be created by oral agreement as may be done in personal property. Civ.Code, § 683.

4. Appeal and error ⚷1008(1)

In action by wife's administrator against husband to have husband declared a trustee for wife's estate of a half interest in new house, whether evidence that husband under agreement with wife deposited proceeds of sale of house which was husband's separate property in joint tenancy bank account prior to enactment of statute and then used money for erection of new house also on husband's separate property overcame presumption of gift to wife by creation with his separate funds of joint tenancy bank account was for trial court. Gen.Laws 1937, Act 652, § 15a.

5. Husband and wife ⚷49½(8)

In action by wife's administrator against husband to have husband declared a trustee for wife's estate of a half interest in new house, where husband under agreement with wife deposited proceeds of sale of house which was husband's property in joint tenancy bank account, and then used money for erection of new house also on husband's separate property, evidence supported implied finding that no gift was made to wife, precluding her estate from asserting claim against the new house.

6. Husband and wife ⚷258

Where improvements are made upon husband's separate real property with community funds, in the absence of an agreement to the contrary, the improvements have the character of husband's "separate property" and belong to husband.

See Words and Phrases, Permanent Edition, for all other definitions of "Separate Property".

7. Husband and wife ⚷258

Where improvements are made upon husband's separate real property with community funds without the wife's consent, wife is entitled to reimbursement upon the dissolution of the marriage and has a claim against the property improved, since to permit husband as manager of the community property to use with impunity the community funds to improve his separate property would be a "constructive fraud" upon the wife.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Fraud".

8. Husband and wife ⚷14(3)

A wife's interest in a bank account held in joint tenancy with husband is a "separate property" interest in which the control of both husband and wife is equal.

9. Husband and wife ⚷258

Where husband sold some of his separate property and with wife's consent deposited proceeds in joint tenancy bank account and thereafter used proceeds to erect house on land also his separate property, finding that wife acquired no interest in new house or land upon which it was erected was not error.

10. Appeal and error ⚷1011(1)

The Supreme Court would not review the conflict in evidence on an issue on which there was sufficient evidence to support the finding of the trial court.

11. Executors and administrators ⚷194(1)

Where husband as surviving spouse was entitled to remain in possession of household furniture which was the separate property of deceased wife until an inventory was filed in the estate proceedings and then have such furniture set apart to him by probate court, refusal of trial court to order delivery of furniture to wife's administrator was not error. Probate Code, § 660.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Charlie Grier Wheeland, as administrator with the will annexed of the estate of Lena P. Rodgers, deceased, against Clarence S. Rodgers, to establish that defendant holds in trust for the decedent's estate certain household furniture and a one-half interest in certain real property. From a judgment for defendant, plaintiff appeals.

Affirmed.

E. S. Patterson, Aubry Miller, and Don F. Tyler, all of Los Angeles, for appellant.

V. A. Morgan, of Alhambra, for respondents.

CARTER, Justice.

Plaintiff, as the administrator with the will annexed of the estate of his mother, Lena P. Rodgers, deceased, brought an action against defendant, Clarence S. Rodgers, the surviving husband of the decedent, and others, asserting a claim to certain property held by said defendant. From a judgment in favor of defendant, Clarence S. Rodgers, plaintiff appeals.

Decedent and defendant Clarence S. Rodgers were married in 1911. At that time defendant owned, as his separate property, real property consisting of a lot upon which was located a brick house. Defendant followed his vocation of foreman bricklayer in which he earned $7.00 to $8.00, and sometimes as high as $14.00 per day, until his retirement in 1929. On August 23, 1920, a joint tenancy savings bank account was opened by defendant and decedent. Defendant informed decedent that he would sell the brick house property and place the proceeds thereof in the joint tenancy account and use them to construct a new house on other real property which was the separate property of defendant, title thereto being in his name. To that decedent agreed. The sale was finally consummated in July, 1924. During 1924, funds obtained by defendant from the sale of his separate property were deposited in the joint tenancy account and used therefrom to construct the new house in which defendant and decedent resided until her death in 1937. Defendant is in possession of the new house. After his wife's death, he encumbered it with a trust deed given to his sister, one of the defendants herein, to secure a promissory note for $5,000. Certain furniture and household equipment had been given to decedent during her lifetime by plaintiff. Plaintiff claimed that because the funds for the construction of the new house were derived from the joint tenancy account, the decedent acquired a half interest therein as her separate property, which defendant now holds in trust for her estate; that the furniture being a gift to decedent was her separate property and now is an asset of her estate. The trial court found against those contentions, finding particularly as to the furniture that its value was "practically exhausted" and that defendant would be entitled to have it set aside to him as exempt property.

[1-5] On this appeal plaintiff urges that defendant holds a half interest in the new house in trust for decedent's estate because it was paid for from the joint tenancy account, relying upon Estate of Harris, 9 Cal.2d 649, 72 P.2d 873. That case held that where, in the absence of an agreement to the contrary, a husband and wife have a joint tenancy account and the husband purchases real property with it and takes it in his own name, the property is then owned by the parties as tenants in common, the husband holding the legal title to a one-half interest therein in trust for his wife. In that case there was an agreement between the husband and wife that the property of each of them would be owned and held in joint tenancy by them. Estate of Harris, 169 Cal. 725, 147 P. 967. If the property purchased by the husband with the funds held in joint tenancy, is personal property, however, then that property so purchased is held in joint tenancy rather than tenancy in common, there being of course no agreement to the contrary. Estate of Harris, supra. The reason for the difference in the rule between real and personal property is that a joint tenancy in real property cannot be created by oral agreement. Civ.Code, § 683; Estate of Harris, supra. But in the instant case the parties agreed that the proceeds from the sale by the husband of his separate property, the brick house, would be used for the construction of a new house on the land of the husband, the separate property, and that to accomplish that result and while the new house was being constructed the money was placed in a joint tenancy account and was withdrawn therefrom and used for that purpose. The trial court found that the decedent never had or acquired any interest in the new house, and also: "That prior to the time the dwelling house and garage (the new house) was constructed upon the parcel (described in the complaint) * * *, the defendant, * * * talked over the matter of its construction with his wife, * * *, and informed her that he would sell the 'brick house' in which they were then living and which was his separate property, and from the moneys received would build the new house; to which the said Lena P. Rodgers agreed; and following such agreement between the parties, the said Clarence S. Rodgers,

did sell the brick house and another parcel, and did use said moneys to pay for the construction of said new house, though during said construction period said moneys were deposited in a joint bank account in the name of both parties." It should be mentioned that the deposit in the joint tenancy bank account was created prior to the enactment of section 15a of the California Bank Act which provides, that the making of a bank deposit in the form of a joint tenancy account with the right of survivorship shall be conclusive evidence of the intention of the depositors to vest title in the survivor. Stats.1909, p. 87; Deering's Gen.Laws, 1937, Act 652; Estate of Gaines, 15 Cal.2d 255, 100 P.2d 1055. While the creation by defendant with his separate funds of a joint tenancy bank account gave rise to a presumption of a gift to decedent, his wife, the issue was a question of fact for the trial court and we are satisfied that the evidence contrary to that presumption is sufficient to support the implied finding that no gift was made, and the wife, decedent, did not become vested with any title. That being the case, it follows that neither she nor her successors acquired any interest in or claim against the new house. The Harris case, supra, has no application because there the joint tenancy relation was founded upon the agreement of the parties.

[6-9] Furthermore, even if it be assumed that the creation of the joint tenancy bank account amounted to a gift by defendant to decedent of his separate property, it is clear that plaintiff cannot prevail. It has been held that, in the absence of an agreement to the contrary, where improvements are made upon the husband's separate real property with community funds, the improvements have the character of his separate property and belong to the husband. See Dunn v. Mullan, 211 Cal. 583, 296 P. 604, 77 A.L.R. 1015. However, when the funds are so paid out of the community assets without the wife's consent the wife is entitled to reimbursement upon the dissolution of the marriage and has a claim therefore against the property improved, the theory being that inasmuch as the husband is the manager of the community property, to permit him to use with impunity the community funds to improve his separate property would be a constructive fraud upon the wife. Dunn v. Mullan, supra; Provost v. Provost, 102 Cal.App. 775, 283 P. 842; Callnon v. Callnon, 7 Cal.App.2d 676, 46 P.2d 988; Spreng v. Spreng, 119 Cal.App. 155, 6 P.2d 104. But in the case at bar we are not concerned with community property over which the husband has control. The decedent's interest in the account held in joint tenancy was, if anything, a separate property interest in which the control of both husband and wife would be equal. Combined with that is the circumstance that the funds making up the account were his separate property and the decedent wife agreed that they were to be deposited in the account and thereafter used to improve the husband's separate property. Under those circumstances the court was justified in holding that she acquired no interest in the new house or the land upon which it was erected.

[10] Plaintiff asserts that the finding that the new house cost $3,500 is not supported by the evidence. Suffice it to state that there is merely a conflict in the evidence on that subject which the trial court resolved against the plaintiff. There being evidence to support the finding, we are not concerned with the conflict.

[11] It is claimed that the trial court erred in failing to order the delivery of the furniture to the plaintiff as administrator of the decedent's estate. It was her separate property, but it was household furniture, and inasmuch as defendant is a surviving spouse, he is entitled to remain in possession of it until an inventory is filed in the estate proceeding, and then it may be set apart to him by the probate court. Probate Code, § 660.

Plaintiff urges that the trust deed executed by defendant to his sister upon the real property in question, is invalid, but in view of the conclusion we have heretofore reached, that decedent had no interest in this property, consideration of that claim is unnecessary.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and TRAYNOR, JJ., concur.

20 Cal.2d 186

EVANS, State Building and Loan Com'r, v. SUPERIOR COURT OF LOS ANGELES COUNTY.

L. A. 18199.

Supreme Court of California.

April 20, 1942.

Rehearing Denied May 18, 1942.

1. Execution ⚷161

The court has power and duty to recall writ of execution if it was improvidently issued.

2. Mandamus ⚷4(4)

Where building and loan commissioner in connection with liquidation of loan society filed motion to recall and quash a writ of execution levied against the society, commissioner's remedy by appeal from order denying motion did not preclude consideration of merits of subsequent application for writ of mandamus to compel superior court to recall and quash the writ. Gen.Laws 1937, Act 986, § 13.11.

3. Building and loan associations ⚷42(3)

Under act prohibiting levy of execution on property of building and loan association pending process of liquidation of association, the building and loan commissioner's act of taking possession of assets of association is a prerequisite to liquidation and is to be considered as part of process of "liquidation", regardless of whether association seeks to enjoin proceedings by commissioner. Gen.Laws 1937, Act 986, §§ 13.11 to 13.13, 13.16.

See Words and Phrases, Permanent Edition, for all other definitions of "Liquidation".

4. Building and loan associations ⚷42(6)

Under statute providing that no execution should be levied upon property of building and loan association pending process of liquidation thereof, where action against loan society was commenced prior to date when building and loan commissioner took possession of society's assets, but judgment was not recovered or execution levied until after such date, although commissioner had not yet filed notice of determination to liquidate, commissioner was entitled to have writ of execution quashed on theory that taking of possession of assets was a part of process of "liquidation", and that hence the writ of execution was improperly issued. Gen. Laws 1937, Act 986, §§ 13.11 to 13.13, 13.16.

5. Judgment ⚷752

A judgment lien is a statutory right which attaches to property not exempt from execution, and such right may be taken away by statute.

6. Building and loan associations ⚷42(3)

Under statute providing that no execution should be levied upon property of building and loan association pending process of liquidation thereof, a judgment which could not be enforced under the statute would be a mere adjudication of the creditor relationship and of the amount due. Gen.Laws 1937, Act 986, § 13.16.

* * *

In Bank.

Mandamus proceeding by Ralph W. Evans, as State Building and Loan Commissioner, against the Superior Court of Los Angeles County, to compel the respondent to recall and quash a writ of execution levied on the assets of the Pacific States Savings & Loan Society to satisfy a judgment rendered in an action against the society.

Writ issued.

For prior opinion, see 117 P.2d 886.

Alan G. Campbell, Wood, Crump & Rogers, and Guy Richards Crump, all of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, Douglas DeCoster, Deputy Co. Counsel, Mathes & Sheppard, William C. Mathes, and J. Stanley Mullin, all of Los Angeles, for respondent.

SHENK, Justice.

The petitioner, as building and loan commissioner, applied for the writ of mandamus to direct the respondent superior court to recall and quash a writ of execution levied on the assets of Pacific States Savings and Loan Society to satisfy a judgment rendered for the plaintiffs, Terry et al., in an action against the society. The facts are not disputed.

On September 30, 1937, Terry and others commenced an action against Pacific States Savings and Loan Society to recover sums claimed to be due on certain fidelity definite term investment certificates and fidelity participating certificates of the society which matured May 23, 1936.

March 4, 1939, the petitioner took possession of the property and assets of the society pursuant to section 13.11 of the Building and Loan Association Act. Stats.

1931, page 483, as amended, Deering's Gen. Laws, Act 986. The next day pursuant to section 13.12 of the act the society commenced an action to enjoin further proceedings on the part of the commissioner.

June 12, 1939, the plaintiffs in the Terry action recovered judgment for $15,696.71 and on August 23, 1939, execution was levied, but nothing has been paid on the judgment by virtue of the levy.

October 30, 1939, pursuant to section 13.16 of the act, the commissioner filed a notice of determination to liquidate. August 2, 1941, the commissioner in the Terry action moved the respondent court to recall and quash the writ of execution on the ground that said section 13.16 forbade the lien of said judgment and any execution thereon. The motion was denied, and on September 4, 1941, the present proceeding was commenced for the purpose of compelling the respondent court to recall and quash the writ of execution. On December 29, 1941, the court in the injunction proceeding filed by the society on March 5, 1939, found for the commissioner and entered its judgment of dismissal.

[1] The foregoing statement of facts is sufficient upon which to resolve the problem here involved. Section 13.16 of the act provides in part: "The determination by the commissioner to liquidate any association, evidenced by filing written notice of such determination with the court, shall operate to stay or dissolve any or all actions or attachments instituted or levied within thirty days next preceding the taking of possession of such association by the commissioner, and pending the process of liquidation as herein provided no attachment or execution shall be levied or lien created upon any of the property of such association." The respondent court had the power and it was its duty to recall the writ of execution if it was improvidently issued. Creditors' Adjustment Co. v. Newman, 185 Cal. 509, 511, 197 P. 334.

[2] If the taking of possession under the act was a part of the process of liquidation within the meaning of the quoted provision, as contended by the petitioner, then the jurisdiction of the respondent court might be exercised in but one way, namely, by granting the motion to recall and quash the writ.

The petitioner's remedy by appeal from the order denying his motion to recall the writ in a case of this character, may not be deemed sufficient to preclude a consideration of the merits of the present application and the issuance of the writ if the application should be found to be meritorious. See Betty v. Superior Court, 18 Cal.2d 619, 116 P.2d 947.

[3, 4] Since the Terry action was brought more than thirty days prior to the taking of possession, it was not stayed by the above provisions of section 13.16 of the act. But whether the judgment or execution in that action created a lien depends upon the answer to the question of when under the act the process of liquidation commences. By section 13.11 of the act the commissioner is empowered to take possession of the property, business and assets of the association by reason of the conduct of its affairs in an injurious and unsafe manner, or for other reasons therein stated, and he may "retain such possession until such association shall with the consent of the commissioner resume business, or until its affairs be liquidated."

By section 13.12 any association affected by the commissioner's order of possession may within thirty days apply to the superior court to enjoin further proceedings. In the injunction proceeding the court may dismiss the application or enjoin the commissioner from further proceedings and direct him to surrender the business and assets to the association. By section 13.13 the commissioner has certain specified powers upon taking possession and, unless he is enjoined from further proceedings, he may proceed to liquidate the affairs of the association, "as hereinafter provided." Section 13.16, in addition to the above quoted provision, enumerates the general powers of the commissioner in liquidating the association's affairs. There is also provision for ratable distribution of dividends from the liquidation of assets; for a hearing on the payment of a final dividend, and the closing of liquidation with the return of any balance to the shareholders after payment of all claims. In practice, when no injunction has been applied for, and at the end of thirty days following the taking of possession, the commissioner files his notice of determination to liquidate and proceeds immediately to liquidate in accordance with the provisions of the act. The question whether a judgment rendered (in an action not stayed), or execution levied during the thirty-day period, created a lien upon the property of the association will first be considered. Undeniably it may be said that the thirty-day period is provided as an automatic stay of the exercise of the powers of liquidation by the commissioner, as distinguished from a stay of the process of liquidation, in order to give the association an opportunity to obtain an injunction. Absence of justification for the taking of possession may then be shown. This is so for the reason that possession under the act is primarily for the purpose of liquidating the affairs of the association. True, it may develop that liquidation will not follow, but that consequence does not alter the obvious fact that under the act possession is a prerequisite to liquidation and must be deemed to be the first step in that process. Since it is such a prerequisite it should be considered as part of the process of liquidation in a case when an injunction proceeding has been commenced as well as in a case where the association has not applied for an injunction; and indeed with greater necessity in the former case inasmuch as the delays which might ensue upon an application for injunction might defeat the purposes of the act. In this connection it is significant that, if no injunction had been sought and the commissioner had filed notice of his determination to liquidate upon the expiration of the thirty-day period, and if the judgment in the Terry action had been entered thereafter, no execution could have issued on said judgment by virtue of the provisions of section 13.16 of the act. That section operates to prohibit the levy of any execution pending the process of liquidation. It makes no exception of an action which was commenced more than thirty days prior to the taking of possession by the commissioner. Obviously it could not have been the legislative intent to permit such an advantage to accrue to some creditors by reason of the delays attending an injunction proceeding. Therefore one of the ends to be achieved by the legislation, namely, the ratable distribution of assets among creditors, furnishes support for our conclusion therein. In Crane v. Pacific Bank, 106 Cal. 64, 39 P. 215, 27 L.R.A. 562, concerning somewhat similar legislation, it was said that if the Bank Commissioners' Act there involved took banks out of the operation of the Insolvency Act to procure equitable distribution of its assets among its creditors, it was equally clear that it was not intended that the moment a bank closed its doors its assets should become the prey of the first creditors who might obtain the issuance of process. If the process of liquidation were deemed not to commence until, for instance, an adjudication of dismissal in an injunction proceeding, it would be a simple matter for the association to apply for an injunction and thus effect a period of delay within which actions not stayed could be prosecuted to judgment with resulting preferment, while in the absence of injunction proceedings judgments would not create a lien on the association's property.

[5, 6] A judgment lien is a statutory right which attaches to property not exempt from execution. Ackley v. Chamberlain, 16 Cal. 181, 183, 76 Am.Dec. 516. The right thus created may also be taken away by statute, altogether or conditionally, as in cases of insolvency. By the enactment of the Building and Loan Association Act the legislature has seen fit to withdraw the right of a judgment lien and execution process from judgment creditors in certain cases during the process of liquidation. The only effect of the judgment in an action not stayed by the provisions of the act, such as in the Terry case, would be an adjudication of the creditor relationship and of the amount due.

In Evans v. Superior Court, 14 Cal.2d 563, 572, 96 P.2d 107, 112, this court referred to the sections of the act here under consideration and related sections and said: "The above-mentioned sections of the act should be considered together (Yager v. Superior Court, 139 Cal.App. 84, 33 P.2d 451) and when so considered, it is apparent that the legislature intended to provide a comprehensive plan for the supervision of building and loan associations generally and for the liquidation of particular associations under certain conditions. * * * It has been held that a liberal rather than a strict construction should be placed upon said sections in determining the powers of the commissioner. * * * Respondents argue for a strict construction of the word 'liquidation' in this connection but it is apparent that the taking of possession by the commissioner under section 13.11 is a necessary and integral part of the process of liquidation * * *."

It is true that the question now to be determined is not the question which was involved in that proceeding. But the foregoing quoted declarations were necessary to the determination of the question there involved, and we are not now presented with authorities or argument which would justify a disapproval of them.

The respondent relies on Lanz v. Fresno L. & S. Bank, 125 Cal. 456, 58 P. 63, and Argues v. Union Savings Bank, 133 Cal. 139, 65 P. 307. In the Lanz case the plaintiff had been overlooked in the distribution of the bank's assets by the trustees in the process of liquidation. It was held that he could recover judgment on his claim. In the Argues case it was held that an ordinary action for the collection of a debt could not be maintained against a bank while it was in process of liquidation, and that the only permissible action would be one against the liquidating trustees for some dereliction of duty. The Lanz case involved such a permissible action. Neither case therefore is inconsistent with our interpretation of the provisions of the act here involved.

Let the peremptory writ of mandamus issue as prayed.

CURTIS, CARTER, and TRAYNOR, JJ., concurred.

HOUSER, J., concurred in the judgment.

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20 Cal.2d 181

PEOPLE v. HOCHWENDER et al.

L. A. 17816.

Supreme Court of California.
April 20, 1942.

1. Executors and administrators 🔑224

Under statute providing that all claims arising upon contract must be filed or presented against a decedent's estate within the time limited by notice, a claim for delinquent sales taxes against a deceased retailer's estate was not a "claim arising upon contract" but arose by operation of law notwithstanding statutory provision that such tax constituted a direct obligation of the retailer and hence a claim therefor filed upon expiration of the time fixed by notice was not barred. Probate Code, §§ 700, 707; Gen. Laws 1937, Act 8493, § 30.

See Words and Phrases, Permanent Edition, for all other definitions of "Claim Arising Upon Contract".

2. Taxation 🔑1

"Taxes" are not "debts" nor "founded upon contract" but they are charges upon persons or property to raise money for public purposes and the general relationship of sovereign and taxpayer is not founded on nor does it create any contractual rights.

See Words and Phrases, Permanent Edition, for all other definitions of "Debt", "Founded Upon Contract" and Taxes".

3. Licenses 🔑32(1)

Under statutes relating to assessment and collection of delinquent sales taxes and interest and penalties attaching thereto, the legislature intended that the payment of the additional tax should not become delinquent until the penalty for nonpayment attached. Gen.Laws 1937, Act 8493, §§ 9, 17, 20, 21, 30.

4. Limitation of actions 🔑58(6)

Where an additional assessment of delinquent sales taxes to correct an insufficient return against a retailer covered a period commencing July 1, 1934, and a notice of assessment was mailed October 6, 1937, an action commenced more than three years and eleven months after the earliest period for which the delinquent assessments were claimed was not barred by the three-year statute of limitations as to the period ending prior to three years before the complaint was filed. Gen.Laws 1937, Act 8493, §§ 9, 17, 20, 21, 30.

In Bank.

Appeals from Superior Court, San Diego County; Robert B. Burch, Judge.

Action by the People of the State of California against Jean Hochwender, as special administratrix of the estate of Fred Hochwender, deceased, for delinquent sales taxes. From a judgment for plaintiff, both parties appeal.

Judgment reversed with directions.

Earl Warren, Atty. Gen., and H. H. Linney, Burdette J. Daniels, James E. Sabine, and Adrian A. Kragen, Deputy Atty. Gen., for appellant.

C. C. Pease and Edward J. Schwartz, both of San Diego, for appellants.

SHENK, Justice.

The plaintiff and the defendants have appealed from a judgment for the plaintiff in an action to recover additional sales taxes.

Fred Hochwender died testate May 1, 1936. During his lifetime he operated a retail used car business under permits issued to him by the State Board of Equalization. Returns were filed for the period from July 1, 1934, to June 30, 1936, showing taxable sales of $72,435.72, and the sales tax thereon was paid.

On May 28, 1936, the first publication of notice to creditors was made by the then acting executor, and the six months period for presentation of claims against his estate under section 700 of the Probate Code expired November 28, 1936. No claim for sales taxes was filed in the probate court or presented to the legal representative of the estate within that time.

More than a year after Hochwender's death, and in September, 1937, the State Board of Equalization made an audit of his books which disclosed a total of taxable sales for the aforesaid period, July 1, 1934, to June 30, 1936, of $188,886.43, or $116,450.71 more than the total reported by the retailer. The State Board of Equalization mailed a notice of additional assessment, dated October 6, 1937, seeking to impose a further tax of $4,634.78. On October 8, 1937, sixteen months after the first publication of notice to creditors, the claim for the latter amount was presented against the estate. The claim was rejected on March 11, 1938.

Thereafter, on June 9, 1938, the plaintiff commenced this action for the enforcement of the claim including interest and penalties. The state thereby sought to collect taxes on sales from July 1, 1934, a period commencing more than three years and eleven months prior to the filing of the complaint. Section 30 of the California Retail Sales Tax Act as amended, Stats.1935, page 1265; Deering's Gen. Laws, 1937, Act 8493, provides that an action to collect delinquent sales taxes must be brought within three years after delinquency.

The trial court rendered judgment in favor of the plaintiff for $3,239.04, but denied recovery for any taxes on sales during the taxable period ending prior to June 9, 1935, or more than three years before the suit was filed.

The appeal of the defendants will first be considered.

They contend that the state's entire claim is barred by Probate Code sections 700 and 707, because the claim was not presented in the probate matter within six months after the first publication of notice to creditors. Section 700 requires that the notice specify six months for the presentation of claims and section 707 provides: "All claims arising upon contract, whether they are due, not due, or contingent, and all claims for funeral expenses, must be filed or presented within the time limited in the notice * * * and any claim not so filed or presented is barred forever * * *."

[1, 2] The defendants insist that the tax is a claim arising upon contract within the meaning of section 707. The contention cannot be sustained. In the early case of Perry v. Washburn, 20 Cal. 318, 350, it was held: "Taxes are not debts * * * due by contract, express or implied." That case has been consistently and uniformly followed. It was cited and approved in Spurrier v. Neumiller, 37 Cal. App. 683, 174 P. 338, 341, where it was said: "Taxes are not debts, nor founded upon contract; but they are charges upon persons or property to raise money for public purposes." This court recently reiterated the rule in Southern Service Co. v. County of Los Angeles, 15 Cal.2d 1, 97 P.2d 963, 969, stating, "The general relationship of sovereign and tax payer is not founded on nor does it create any contractual rights," citing Perry v. Washburn, supra, and Spurrier v. Neumiller, supra.

The defendants rely upon the case of the People v. Sischo, 31 Cal.App.2d 345, 87 P.2d 862. That case holds that a liquidated demand for sales taxes made by the State Board of Equalization on a retailer, a business trust, is a claim on which the trustees of the business trust are personally liable in accordance with the rule that trustees of such a trust are personally liable for the obligations of their trust except when exempted either expressly or by implication. The case lends no support to the contention that the tax obligation is contractural in nature. Nor does section 9 of the Retail Sales Tax Act, which states that "the tax levied hereunder shall be a direct obligation of the retailer * * *." render the tax contractual. The fact that the tax may be an obligation does not make it a contractural obligation. Section 26 of the Code of Civil Procedure provides that obligations may arise by contract or by operation of law. The tax liability here involved is one that arises by operation of law and not by contract.

Defendants also stress one of the reasons for the six months' provisions for filing claims against estates which is said to be based upon "the special nature of probate and the vital necessity for winding up the affairs of a decedent's estate within the shortest time possible." However, it is clear that a tax claim should come within the terms of the probate statute before the reason would be applicable. Here it does not. It is significant that the statutory limitation does not apply to other law imposed obligations, such as tort claims and alimony allowances. Hardin v. Sin Claire, 115 Cal. 460, 47 P. 363; Millar v. Millar, 51 Cal.App. 718, 197 P. 811.

[3] On the plaintiff's appeal the contention is that none of the additional taxes here assessed is barred by the statute of limitations provided by section 30 of the Retail Sales Tax Act. The additional assessment covered a period commencing July 1, 1934. The notice of additional assessment was mailed on October 6, 1937. The action was commenced on June 9, 1938. It is not disputed that if additional assessments become delinquent on the 15th day following the first quarter for which the additional tax was assessed, then the trial court was correct in its conclusion that as to a portion of the additional assessment the action was commenced too late. We do not, however, agree with the defendant's contention that delinquency of the additional assessment occurred at that time. Section 30 provides that at any time within three years after the delinquency of any tax, the board may bring an action in a court of competent jurisdiction to collect the amount delinquent together with interest and penalties. Section 17 provides for an additional assessment if the board is not satisfied that the retailer's return is sufficient. It also provides that notice thereof be served upon the retailer and that any such additional assessment shall bear interest at the rate of one-half of one per cent per month from the fifteenth day after the close of the period for which the assessment is imposed to the date of payment. By section 20 assessments made under the provisions of section 17 become due and payable at the time of service of notice thereof, and if not paid at that time a ten per cent penalty is added to the amount of the tax. Section 21 provides that notice of such additional assessment be mailed to the retailer within three years after his return was filed. Section 9 requires the retailer to file his return on or before the fifteenth day following the close of the taxable period. No contention is made that notice was not mailed within three years from the filing of the return covering the first quarterly period involved herein.

The defendants argue that because interest is added from the fifteenth day following the close of the period for which the additional assessment is made, an intent is shown that the additional assessment be deemed delinquent on that day. That possibility is negatived by the provisions of sections 20 and 21 which establish the due date of the assessment, the fixing of a ten per cent penalty upon failure to pay on the due date, and the requirement that notice of additional assessment be mailed within three years after the filing of the return. Approval of the defendant's contention would lead to the absurd result that the board might notify the retailer just before the close of the three-year period but must file an action at the same time and before the time expires within which the taxpayer is permitted to comply with the notice without suffering the addition of the penalty for nonpayment. It is obvious that the legislature intended that payment of the additional tax under those sections should not become delinquent until the penalty for nonpayment attaches.

[4] The court was therefore in error in concluding that the provisions of section 30 barred the right of the plaintiff to collect the entire amount of the additional assessments.

The judgment is reversed with directions to the trial court to enter judgment for the plaintiff for the full amount of the additional taxes, interest and penalties.

GIBSON, C. J., and CURTIS, EDMONDS, HOUSER, and CARTER, JJ., concurred.

TRAYNOR, J., did not participate herein.

20 Cal.2d 208

STUB et al. v. BELMONT.

L. A. 17715.

Supreme Court of California.
April 22, 1942.

1. Pleading 🔑350(3)

The affirmative allegations in defendant's answer must be taken as true in entertaining plaintiffs' motion for judgment on the pleadings.

2. Chattel mortgages 🔑21
Mortgages 🔑15

A mortgage on either chattels or real property, given as security for performance of a contract, is valid and may stand as security for such performance, at least as between mortgagor and mortgagee. Civ.Code, §§ 2875, 2891, 2905, 2909, 2911, 2912, 2920, 2924, 2928.

3. Chattel mortgages 🔑236

Where note, chattel mortgage and consignment contract were given by plaintiffs to defendant as part of same transaction, the mortgage specifically providing that it was given not only as security for payment of loan and advances, but also for performance of the contract, and there was independent consideration supporting contract, the payment of loan and advances during term of contract did not entitle plaintiffs to a satisfaction of the mortgage and cancellation of the contract.

4. Compromise and settlement 🔑22

Defendant's pleading which alleged that under a consignment contract defendant would have made a certain profit during its term, that a dispute arose between parties as to defendant's right to have contract continued, and to be secured by a chattel mortgage during the term, that dispute was in good faith, and that there was an offer of compromise by one of plaintiffs and an acceptance of the offer by defendant, was sufficient to present defense of compromise and settlement in an action to recover money paid for cancellation of the contract and a statutory penalty for failure to give satisfaction of a chattel mortgage on payment thereof. Civ.Code, § 2941.

5. Compromise and settlement 🔑6(4)

The consideration necessary to support a compromise need not always consist of surrender of a claim that is necessarily valid and enforceable.

6. Compromise and settlement 🔑6(4)

An agreement entered into on supposition of right or of doubtful right is binding, although it later develops that right was on other side.

7. Accord and satisfaction 🔑25(2)
Compromise and settlement 🔑22

In action to recover money paid for cancellation of consignment contract and a statutory penalty for failure to give a satisfaction of a chattel mortgage on payment thereof, where defendant's pleading showed a bona fide dispute as to right of defendant to have contract continued and to be secured by chattel mortgage during its term, and that a release was given upon payment to him by one of plaintiffs of $2,000, defendant's pleading was sufficient to set forth defense of accord and satisfaction, it being immaterial whether defendant's claim was legally enforceable.

In Bank.

Appeal from Superior Court, Los Angeles County; Peirson M. Hall, Judge.

Action by I. A. Stub and others against Frank Belmont to recover money paid for cancellation of a contract and a statutory penalty for failure to give a satisfaction of a mortgage on payment thereof. From a judgment for the plaintiffs, rendered on the pleadings, the defendant appeals.

Reversed.

Henry O. Wackerbarth, of Los Angeles, for appellant.

Monta W. Shirley and Taylor H. Snow, both of Los Angeles, for respondents.

CARTER, Justice.

Defendant appeals from a judgment for $2,000 and a penalty of $100 entered against him pursuant to plaintiffs' motion for judgment on the pleadings. The penalty of $100 was awarded pursuant to section 2941 of the Civil Code providing therefor in cases where a mortgagee fails to give to the mortgagor a satisfaction of mortgage upon the payment thereof.

[1] The following facts appear from the affirmative allegations in defendant's answer, which must be taken as true in entertaining a motion for judgment on the pleadings (Cuneo v. Lawson, 203 Cal. 190, 263 P. 530), and the undenied allegations of plaintiffs' complaint. Plaintiff Under-

wood obtained title to an orange grove, having purchased it from a Mr. Wilcox. The purchase price was $29,000 to be paid $5,000 in cash, $15,000 according to the terms of a promissory note secured by a second trust deed on the grove property, and the balance of $9,000 by the assumption of a trust deed then encumbering said property. In order to consummate the transaction, plaintiff Underwood executed the note and second trust deed for $15,000 to Wilcox and assumed the first trust deed. Not having the $5,000 cash she borrowed it from defendant for which she gave defendant on May 23, 1936, a promissory note, a crop mortgage securing the note, and a consignment contract having a three-year term. The latter contract did not contain a proper description of the land but was corrected on August 1, 1936. Thereafter, plaintiffs failed to properly care for the grove or crops thereon, and plaintiffs requested defendant to care for the same and advance the money necessary therefor, to which defendant agreed if new notes, mortgages and contracts would be executed. Accordingly, on October 3, 1936, the following instruments here directly involved were executed. A promissory note for $5,000 executed by plaintiffs to defendant payable on or before five years after date. The note was secured by a chattel mortgage, in which plaintiffs were mortgagors, on the crops growing and to be grown on the grove for the years 1936-1937 to 1940-1941, inclusive. The mortgage provided that it was given to secure: (1) the performance of "the terms and obligations of this mortgage," and the promissory note for $5,000. (2) The payment of any further loans or advancements not exceeding $5,000, "exclusive of any expenditures, advances, or expenses made or paid by said Mortgagee, or due or to become due to said Mortgagee from said Mortgagor by reason of any of the terms, provisions or conditions herein contained, or by reason of any contract secured hereby." (3) "The faithful performance by said Mortgagor, in the manner therein provided, of that certain contract in writing of even date herewith signed, executed, and delivered by said Mortgagor to said Mortgagee and which said contract, in the possession of said Mortgagee, is made a part hereof and referred to for further particulars and by which said Mortgagor in consideration of the said loan made by said Mortgagee to said Mortgagor and evidenced by said promissory note, has placed and agrees to deliver the said crops hereby mortgaged to and into the hands of the said Mortgagee to be packed and sold by said Mortgagee for the account of said Mortgagor, in the manner in said contract provided." (4) "The faithful delivery of said crops when harvested to said Mortgagee for the purposes thereof and the payment to said Mortgagee of the commission to be paid by said Mortgagor under the terms of said contract, for the services to be rendered in the packing and selling of said crops thereunder." (5) "The payment of all other sums due or to become due to, and all advancements or payments made or which may be made by, said Mortgagee for and on account of said Mortgagor, under the terms or for the purposes of said contract, which said contract, each and all of the terms thereof, together with the commissions therein provided for said Mortgagor promises to keep, make and pay as therein provided."

The consignment contract executed on the same date as the note and mortgage, and referred to in the latter, is between plaintiffs as owner and defendant, as consignee and provides: "That the Owner, in consideration of one dollar and the promises herein on the part of Consignee, *employs* said Consignee to pick, haul, pack, ship and market All Valencia Oranges, now growing on his land and that during the term of this agreement may be grown upon his lands * * *"; that there is no lien against the crop except defendant's $5,000 chattel mortgage; that defendant accepts the employment and "agrees to pick, haul, pack, ship and market all or part of said crop or crops in such manner, at such time or place as will in his judgment yield the maximum returns therefor, subject to the following conditions"; that before payment of the net proceeds from the crops to plaintiffs, defendant may deduct 70 cents per box for packing oranges, 15 cents per box for selling, 5 cents for sweating, 15 cents for export shipments and also all expenses involved in transportation; that if plaintiffs dispose of any of the crops they shall "pay to the Consignee [defendant], as liquidated damages for such breach, the sum of fifteen cents (15 cts.) for each and every commercial package or box, known in the trade as 'field box,' or the equivalent thereof, which may be so disposed of, sold, marketed or consigned by said Owner, it being spec ifically agreed that it is impracticable and extremely difficult to fix the actual damage which would thereby be suffered by the Consignee." The term of the contract is until October 3, 1941, and gives to defendant broad authority and discretion with respect to marketing the crops.

Defendant took care of the grove and between May 23, 1936, and August 1, 1937, advanced therefor $8,000 more than he received from the sale of fruit. He alleges that he would have made a profit of $5,000 under the consignment contract during its term had he continued operations pursuant thereto. Plaintiffs desiring to sell the grove, requested defendant to cancel his mortgage and consignment contract upon payment of the amount he had expended on the grove and loaned to plaintiffs. Defendant agreed to cancel the mortgage upon payment of the loans and advancements, but insisted that the consignment contract and the mortgage insofar as it secured its performance remain in force. Finally, in August, 1937, it was agreed between the parties that plaintiffs would pay defendant $2,000 and defendant would cancel the contract. Pursuant to escrow instructions therefor, $10,598.28 was paid on behalf of plaintiffs to defendant, $8,598.28 representing the loan of $5,000 and advancements, and $2,000 for the cancellation of the contract. Defendant released plaintiffs from all liability under all the instruments.

Plaintiffs brought this action to recover the $2,000 paid by them and a penalty of $100, claiming that they were entitled to a satisfaction of the mortgage without the payment of the $2,000 because the performance of the consignment contract was not secured by the mortgage and did not create an independent obligation. We believe it is clear that defendant has stated a good defense to the action and the judgment on the pleadings must be reversed.

[2] The trial court apparently based its decision upon the case of Hayashi v. Pacific Fruit Exchange, 43 Cal.App. 677, 186 P. 174. In that case the action was by the mortgagor to compel satisfaction of a chattel mortgage on crops given to secure the payment of a $200 loan, the mortgage reciting that it was given as security for that payment "'and also all other indebtedness that may hereafter be due, owing or existing from said' mortgagor" and for the performance of the other covenants in the mortgage. It was also recited that in consideration of the loan the mortgagor gave the mortgagee the right to market the crops for which services he was to receive a commission, and the mortgagor was to purchase packing material from the mortgagee. The court held that the last-mentioned provisions were placed in the mortgage only for preserving the security for the payment of the $200, and that when it was paid, the mortgage did not stand as security for the performance by the mortgagor of the marketing agreement embodied in the mortgage. That construction placed upon the instrument is extremely doubtful, but in any event it is not controlling in the case at bar because in the cited case it is stated:

"It will be observed that *it is not by language expressly provided,* nor is it reasonably susceptible to that construction when it is considered in connection with the other provisions of the instrument, that 'the mortgage is intended to secure and does secure the right of the defendant to the possession of the fruit when harvested.'" (Emphasis added.) In the case at bar as heretofore seen, the chattel mortgage expressly states it is to secure the performance of the consignment contract. In any event, however, the Hayashi case must be disapproved because it further holds that a mortgage may not be given to secure the performance of a contract such as the consignment contract here in question, and that a mortgage may not stand as security for damages for the breach of a contract. Approval of that portion of the decision was specifically withheld by this court on denial of a petition for a hearing. Hayashi v. Pacific Fruit Exchange, supra, 43 Cal.App. at page 684, 186 P. 174. At least as between the mortgagor and mortgagee, a mortgage on either chattels or real property, given as security for the performance of a contract is valid and proper, and may stand as security for such performance. The statutory law recognizes that rule. Section 2920 of the Civil Code defining a mortgage provides:

"Mortgage is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession." See, also, Civ. Code, §§ 2875, 2891, 2905, 2909, 2911, 2912, 2924, 2928; Congregational Church Bldg. Soc. v. Osborn, 153 Cal. 197, 94 P. 881;

Falkner, Bell & Co. v. Hunt, 16 Cal. 167; Purser v. Eagle Lake L. & I. Co., 111 Cal. 139, 43 P. 523; 41 C.J. 454-459; 36 Am. Jur. 720; Kansas City Life Ins. Co. v. Banaka, 150 Kan. 334, 92 P.2d 63; Seid Pak Sing v. Barker, 197 Cal. 321, 240 P. 765; Dover Lumber Co. v. Case, 31 Idaho 276, 170 P. 108; McNeff v. Southern Pacific Co., 61 Or. 22, 120 P. 6.

[3] Turning to the transactions in the instant case, we think there is no doubt that defendant has stated a sufficient defense to plaintiffs' action. The three instruments, the note, mortgage, and consignment contract were executed on the same day, October 3, 1936, and should be construed together as a part of the same transaction. The mortgage specifically and expressly provides that it was given not only as security for the payment of the $5,000 loan and advances, but also for the performance of the terms of the consignment contract. This is clear from the hereinabove quoted excerpts from the mortgage. As before noted, the court in the Hayashi case stated that there was no express term of the mortgage there involved making it security for the marketing agreement with reference to the crops. The loan of $5,000 and advancements were made in consideration of the execution of the consignment contract, but independent thereof there was adequate consideration supporting the contract expressed upon its face, that is, a promise for a promise. Plaintiffs agreed to employ defendant at certain rates to market the crop for five years and defendant promised to accept the employment and market the crops. We do not believe the consignment contract was merely an additional method of preserving the security (the crops) and therefore terminated when the loan of $5,000 and advances were paid, or that it was not secured by the mortgage. There were definite advantages gained by defendant in entering into the contract such as the fixed payments for the various types of services rendered. This is clearly indicated by the clause for liquidated damages payable to defendant, which is hereinabove quoted. That it was contemplated that defendant would benefit under and during the term of the contract in addition to merely receiving the money he loaned and advancements is indicated by the following clause that the property is not to be sold even after the term of the contract unless all advances have been paid:

"It is understood and agreed that any claim of the said Consignee for advances or other money paid on account of the said Owner under the terms of this agreement shall be fully satisfied before the consummation of any sale of all or part of the above described property. *This applies only after expiration of this contract.*" (Emphasis added.) While the mortgage does contain provisions such as the making of the consignment contract a part of the mortgage; that it is to secure the repayment of every other item mentioned therein and all other liabilities incurred for the protection of the indebtedness; that the mortgagor shall pay all advances made under the contract with interest; and that the mortgagee may take possession of the crops when harvested and pay his commissions, it is clear that the mortgage was specifically made security for the *performance* of the contract; the performance of that contract was therefore an independent affair. The contract thus created an arrangement under which certain benefits accrued to defendant along with definite obligations assumed by him for a fixed period of time, namely, five years. It follows that insofar as appears from the pleadings, the consignment contract was binding upon plaintiffs for five years and a discharge of the $5,000 loan and advances did not entitle plaintiffs to a satisfaction of the mortgage because it would still stand as security for the performance of the contract during the term thereof. Defendant was thus not required to cancel the consignment contract or satisfy the mortgage until the covenants in the contract had been performed. There is nothing contrary to these views in Western Loan & Bldg. Co. v. Scheib, 218 Cal. 386, 23 P.2d 745, where a third party lien claimant was involved, and no obligation was owed by the mortgagor to the mortgagee, or in Miller v. Salomon, 100 Cal.App. 756, 281 P. 89, where the lease, the performance of which was secured by the mortgage was terminated.

[4] It is also urged by defendant as a ground for the reversal of the judgment that his pleading sufficiently establishes a compromise and settlement of the controversy between the parties as a sufficient defense to plaintiffs' action. With this contention we also agree. It was pleaded by defendant in that respect that he would have made a profit of over $5,000 under

the consignment contract during its term. He then alleges:

"* * * that during the month of July, 1937, the plaintiffs herein had an opportunity to sell the orange grove * * * upon condition that they could convey the title thereto free and clear of encumbrances, * * * except the trust deed securing the $9,000.00 trust deed note * * * and * * * plaintiffs * * * requested * * * defendant to forward to the Security Title Insurance and Guarantee Company, as escrow holder a release of the crop mortgage * * * and a cancellation of the consignment contract * * * said documents to be recorded when said escrow holder could pay to * * * defendant the sums of money which * * * defendant had expended in the care and maintenance of said orange grove and the balance due on the advancement by * * * defendant to * * * plaintiffs in connection with the purchase of said orange grove by the plaintiff * * *; that * * * defendant notified said escrow holder that he had expended large sums of money in caring for said orange grove and protecting same during the freeze of January, 1937, and that there was no reason why he should cancel said consignment contract, that if the plaintiffs herein desired to pay off the crop mortgage * * * defendant would receive said sums of money and release the crop mortgage so far as it affected said loans or advancements, reserving his rights thereunder, however, to secure the performance of the terms of the consignment contract.

"* * * defendant refused to cancel said consignment contract in view of the fact that plaintiffs did not have any money invested in said orange grove and had not cared for same during the time that the plaintiff * * * held legal title thereto, and because * * * defendant had advanced the money which was used as the down payment on said orange grove and advanced all sums of money in connection with the care and maintenance of said orange grove and had advanced large sums of money and had done considerable work in connection with the protecting of said orange grove and the crop growing thereon from the freeze during the month of January, 1937; that * * * defendant felt he was entitled to the profit on said consignment contract * * * and to any profit which he might make in carrying out the terms of said consignment contract, and for this reason * * * defendant refused to cancel said consignment contract when requested to by the plaintiffs herein.

"* * * a conference was held by the plaintiff I. A. Stub, W. H. Wadsworth, his attorney, * * * defendant * * * and Henry O. Wackerbarth, his attorney, and in the course of said conference said plaintiff I. A. Stub agreed to pay this answering defendant the sum of $2,000.00 if he would cancel said consignment contract * * * and thereafter * * * defendant deposited with * * * such escrow holder, all documents necessary to clear the title to the real property * * * so far as the same was encumbered by any of the documents executed by the plaintiffs * * * in favor of * * * defendant, and instructed said escrow holder to use them in accordance with the instructions of the plaintiffs herein upon payment to * * * defendant of the sum of $10,598.28 within the time provided in said escrow instructions, upon condition that the plaintiffs herein waive any and all future claims against * * * defendant in connection with said escrow, the documents deposited therein or the transactions between the plaintiffs and * * * defendant; and the plaintiffs herein, in connection with said escrow, signed a waiver of all future claims against * * * defendant in connection with the transaction out of which said consignment contracts, notes and mortgages * * * arose, * * * there was due * * * to * * * defendant from the plaintiffs * * * the sum of $8,598.28, and the difference between said sum of $8,598.28 and $10,598.28, to wit, $2,000.00, was paid to this answering defendant as the consideration for the cancellation of the consignment contract * * * and a waiver of all profits which * * * defendant would have made under said consignment contract, which said profits, as hereinbefore alleged, would have exceeded $5,000.00 under the terms of said contract." It cannot be doubted that the necessary elements for a compromise were present. There was a dispute between the parties, namely, whether defendant had the right to have the consignment contract continue for the balance of its term and be secured by the mortgage during that time. It is clear from the foregoing allegations that the dispute was in good faith and nothing to the contrary appears. There was nothing illegal about defendant's claim. There was an offer and acceptance of the compromise.

[5, 6] The only question that might arise is with respect to the consideration for the settlement. From what we have heretofore stated, it is obvious that the giving up of the consignment contract was a surrender of a legal right by defendant. But even if it were not, the consideration necessary to support a compromise need not always consist of the surrender of a claim that is necessarily legally valid and enforceable. The rule is thus stated in Bennett v. Bennett, 219 Cal. 153, 159, 25 P.2d 426, 428:

"The agreement herein involved was a compromise agreement entered into between Bennett and his wife to settle a disputed claim, and as such is binding upon the parties. 'An agreement entered into upon a *supposition of a right*, or of a *doubtful right, though it afterwards comes out that the right was on the other side*, is binding, and the right shall not prevail against the agreement of the parties, for the right must always be on the one side or the other, and therefore the compromise of a doubtful right is a sufficient foundation of an agreement.'" (Emphasis added.) See, also, Hamilton v. Oakland School Dist., 219 Cal. 322, 26 P.2d 296. Plaintiffs assert that there was no bona fide dispute between them and defendant, especially, as the relations between them were of a fiduciary character. It is apparent from the defendant's pleadings that the dispute was honest and bona fide. Defendant was claiming no more than that to which he believed he was entitled. There was nothing in the record to establish that the dispute was not in good faith, or was the result of fraud or undue influence, or was wholly groundless and known by defendant to be so.

[7] Defendants' defense may be treated as an accord and satisfaction inasmuch as the $2,000 was paid and the release given. Treated as such, it follows that as far as the pleadings show there was a bona fide dispute as to the claim for the $2,000. Whether in fact the claim was legally enforceable is immaterial. Everhardy v. Union Finance Co., 115 Cal.App. 460, 1 P.2d 1024; B. & W. Engineering Co. v. Beam, 23 Cal.App. 164, 137 P. 624. It remains for the court to determine the issue upon the evidence at a trial of the action from all the circumstances of the transaction.

Defendant contends that judgment should be directed for him because of certain statements made by plaintiffs' counsel in the course of his argument on the motion for judgment on the pleadings. We do not believe those statements were sufficient as a basis for a directed judgment. Justice will be best served by a trial of the action.

The judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and TRAYNOR, JJ., concurred.

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20 Cal.2d 202

BRUNTON, City Council Member, et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY.

L. A. 18140.

Supreme Court of California.

April 21, 1942.

1. Contempt 🔑67

The jurisdiction of a lower court to issue a final judgment of contempt may be reviewed on petition for a writ of certiorari, and the question whether the acts complained of can constitute contempt is a jurisdictional one for purpose of such review.

2. Injunction 🔑219

To hold a person guilty of "contempt" for violating an injunction, the acts constituting contempt must be clearly and specifically prohibited by the injunction, and the party bound by injunction must be able to determine from its terms what he may and may not do, and cannot be held guilty of contempt for violating an injunction that is ambiguous.

See Words and Phrases, Permanent Edition, for all other definitions of "Contempt".

3. Mines and minerals 🔑87

Findings, on which judgment enjoining the enforcement of city ordinances was based, that plaintiff flood control district in applying for a permit to drill for oil under the ordinances acted through its officers in their official capacity, and that their fees are payable for official services of the city officials, did not constitute a holding that all fees of this type were prohibited by statute providing that no political subdivision should be required to pay any fee for performance of any official service, or that the injunction was intended to prohibit the charging of any such fees under any ordinance. Pol.Code, § 4295.

4. Municipal corporations ⚿170

The statute prohibiting state, county, and township officials from performing any official services without payment of lawful fees except for the state, county, city, or other political subdivision was concerned with fees paid to state, county, and township officers and did not expressly apply to fees paid to city officers. Pol.Code, § 4295.

5. Mines and minerals ⚿87

The fee imposed by ordinance requiring payment of license fees by each person operating an oil well within the city limits, if a tax, was not a tax upon the value of property owned by applicant, but a tax upon the privilege of drilling for oil.

6. Taxation ⚿246

A "privilege tax" is not a "property tax" within the meaning of constitutional provision that property owned by a municipal corporation shall be exempt from taxation. Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Privilege Tax" and "Property Tax".

7. Injunction ⚿221

A finding on which judgment enjoining the enforcement of city ordinances was based requiring each person drilling for oil to obtain a permit that the fees required therefor were imposed for revenue as well as regulation was not sufficient to charge city officers with "notice" that all fees in the nature of the ones in question were prohibited by constitutional provision against taxing property of municipal corporations, in determining whether the refusal of city officers to issue permit required by a materially different amending ordinance without payment of fees required thereby constituted contempt. Const. art. 13, § 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice".

8. Injunction ⚿230(3)

Evidence that city ordinances requiring licenses with fees payable to the city clerk for use as part of the general fund for oil operations anywhere within the city limits were materially different from amended ordinances, the enforcement of which had been enjoined, requiring license fees for oil operations within the harbor district, payable to the harbor commissioners and becoming a part of the harbor revenue fund, showed that city officials were not guilty of "contempt" in refusing to issue permits under the amending ordinances without payment of fees required thereby.

In Bank.

Proceeding in certiorari by William J. Brunton as City Council Member, and others, to review an order of the Superior Court of Los Angeles County, Emmet H. Wilson, Judge, adjudging petitioners guilty of contempt.

Order annulled and petitioners discharged.

For prior opinions, see Cal.App., 114 P.2d 45, and 116 P.2d 643.

Irving M. Smith, City Atty., and Roy J. Brown and Frank C. Charvat, Deputy City Attys., all of Long Beach, for petitioners.

J. H. O'Connor, Co. Counsel, W. B. McKesson, Deputy Co. Counsel, and George H. Emerson, all of Los Angeles, for respondent.

TRAYNOR, Justice.

The Los Angeles County Flood Control District owns certain real property in the channel of the Los Angeles River located in the harbor district of the city of Long Beach. In 1939 the Flood Control District entered into an agreement with the Continental Corporation giving the latter the right to operate oil wells upon the property. Certain ordinances of the city of Long Beach prohibited the operation of oil wells within this area, and the officials of the city refused to issue permits or to allow the operation of oil wells on the Flood Control District's property. The Flood Control District and the Continental Corporation thereupon brought an action against the city of Long Beach and certain of its officers to enjoin the enforcement of all ordinances affecting the right of plaintiffs to drill for oil. The trial court held that those ordinances entirely prohibiting plaintiffs from drilling for oil upon the land in question were unreasonable and discriminatory and therefore invalid.

Ordinance C-1549 as amended by C-1739 and ordinance H.D. 22 as amended by H.D. 38 required each person drilling for oil in the harbor district of Long Beach to obtain a permit from the Board of Harbor Commissioners and to pay that board a seven hundred and fifty dollar "Investigation and Permit Fee" and a one hundred and fifty dollar "Annual Permit Renewal and Inspection Fee" each fiscal year thereafter. The trial court found that these fees were imposed "for revenue as well as for regulation," that any application for such a permit is made by the Flood Control District "through its officers acting in their official capacities," and that the fees are payable "for the performance of official services of the officers named in said ordinances." It concluded that the plaintiffs were entitled to obtain such permits "without the payment of any of the fees prescribed by said ordinances" and enjoined defendants from "enforcing, seeking, or threatening to enforce: * * * the provisions relating to the payment of fees * * * in * * * ordinance H.D. number 22 as amended by ordinance H.D. number 38, and ordinance C-1549 as amended by ordinance C-1739." No appeal was taken from this judgment, and it has become final. In compliance with the injunction, permits were issued to the Flood Control District without payment of the fees required by the ordinances.

In June, 1940, the city council of Long Beach passed ordinance C-1815 and ordinance C-1814, which by its terms purported to amend ordinance C-1549. At the same time the Board of Harbor Commissioners passed ordinance H.D.55, which purported to amend ordinance H.D. 22. These ordinances required the payment of license fees to the city clerk of Long Beach by each person operating an oil well at any place within the city of Long Beach. They eliminated the previous requirement for the payment of fees to the Board of Harbor Commissioners by persons operating oil wells within the harbor district of Long Beach and substituted for that requirement the duty to pay to the city clerk the uniform fees prescribed for the operation of wells throughout the city.

In January, 1941, after the enactment of the new ordinances, the Continental Corporation, on its own behalf and as agent for the Los Angeles County Flood Control District, applied to the city clerk of Long Beach and to the Board of Harbor Commissioners for a permit to operate an oil well on the property owned by the Flood Control District. Neither application was accompanied by the fees prescribed in the new ordinances, and, on the advice of the city attorney of Long Beach, the Board of Harbor Commissioners and the city clerk refused to issue the permits. The Continental Corporation, acting through its vice president, thereupon filed in the superior court an affidavit of contempt setting forth the judgment in the injunction proceeding, the passage of the amendatory ordinances, the application for the permit, and the intentional refusal of the defendants to issue the permit without the payment of fees. The court held that the members of the city council, the members of the Board of Harbor Commissioners, the city clerk, the city attorney, and the deputy city attorney had violated the injunction and were therefore guilty of contempt. Defendants have petitioned for a writ of certiorari to annul the order of the trial court holding them guilty of contempt.

[1] The jurisdiction of a lower court to issue a final judgment of contempt may be reviewed on petition for a writ of certiorari. See cases cited in 5 Cal.Jur. 955. It is settled that the question whether the acts complained of can constitute a contempt is a jurisdictional one for the purposes of such review. Mattos v. Superior Court, 30 Cal.App.2d 641, 86 P.2d 1056; Jones v. Superior Court, 88 Cal.App. 253, 262 P. 1098. See Times-Mirror Co. v. Superior Court, 15 Cal.2d 99, 98 P.2d 1029; and cases cited in 5 Cal.Jur. 918. In the present case there is no dispute as to the facts. The question is whether the trial court could justifiably hold the petitioners guilty of contempt on the basis of their acts as alleged in the affidavit of contempt and as shown by the evidence. If these acts were not sufficient to constitute a contempt, the judgment cannot stand.

[2] To hold a person guilty of contempt for violating an injunction, the acts constituting the contempt must be clearly and specifically prohibited by the terms of the injunction. Mattos v. Superior Court, supra, 30 Cal.App.2d at page 649, 86 P.2d 1056, and cases there cited; American Foundry & Mfg. Co. v. Josam Mfg. Co., 8 Cir., 79 F.2d 116, 118; City of Campbell v. Arkansas-Missouri Power Co., 8 Cir., 65 F.2d 425, 427, 428. The party bound by an injunction must be able to determine from its terms what he may and may not do; he cannot be held guilty of contempt for violating

an injunction that is uncertain or ambiguous (Ibid.), just as he may not be held guilty of violating a criminal statute that fails to give him adequate notice of the prohibited acts. See cases cited in 7 Cal.Jur. 843.

[3, 4] In the present case, therefore, the petitioners are guilty of contempt only if the acts complained of were clearly prohibited by the terms of the injunction. These acts consisted of a refusal to issue to plaintiffs a permit for the operation of an oil well without payment of the fees prescribed by the new ordinances. Respondents contend that petitioners were enjoined from attempting to collect any fees from respondents for the operation of oil wells. The injunction by its terms, however, enjoins petitioners only from attempting to collect from respondents those fees required by the old ordinances, H.D. 22 as amended by H.D. 38 and C-1549 as amended by C-1739. The findings of fact and conclusions of law do not indicate that the injunction was any broader in scope. The pertinent conclusion of law simply states that plaintiffs "are entitled to have issued any permits required by ordinances number C-1549, as amended by C-1739, H.D. number 22 as amended by H.D. number 38 * * * without the payment of any of the fees prescribed by said ordinances." The findings of fact state: "That ordinance H.D. number 22, as amended by ordinance H.D. number 38, and ordinance number C-1549, as amended by ordinance number C-1739, require applicants as defined in said ordinances to pay the fees therein provided for the issuance of the permits described in said ordinances; that the amounts paid for said fees are imposed by said city under said ordinances for revenue as well as for regulation; that if any permit is applied for by the plaintiff Los Angeles County Flood Control District under any of said ordinances for any operations to be carried on under the provisions of the drilling and operating agreement which is attached to plaintiffs' Amended and Supplemental Complaint and marked Exhibit A, said District makes such application through its officers acting in their official capacity, and the fees prescribed by said ordinances are payable for the performance of official services of the officers named in said ordinances."

Respondents contend that these findings constitute a holding by the court that all fees of this type are prohibited by section 4295 of the Political Code, which provides: "State, county and township officers shall not perform any official services unless upon the payment of such fees as are prescribed by law for the performance of such services, except * * * in the following cases: * * * (2) * * * neither the State nor any county, city and county, city, district, or other political subdivision, nor any public officer, or board or body, acting in his or its official capacity on behalf of the State, or any county, city and county, city, district or other political subdivision, shall be required to pay or deposit any fee for the filing of any document or paper, or for the performance of any official service." This section is concerned with fees paid to state, county, and township officers and does not expressly apply to fees paid to officers of cities. There is no clear and specific statement to indicate to petitioners that the court based its decision upon this section or that the injunction was intended to prohibit the charging of any such fees under any ordinance rather than just those provided for by the old ordinances.

[5-7] Respondents contend that the statement in the foregoing findings that the fees were imposed by the city "for revenue as well as regulation" indicates the court was of the opinion that under article XIII, section 1 of the California Constitution no fees for revenue purposes can be imposed by one political subdivision upon another. This section provides that all property shall be taxed in proportion to its value and "that property * * * such as may belong to the United States, this State, or to any county, city and county, or municipal corporation within this State shall be exempt from taxation * * *." If the fee required by the ordinances under consideration is a tax, however, it is not a tax upon the value of the property owned by the Flood Control District but a tax upon the privilege of drilling for oil. It is settled that a privilege tax is not a property tax within the meaning of this and other sections of the Constitution. Ingels v. Riley, 5 Cal.2d 154, 53 P.2d 939, 103 A.L.R. 1; Douglas Aircraft Co., Inc., v. Johnson, 13 Cal.2d 545, 90 P.2d 572; Kaiser Land & Fruit Co. v. Curry, 155 Cal. 638, 650-654, 103 P. 341; Los Angeles v. Los Angeles, etc., Co., 152 Cal. 765, 767, 93 P. 1006; McAdams Oil Co. v. Los Angeles, 32 Cal.App.2d 359, 89 P.2d 729; Roth Drug, Inc., v. Johnson, 13 Cal.App.2d 720, 57 P.2d 1022; see cases cited in note 103 A.L.R. 35 et seq. If the lower court was of the opinion that this constitutional provision prohibited all fees in the nature of

the ones in question it failed to give any indication sufficient to charge petitioners with notice that the injunction extended to all such fees rather than just those required by the old ordinances.

[8] It is thus clear that the injunction enjoined petitioners from collecting from plaintiffs only those fees required by the old ordinances. Petitioners, however, could not evade the injunction by the subterfuge of enacting new ordinances that did not materially differ from the old ones. Perry v. Kinnear, 42 Ill. 160, 162, 163; Ray v. Parish of Rapides, 170 La. 644, 128 So. 663; see cases cited in 32 C.J. 493, 494, § 860. Their attempt to collect fees under the new ordinances would constitute contempt of court if the new ordinances were not substantially different from the old. A comparison of the old ordinances with the new, however, reveals the following material differences: (1) The new ordinances require license fees for oil operations anywhere in the city of Long Beach whereas the old ordinances were effective only in the harbor district of the city. Thus, the old ordinances were discriminatory while the new ones are uniform in operation. (2) Under the new ordinances the fees are payable to the city clerk and become part of the general funds of the city, whereas under the old ordinances the fees were paid to the Board of Harbor Commissioners and become part of the harbor revenue fund. Since the general funds of the city enable it to furnish services such as police and fire protection, street maintenance, building inspection, and health and sanitary facilities, the fees paid under the new ordinances are used to furnish special services for the benefit of those to whom the permits are issued, whereas under the old ordinances the fees collected could be expended only by the Board of Harbor Commissioners exclusively for harbor purposes.

In view of the material differences between the new ordinances and the old, petitioners cannot be held guilty of violating an injunction that prohibited them from attempting to collect the fees required by the old ordinances. The validity of the new ordinances is not now before this court. Plaintiffs are free to test their validity by appropriate proceedings.

The order is annulled and petitioners are discharged.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and CARTER, JJ., concurred.

51 Cal.App.2d 340

PHILLIPS v. McINTOSH et al.

Civ. 6755.

District Court of Appeal, Third District, California.

April 21, 1942.

1. Trial ⚷142

It is trial court's duty to deny motion for nonsuit if there is any substantial evidence which, with aid of all legitimate inferences favorable to plaintiff, tends to establish averments of complaint.

2. Licenses ⚷39

In action for work performed and materials furnished, evidence *held* to show that plaintiff was not "employee", but "contractor", making profit on labor of others, so as to require nonsuit, in absence of proof that plaintiff had a contractor's license. St.1939, p. 3020, § 7026; p. 384, § 7031.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Contractor".

◆

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Alva L. Phillips against James C. McIntosh and others for work performed and materials furnished. From a judgment of nonsuit, plaintiff appeals.

Affirmed.

J. O. Stemmler and George M. Hench, both of Stockton, for appellant.

Lafayette J. Smallpage and Forrest E. Macomber, both of Stockton, for respondents.

TUTTLE, Justice.

Plaintiff seeks to recover the sum of $1,131.99 for work performed and materials furnished. At the close of her case, the court granted defendants' motion for nonsuit and plaintiff prosecutes this appeal from the order granting said motion.

The sole question on appeal is whether or not the evidence brings the case within the purview of section 7031 of Business and Professions Code, St.1937, p. 1229 as added by St.1939, p. 384, which reads as follows: "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

Plaintiff made no proof of compliance with said section, and relied solely upon the theory that she was not a contractor, but an employee, and hence required no license.

Section 7026 of the Business and Professions Code defines the term "contractor" as follows: "The term contractor for the purposes of this chapter is synonymous with the term 'builder' and, within the meaning of this chapter, a contractor is any person, except a licensed architect or a registered civil engineer acting solely in his professional capacity, who in any capacity other than as the employee of another with wages as the sole compensation, undertakes to or offers to undertake to or purports to have the capacity to undertake to or submits a bid to, or does himself or by or through others, construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building, highway, road, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith."

[1] It is the duty of the trial court to deny a motion for nonsuit if there is any substantial evidence which, with the aid of all legitimate inferences favorable to the plaintiff, tends to establish the averment of the complaint, or, in other words, where plaintiff's evidence would support a judgment in his favor. 9 Cal.Jur., § 36, pp. 558, 559. We will proceed to subject plaintiff's evidence to the foregoing rule.

[2] C. F. Phillips testified that he was the manager of the Phillips Heating and Plumbing Company, and as such manager, he performed the work and labor, and furnished the material as alleged in the complaint, for the defendant James C. McIntosh, doing business under the name of Electric Planing Mill. The work was done for defendant Kestin, through the Electric Planing Mill. He testified that he was the husband of plaintiff Alva L. Phillips, and was in full charge of plaintiff's business as her manager; that plaintiff personally performed no labor; that he had a conversation with defendant McIntosh, in regard to doing the work and supplying the materials mentioned in the complaint; that McIntosh told him that he wished to have some plumbing work done in a restaurant at Merced, on a time-and-material basis; that there was no bid made for the value of the labor or material, and that his only instructions were "to go down there and see the business agent, and see that it was run on a Union basis"; that all work was to be done according to instructions received from the manager of the restaurant where the work was to be done. He further testified that he paid for helper's labor the sum of $6.00 per day, while he charged defendants $8.00 for such work. To use his language: "I made a profit on it, which I was entitled to."

In regard to the materials to be used on the job, Phillips testified: "I was to use everything that he had there that I could find, and not to buy anything except what we had to have and he didn't have." There is further evidence to the effect that all the materials supplied were billed direct to defendant McIntosh, doing business under the name of "Electric Planing Mill." Phillips testified that he charged defendants 15 per cent upon all materials furnished by plaintiff, and he also charged for board and room furnished his employees.

We have set forth facts proven by plaintiff which are most favorable to her. We are of the opinion, however, that such facts do not establish a prima facie case. It is at once apparent that the only reasonable conclusion to be drawn from such evidence is that plaintiff was acting in a capacity "other than as the employee of another with wages as the sole compensation." Plaintiff made a profit upon the labor of others. She charged 15 per cent over and above the cost of materials. She performed no labor herself.

Appellants have cited numerous cases upon the question of the relation of employer and employee. We do not deem it necessary to discuss them at length as we are concerned only with the definition of a "contractor" as laid down by the legislature in the Business and Professions Code. We conclude that under the facts as adduced by plaintiff, it was necessary for her to prove that she had a contractors' license. Failing in this, she is precluded from bringing or maintaining the action.

The judgment is affirmed.

THOMPSON, Acting P. J., concurred.

51 Cal.App.2d 323

HOWTON v. HOWTON.

Civ. 11897.

District Court of Appeal, First District,
Division 1, California.
April 20, 1942.

1. Divorce 🔑211, 223

Statute authorizing court to require husband pending divorce action to pay any money "necessary" to enable wife to support herself and children and prosecute or defend the action uses the quoted word in the broadest sense, and what is necessary rests in the sound discretion of the trial court. Civ.Code, § 137.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary".

2. Divorce 🔑211, 223

The discretion vested in court by statute authorizing allowance to wife of maintenance and suit money pending divorce action must be exercised in view of the circumstances of the parties, their several necessities, and the pecuniary ability of the husband. Civ.Code, § 137.

3. Divorce 🔑211

Court did not abuse its discretion in requiring husband pending divorce action to contribute $75 per month to support of wife and three minor children, where it appeared $153 per month was needed to maintain household, including payments on loan on house, and wife earned approximately $70 per month while husband whose necessary expenses amounted to less than $100 per month had an income of over $200, and the earnings of children, one of whom was in college, were being used or saved for their education. Civ.Code, § 137.

4. Divorce 🔑215

In determining what amount husband should be required to contribute to support of wife and children pending divorce action, trial court, under statute authorizing it to make any reasonable order concerning the education of the children as might seem necessary or proper, could exclude earnings of minor children being used or saved for their education in computing amount available for maintenance of household. Civ. Code, §§ 137, 138.

5. Parent and child 🔑5(4)

Where father during the three or four months following his departure from family home contributed only $32 to support of wife and three minor children, such conduct constituted such "abandonment" as is by statute made presumptive evidence of relinquishment of right to children's earnings. Civ.Code, §§ 169, 197, 211.

See Words and Phrases, Permanent Edition, for all other definitions of "Abandonment".

6. Parent and child 🔑5(3)

Mother had a legal right to relinquish to minor children their earnings to be used by them in securing an education. Civ. Code, § 169.

7. Divorce 🔑223

The granting of suit money to the wife pending divorce action rests in the sound discretion of the trial court. Civ.Code, § 137.

8. Divorce 🔑223

Trial court did not abuse its discretion in requiring husband, pending divorce action, to pay $100 attorney's fee and $15 costs, notwithstanding statement in wife's affidavit that she had made arrangements with her attorney to pay his fees, where record disclosed that wife was entirely without funds to defray such expenses and there was a justifiable inference that arrangement referred to in affidavit was that attorney should accept court's award. Civ.Code, § 137.

◆

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Divorce action by Esther Doras Howton against Norman E. Howton. From an order directing defendant pendente lite to contribute $75 per month to the support of plaintiff and the three minor children of the parties, and pay attorney's fees and costs, defendant appeals.

Order affirmed.

Daily & Gallaudet, of Glendale, for appellant.

P. V. Davis, of Los Angeles, for respondent.

PETERS, Presiding Judge.

Defendant appeals from an order made in a divorce action whereby the defendant husband was ordered, pendente lite, to pay to the plaintiff wife $75 per month towards her support and the support of the three minor children of the parties, $100 for attorney's fees, and $15 costs.

Plaintiff filed her complaint for a divorce on November 13, 1940, charging extreme cruelty. On the same day, upon her affidavit, an order to show cause was issued to the husband directing him to appear on December 4, 1940. The defendant filed his opposing affidavit on that date. At the hearing defendant was required to, and did, pay plaintiff $50, which was used to pay taxes on the home of the parties owned by them in joint tenancy. The further hearing on the order to show cause was continued to December 20, 1940, on which date, after taking evidence, the trial court made the order appealed from.

Appellant urges that the trial court abused its discretion in awarding $75 a month to the wife for her support and the support of the three children. The contention is without merit. The evidence produced at the hearing of December 20, 1940, and the affidavits filed by the parties, show that the wife and the three minor children who, in September, 1940, were 20, 19 and 18 years of age respectively live together and that the husband has left the family home. The wife works and earns, on an average, $70 per month; the 19 year old boy, who wants to save his earnings and go to college, earns about $100 per month; the daughter, who is 18, and who has just graduated from high school, earns $8 to $9 per week, and desires to continue her education; the oldest boy is attending Cal.-Tech. where he has received a scholarship that pays him $150 per year, and where his tuition of $150 per year is borrowed from the school. The appellant, who is a sergeant in the police department, earns a little over $200 per month. The wife, in her affidavit, stated that she needs $153 a month to run the house, and, at the hearing, testified that she needed $80 to $85 in addition to her salary of $70 to properly run the house. Included within this estimate was a monthly payment on the loan on the house of $25.50 per month, and taxes and insurance of $7.50 per month. Prior to the separation it cost about $195 a month to run the house.

It is the theory of appellant that, since respondent testified that she needed but $153 to run the house, and, since her testimony showed that she and the children have a total monthly income of over $200, she has failed to show that any allowance is "necessary" within the meaning of section 137 of the Civil Code. That section provides: "When an action for divorce is pending, the court may, in its discretion, require the husband * * * to pay as alimony any money necessary to enable the wife * * * to support herself and her children * * * or to prosecute or defend the action. * * *" Section 138 of the Civil Code empowers the trial court, during the pendency of an action, to "make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper * * *."

[1-3] The term "necessary" in section 137 must be given its broadest connotation. What is "necessary" rests in the sound discretion of the trial court. Westphal v. Westphal, 122 Cal.App. 379, 10 P.2d 119; see cases collected 1 Cal.Jur.P. 964, § 19. In Turner v. Turner, 80 Cal. 141, 144, 22 P. 72, 73, it is stated that the discretion vested in the trial court is "to be exercised in view of the circumstances of the parties, their several necessities, and the pecuniary ability of the husband." See, also, Tremper v. Tremper, 39 Cal.App. 62, 177 P. 868. Tested by these standards, it is obvious that no abuse of discretion has been shown.

The wife does not have an income of $216.50 per month, as urged by the appellant. That sum is arrived at by adding to the wife's income of $70 per month, the total income of the three children, including the $12.50 per month received by the oldest boy as a scholarship. That $12.50 cannot be considered as income of the respondent for she asked nothing for this boy's tuition expenses. The money earned by the other boy ($100 per month) and the money earned by the girl ($8 to $9 per week), under a fair reading of the record, is not being received by respondent, but such earnings are being saved for the children's education.

[4] Under section 138 of the Civil Code, supra, the trial court had power to make any reasonable order concerning the education of the children "as may seem necessary or proper." The record shows that the trial judge and the wife believed that the further education of the three children was of great importance. The trial judge obviously believed, and properly so,

that the earnings of the children should be saved for their education. Thus, the facts are that the wife earns $70 and has been awarded $75, from which she must pay out $33 for the taxes and payments on the house. The husband's income is over $200 a month, while his necessary expenses, as set forth in his affidavit, including $25 per month on past due bills and a car payment of $24.73 are but $99.73.

[5, 6] Appellant urges, however, that under section 169 of the Civil Code the mother is entitled to the earnings of the children, and that therefore such earnings, as a matter of law, must be considered as part of the income of the respondent. Moreover, it is urged, no order awarding the custody of the children to the mother was made. The obvious answer to this last contention is that no such order was necessary. If it be assumed that without a formal order of custody, under section 197 of the Civil Code both parents are equally entitled to the children's earnings, then under section 211 of that code the evidence shows that both parents have relinquished such earnings to the children. Section 211 provides in part that: "Abandonment by the parent is presumptive evidence of such relinquishment." So far as appellant is concerned, the evidence shows a clear abandonment of such earnings under this section. He left the family home in September of 1940, and between that date and December 20, 1940, was so insensible of his obligations as a husband and father that he contributed but $32 to their support, and $50 for taxes—the last, under court order. So far as the respondent is concerned, her testimony clearly supports the implied finding that she has relinquished such earnings to her children so they can secure a proper education. This she had the legal right to do.

[7, 8] As to the allowance of attorney's fees and court costs it is urged by appellant first, that there was no evidence of the wife's lack of funds and inability to pay such charges, and, secondly, that in her affidavit she stated she had made arrangements with her attorney to pay such charges. It is urged that such an arrangement is a bar to such allowance. The record shows that respondent was entirely without funds. Not only did she inferentially so state in her affidavit, but she testified she had earned nothing during the summer; that in November she had but two weeks' pay, and that she had been forced to borrow $130 in order to live. While it is true that in her affidavit she stated she had personally arranged to pay her attorney's fees, there was no evidence of the terms of such agreement, and she further stated that attorney's fees of $150 are reasonably necessary; that she has paid nothing on account and that her husband is able to pay such sum. When those statements are considered with the evidence of her lack of funds it is obvious that the trial court was justified in inferring that the "arrangement," if any, between her and her attorney was that he would accept the court's award, and that she was not financially able to defray such expenses. The granting of suit money to the wife rests in the sound discretion of the trial court. 1 Cal.Jur., p. 992, § 46. No abuse of discretion here appears.

The order appealed from is affirmed.

WARD, J., and E. P. MURPHY, J. pro tem., concurred.

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51 Cal.App.2d 374

GIVENS v. MARKALL.

Civ. 6656.

District Court of Appeal, Third District, California.

April 22, 1942.

1. Evidence ⇨533

The trial judge or the jury has the exclusive province of determining amount of damages to be awarded for injury to property, and a witness may not be permitted to speculate on amount of damages which is deemed to have been sustained.

2. Damages ⇨103

There is no fixed rule relating to measure of damages for wrongful injury or destruction of property and each case must be determined on its own particular facts.

3. Damages ⇨110

Generally, measure of damages for wrongful injury or destruction of property depends on whether injury is of permanent or temporary character, and an injury is not necessarily "permanent" because it is an injury to realty.

See Words and Phrases, Permanent Edition, for all other definitions of "Permanent".

4. Damages ⚿111

The courts recognize as elements of damages for wrongful injury to property which is affixed to and a part of realty, the value after separation from the freehold, if any, of the property taken, injured or destroyed and any damage to the freehold occasioned by the severance.

5. Damages ⚿111

If property which is affixed to realty and is wrongfully injured or destroyed has a value which can be accurately measured without reference to the value of the soil on which it stands or out of which it grows, measure of damages is its value, or the cost of restoring or replacing it, where this can be done at a reasonable cost, or at a cost not disproportionate to the real injury or less than the diminution in value of the whole property.

6. Damages ⚿111

If the thing destroyed, although it is a part of the realty, has a value which can be accurately ascertained without reference to the soil on which it stands or out of which it grows, the recovery may be of the value of the thing destroyed, and not the difference in the value of the land before and after such destruction.

7. Damages ⚿111

Where defendant wrongfully removed from plaintiff's mining property machinery which was affixed to the land and was used in operation of mine, at a time when mine was not in actual operation, and after plaintiff started suit defendant returned the machinery but did not reinstall it in its proper place, the proper measure of damages was loss sustained by plaintiff by the breaking or injuring of the machinery together with reasonable cost of reinstalling it in the mine. Civ.Code, § 3333; St.1939, p. 1108, § 2601.

8. Damages ⚿138

In action for damages sustained as result of defendant's wrongful removal of machinery affixed to mining property and used in operation of mine, and failure to reinstall machinery in mine upon returning it to plaintiff, testimony of witness, who had owned and operated mining enterprises for many years and was familiar with plaintiff's mining claims and equipment, that it would cost $1,144 to replace machinery was not a mere declaration of amount of damages but was "expert testimony" of cost of labor and materials necessary to restore the machinery, and sustained judgment for plaintiff for $1,000. Civ.Code, § 3333; St.1939, p. 1108, § 2601.

See Words and Phrases, Permanent Edition, for all other definitions of "Expert Testimony".

Appeal from Superior Court, Mariposa County; Andrew R. Schottky, Judge.

Action by A. W. Givens against M. Markall for wrongfully removing from plaintiff's mining property certain machinery and equipment which was fixed to the property and used in operation of mine. From an adverse judgment, defendant appeals.

Affirmed.

C. Ray Robinson, of Merced, and Dinkelspiel & Dinkelspiel, of San Francisco, for appellant.

Louis T. Milburn, of Mariposa, and Preston, Braucht & George, of Merced, for respondent.

THOMPSON, Acting Presiding Justice.

Judgment was rendered against the defendants for damages in the sum of $1,000 for wrongfully removing from plaintiff's mining property, called the Jesus Domingues Mining Tract, in Mariposa County, certain machinery and equipment, which was affixed to the property as provided by section 2601 of the Public Resources Code of California, St.1939, p. 1108, formerly section 661 of the Civil Code, and used in the operation of the mine. The complaint asked for damages in the sum of $3,000 for the wrongful removal of the machinery. Punitive damages in the additional sum of $10,000 were also demanded. After the commencement of the action and possession of the property for four months, the defendants returned the machinery to the plaintiff's property but failed to reinstate it in the mine as it was located before the removal. The answer admitted the taking of the machinery but alleged that it was innocently purchased from a stranger to the action, whom they believed to be the owner, and that they had returned the machinery to plaintiff's mining claim.

Findings were adopted favorable to the plaintiff upon the chief issue. The demand for punitive damages was denied. Judgment was rendered against the defendants in the sum of $1,000 for the wrongful taking of the machinery and failure to restore it to the place in the mine from which it was removed. From that judgment this appeal was perfected.

The appellant contends that the findings and judgment are not supported by the evidence for the reason that there is no valid proof of detriment to the freehold. In other words, it is asserted the rule of evidence requires proof of the value of the real property before and after the removal or damage to the machinery which was deemed, by statute, to be affixed to the mining claim. It is asserted the court erred in permitting two witnesses to testify, over objections, to the amount of damages which they believed should be awarded on account of the removal of the machinery.

[1] It is true that the trial judge or the jury has the exclusive province of determining the amount of damages to be awarded for injury to property, and that a witness may not be permitted to speculate on the amount of damages which is deemed to have been sustained. Miller & Lux, Inc., v. Pinelli, 84 Cal.App. 42, 50, 257 P. 573.

We are of the opinion the evidence adequately sustained the findings and judgment in this case regardless of whether the rule, under the circumstances which existed in this case, required proof of damages to the real property by showing its value before and after the removal of the mining machinery, or whether the injury to the machinery and the detriment on account of its removal from the mining claim and failure to restore it to its proper place may be shown separately from the value of the real property, with and without the machinery.

Mr. A. W. Givens, the owner of the mining claim and property which are involved in this action, testified that he had bought and sold mining machinery for many years, and that he knew the value of the property. Regarding the value of the property, he was asked this question:

"Q. What would you say the value of the Domingues claim was before the machinery was taken, the machinery and equipment and buildings were still on the Domingues claim early in December, 1939?"

To which he replied:

"A. Why, I believe that as near as I can figure up, it would be worth around $3,000 to the property to have the machinery on there."

On motion that answer was stricken from the record on the ground that it was not responsive. He was then asked:

"What, in your opinion, was the value of the property after the removal of the machinery and equipment in December of 1939, what difference, if any, would you consider the removal had made in the market value of the Domingues claim?"

To which he replied:

"A. Well, I believe it will make a difference of about $3,000, as near as I can estimate."

Mr. James W. Warford was then called to establish the value of the property. He testified that, for many years, he had owned and operated mining enterprises; that he had bought and sold mining machinery and equipment, and that he was familiar with plaintiff's mining claims and equipment since 1929 or 1930, and knew their values. He said he had visited the mines in August, 1940, and knew the condition of the machinery and equipment. He was then asked the following question:

"Q. Now what, in your opinion, resulting from your examination of this property, would be the difference in the market value of the Jesus Domingues tract, immediately before the machinery was removed and immediately after it was removed?"

To this question he replied:

"A. The difference would be the value of that equipment plus its installation value amounting—* * * That amount is $2,990.25."

He was then asked:

"Q. How much would it cost to put that machinery back in the same condition it was when you saw it in 1939?"

To which he answered:

"A. I estimate the cost to be $1,144 and a few cents."

Both witnesses were elaborately cross-examined by the appellant. He had every opportunity to ascertain the knowledge of the witnesses regarding the value of the mining claim with and without the machinery attached thereto, both before and after the wrongful removal of the equipment. In a proper suit for permanent damages to a freehold, the reason for the rule which ordinarily requires the measure of damages to be shown by proof of the value of the property before and after the commission of the acts complained of, is that the jury may determine, by subtracting one valuation from the other, what the amount of actual damages may be. In the present case that result is exactly what the testimony of Mr. Givens, the owner, amounts to. In effect he said that the difference in the market value of the mining claim before and after the removal of the machinery, in his opinion, was about $3,000. To the same effect, Mr. Warford testified that the difference between the value of the mining claim before and after the removal of the machinery was the market value of the machinery and equipment, plus the cost of replacing or installing it in its proper position in the mine, which difference in value he fixed at $2,990.25. He further testified that it would cost $1,144 to restore that machinery to the same condition it was before it was removed by the defendants from the mining property. The damages which were awarded amounted to only $1,000. That is less than the stated cost of restoring the machinery to its former condition and place. The foregoing evidence adequately supports the findings and judgment in that regard.

It should be recalled that the issues of this case were changed entirely by the allegations of the answer and by the actual return of the machinery to the mining property, although it was not installed in its proper place. While the complaint did sue for damages to the freehold, the answer and the subsequent actual return of the machinery left the issue only as to what damages were sustained by the plaintiff on account of the removal of the machinery and the damage thereto, plus the detriment sustained for failure to reinstall the machinery in the mine. The suit was tried on the theory that the defendants were entitled to credit for having returned the machinery to plaintiff's claim, but that he was still entitled to damages for injury and detriment to the machinery and equipment, and for failure to reinstate it in the position in the mine from which it had been wrongfully removed. The court found that the plaintiff sustained damages on account of the wrongful acts of the defendants, in the sum of $1,000. Warford's testimony that it would cost $1,144 to "put that machinery back in the same condition" that it was before its removal is sufficient evidence to support the award of the court.

[2] There is no fixed rule with respect to the measure of damages for the wrongful injury or destruction of property. Each case must be determined on its particular facts. It is said in 15 American Jurisprudence, page 514, section 106, in that regard:

"There is no fixed rule for determining the measure of damages for injuries to, or destruction of, property in every case. The amount to be awarded depends upon the character of the property and the nature and extent of the injury, and the mode and amount of proof must be adapted to the facts of each case. In ascertaining the damages to be allowed, the jury may consider all the circumstances connected with the injury."

[3-5] In the last-cited authority, at page 515, section 107, it is further said:

"One whose real property is injured by another's wrongful and negligent act is entitled to such damages as will compensate him for the injury or loss sustained. No hard and fast rule can be laid down, however, for the measurement of those damages; whatever rule is best suited to determine the amount of the loss in the particular case should be adopted. Usually the measure of damages depends upon whether the injury is permanent or temporary in character, an injury not being necessarily permanent because it is to real estate." In discussing the rule for establishing the measure of damages for wrongful injury to property which is affixed to and a part of real estate, it is said at page 521 of the authority last cited that courts recognize two elements of damages under such circumstances: (1) "The value after separation from the freehold, if any, of the thing taken, injured or destroyed, and (2) the damage to the realty, if any, occasioned by the severance." It is further said, in that same paragraph, regarding the measure of damages:

"If the thing destroyed or injured has a value which can be accurately measured without reference to the value of the soil on which it stands or out of which it grows, the measure of damages is its value

* * * or the cost of restoring or replacing it, where this can be done at a reasonable cost, or at a cost not disproportionate to the real injury, or less than the diminution in value of the whole property."

Again, it is said at page 526 of the authority last cited, regarding the measure of damages for injury to fixtures:

"The weight of authority seems to favor the rule that the measure of damages for the wrongful removal or destruction of fixtures is the value of the fixtures in their condition at the time of their removal or destruction—that is, their replacement value, or their value in place, and not their secondhand value, or their value when taken down for removal, or the difference in the value of the real property before and after their removal. But there is authority to the effect that the proper measure of damages is the cost of restoring the property to its original condition or its diminished value. In fixing the damages, the extent of the depreciation of the fixtures, if any, as well as the original cost and cost of replacement, should be taken into consideration, but if the property removed is as good as new, depreciation will not be deemed important nor will computation to a nicety be made for the difference in value between the old and the new."

[6] To the same effect is the text which is found in Volume IV, Sutherland on Damages, 3rd edition, page 2967, section 1015, where it is said:

"If the thing destroyed, although it is part of the realty, has a value which can be accurately ascertained without reference to the soil on which it stands or out of which it grows, the recovery may be of the value of the thing thus destroyed, and not the difference in the value of the land before and after such destruction."

In accordance with the principle of ascertaining the measure of damages by receiving proof of the value of the fixtures at the time of their wrongful removal, independently of the value of the real property to which they were previously affixed, at least two California cases have held that it constitutes a proper measure of damages to prove the market value of the fixtures at the time of their removal, separate and apart from the value of the real property. Rhoda v. Alameda County, 58 Cal. 357; Greenebaum v. Taylor, 102 Cal. 624, 36 P. 957.

Section 3333 of the Civil Code provides that: "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

[7, 8] In the present case, since the mine was not in actual operation at the time of the wrongful removal of the machinery and equipment, and since the machinery was returned to the property of the plaintiff after the suit was commenced, but not reinstalled in its proper place, we are satisfied the correct measure of damages was the loss sustained by the plaintiff by breaking or injuring the machinery and equipment, together with the reasonable cost of reinstating it in the mine in the same condition and place it occupied at the time of its wrongful removal. Mr. Warford's testimony that it would cost $1,144 to replace it in the mine where it belonged, in the same condition that it was before the removal of the machinery and equipment, supports the judgment with respect to the amount of damages. This statement is not a mere declaration of the amount of damages. It is expert evidence of the cost of labor and materials necessary to restore and install the machinery in the mine in the same condition and place it occupied before its removal.

The judgment is affirmed.

STEEL, J., pro tem., and TUTTLE, J., concurred.

51 Cal.App.2d 307

WOODS v. WALKER et al.

Civ. 12084.

District Court of Appeal, First District,
Division 2, California.

April 17, 1942.

Rehearing Denied May 16, 1942.

Hearing Denied June 16, 1942.

1. Automobiles 🔑244(14, 36)

Evidence that defendant's truck was stopped without lights at least partially on paved portion of highway, that it could have been driven entirely off pavement, that plaintiff motorist saw defendant truck driver waving flashlight but did not see unlighted truck, and that plaintiff thought it was a "hold-up" and struck truck in attempt to get around defendant truck driver, justified jury's finding that driver and owner of truck were chargeable with negligence proximately causing the collision. Vehicle Code, §§ 582, 584, St.1935, pp. 190, 191.

2. Automobiles 🔑245(17)

In motorist's action for injuries sustained when he struck unlighted truck parked on paved portion of highway, whether it would have been practicable to park truck off paved portion of highway was for jury. Vehicle Code, §§ 582, 584, St.1935, pp. 190, 191.

3. Automobiles 🔑245(17)

Where lights of truck went out and truck was parked at least partially on paved portion of highway for changing of fuse, whether the truck was "disabled" to such an extent as to make it impossible to avoid stopping on paved portion of highway was for jury in motorist's action for injuries sustained when he struck the truck. Vehicle Code, §§ 582, 584, St.1935, pp. 190, 191.

See Words and Phrases, Permanent Edition, for all other definitions of "Disabled".

4. Automobiles 🔑242(1)

Where lights of truck went out and truck was parked at least partially on paved portion of highway while new fuse was being put in truck, burden of proof was on defendant's truck driver and owner to prove defense that it was impracticable or impossible to avoid stopping on paved portion of highway, in motorist's action for injuries sustained in collision with truck. Vehicle Code, §§ 582, 584, St.1935, pp. 190, 191.

5. Automobiles 🔑245(83)

Under evidence that defendant's truck was stopped without lights at least partially on paved portion of highway, that it could have been driven entirely off pavement, that plaintiff motorist saw defendant truck driver waving flashlight but did not see unlighted truck, and that plaintiff thought it was a "hold-up" and struck truck in attempt to get around defendant truck driver, whether plaintiff motorist was contributorily negligent was for the jury. Vehicle Code, §§ 582, 584, St.1935, pp. 190, 191.

◆

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Personal injury action by Walter Woods against Eugene Walker and another. From an order denying their motion for judgment notwithstanding the verdict, defendants appeal.

Affirmed.

T. L. Chamberlain and Gerald Beatty Wallace, both of Auburn, for appellants.

Chas. J. Janigian and Jas. F. Brennan, both of San Francisco, and Chas. A. Tuttle, of Auburn, for respondent.

SPENCE, Justice.

This is an appeal by defendant Eugene Walker and defendant Kenneth Lee, his employee, from an order of the trial court denying their motion for judgment notwithstanding the verdict.

Plaintiff sought damages for personal injuries sustained in an automobile accident. The jury returned a verdict in favor of plaintiff and against said defendants in the sum of $5,200. Said defendants had previously made a motion for a directed verdict which was denied and, following the verdict, they made a motion for judgment notwithstanding the verdict which was likewise denied. In support of said motions, said defendants contended that the evidence was insufficient to show negligence on the part of the defendants and that the evidence affirmatively showed that plaintiff was chargeable with contributory negligence as a matter of law. The same contentions are presented on this appeal.

The accident occurred on the transcontinental highway known as U. S. Highway No. 40. Plaintiff was driving a Dodge truck in a general westerly direction along said highway at about 11 p. m. on the night of July 11, 1939, proceeding from Truckee toward Auburn. The collision took place at a point about one-half mile west of the Pioneer Garage, at which point plaintiff's truck collided with the truck of defendants which was admittedly parked without lights at least partially on the paved portion of the highway.

The photographs in evidence clearly show the nature of the highway and the adjacent terrain near the point of collision. Said photographs show a straight portion of a typical mountain highway running through a long but shallow cut with banks gradually sloping upward from the sides to a height of about 15 feet. The main traveled portion of the highway is well paved with a white line running down the center thereof. The testimony shows that each side of the paved portion of the highway is 11 feet 8 inches in width. On either side of the paved portion is a shoulder of small rock and dirt which slopes very gradually downward to a small ditch or drain, approximately 6 inches in depth, at the foot of the sloping bank. The distance from the edge of the paved portion of the highway to the bank is 6 feet 4 inches.

The testimony offered by defendants shows that defendant Lee had been operating a Ford truck, loaded with beehives, in a general westerly direction on said highway when the lights of said truck went out. Said defendant stopped said truck but there is some conflict in the evidence as to the exact position at which said truck was brought to a stop. Said defendant conceded that there was "about a foot and a half" of the truck on the paved portion of the highway, stating that he did not drive further off the paved portion as "there is a little ditch there." There is other evidence, however, tending to show that defendants' truck was entirely or practically entirely on the paved portion of the highway and that it would have been practicable to have driven said truck to a position where it would have been entirely off the paved portion of the highway.

After stopping the truck, a man working with defendant Lee started to take out a fuse and to put in a new one. Defendant Lee testified that he looked into the rear view mirror and saw the lights of an automobile coming down the hill from behind. He stated that he had no time to put out flares, with which the truck was equipped, but he jumped out of the truck and flashed his flashlight in an attempt to wave the driver of the approaching car around the truck. Plaintiff, a man 68 years of age, saw that someone was waving a flashlight in the middle of the road when his truck was about 85 to 100 feet away. He also saw that the person waving the flashlight was moving across the road toward the bank. Plaintiff did not see the unlighted truck and he "thought it was a hold-up." He "got all excited" and swerved his "car out to get around him to get away from him" and struck a portion of the rear of the truck while traveling at about 30 miles per hour. Plaintiff's car went out of control and ran over to the opposite bank of the road and stopped.

[1-4] We are of the opinion that there was ample evidence to justify the jury in concluding that defendants were chargeable with negligence proximately causing the collision. Defendants first claim that it was not "practicable" for them to have stopped their truck off the paved portion of the highway (Vehicle Code, § 582, St. 1935, p. 190), but under the evidence that question was one of fact for the determination of the jury. Defendants further claim that section 584 of the Vehicle Code relieved them of the restrictions provided in section 582 of the Vehicle Code. Said section 584 relates only to a vehicle which is "disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle upon such part or portion of said highway." The most that can be said is that the question of whether said vehicle was disabled to such extent as to make it impossible to avoid stopping on the paved portion of the highway was, under the evidence presented, also a question of fact for the determination of the jury. It has been held that under these circumstances the burden of proof was on defendants to prove the impracticability or the impossibility. Casey v. Gritsch, 1 Cal.App.2d 206, 36 P.2d 696. And further, it may be added that aside from any consideration of the specific provisions of the Vehicle Code, it was for the jury to determine whether defendant Lee had done all that a reasonably prudent man would have done under the same or similar circumstances to protect other vehicles approaching along said heavily traveled highway.

[5] We are further of the opinion that the question of whether plaintiff was chargeable with contributory negligence was likewise a question of fact for the jury. It may not be said that plaintiff was guilty of contributory negligence as a matter of law merely because he failed to see the unlighted truck on the highway in time to avoid the collision. Hall v. Associated Oil Co., 19 Cal.App.2d 491, 65 P.2d 954; Scoville v. Keglor, 27 Cal.App.2d 17, 80 P.2d 162; Gammon v. Wales, 115 Cal.App. 133, 300 P. 988; Sawdey v. Producers' Milk Co., 107 Cal.App. 467, 290 P. 684; Grimes v. Richfield Oil Co., 106 Cal.App. 416, 289 P. 245. See, also, Casey v. Gritsch, supra.

The order appealed from is affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

51 Cal.App.2d 393

LORENZ v. SANTA MONICA CITY HIGH SCHOOL DIST. et al.

Civ. 13230.

District Court of Appeal, Second District, Division 1, California.

April 24, 1942.

Hearing Denied June 22, 1942.

1. Negligence 🔑44

Wax or soap if applied to a floor must be so applied as to afford a reasonably safe condition for invitees, and if wax or soap compounds cannot be used on a particular type of floor material without violating duty to exercise ordinary care for safety of invitees by reason of dangerous conditions created, they should not be used at all.

2. Negligence 🔑44, 136(22)

That a floor is slippery does not necessarily mean that it is dangerous to walk upon, as respects liability to an invitee for injuries, but it is the degree of slipperiness which determines whether the condition is reasonably safe and that is a fact question.

3. Appeal and error 🔑1011(1)

Trial judge's fact findings based on conflicting evidence are binding on reviewing court.

4. Schools and school districts 🔑122

In action against school districts for injuries sustained when plaintiff slipped and fell on floor of foyer leading to school auditorium where she went to attend an educational lecture, negligence of districts with respect to waxing floor and slipperiness of floor was for the jury under the evidence. School Code, § 2.801.

5. Appeal and error 🔑197(3)

In personal injury action against school districts, fact that copy of plaintiff's claim was attached to complaint and admitted in districts' answer, districts' failure to object to introduction of evidence on ground of variance, and fact that districts introduced controverting evidence, showed that districts were not misled, and hence they could not contend on appeal that there was a fatal variance between claim, allegations, and evidence. School Code, § 2.801.

6. Pleading 🔑398

A variance between the allegations of a complaint and the evidence introduced must have misled or served to mislead the adverse party to be a "fatal variance".

See Words and Phrases, Permanent Edition, for all other definitions of "Fatal Variance".

7. Schools and school districts 🔑89

Where there was no dispute that slippery condition of school floor on which plaintiff slipped and fell when going to attend educational lecture in school auditorium had been created by defendant school districts or their employees acting within scope of employment, knowledge of condition was imputed to districts as a matter of law, and trial court did not err in refusing to give instruction requiring districts to have knowledge of condition. School Code, § 2.801.

8. Negligence 🔑48

Where dangerous or defective condition of property which causes injury to an invitee has been created by negligence of owner or his employee acting within scope of employment, knowledge of condition is imputed to owner, and he cannot assert that he had no notice or knowledge thereof.

9. Negligence ⚿48

Where dangerous condition of premises is brought about by natural wear and tear, third persons, acts of God, or other causes not due to negligence of owner or his employees, owner must have actual or constructive knowledge of condition and have been able by exercise of ordinary care to discover condition in order to be liable for resulting injuries to invitees on ground of failure to exercise ordinary care in remedying defect.

10. Trial ⚿260(8)

Where trial court gave several special instructions and a general instruction defining contributory negligence and explaining rule applicable thereto, and instructions given charged jury fully and impartially on all questions of law appertaining to issues presented, trial court did not err in refusing to give a particular instruction on contributory negligence.

11. Schools and school districts ⚿121

In action against school districts for injuries sustained when plaintiff slipped and fell on floor of foyer leading to school auditorium where she went to attend an educational lecture, evidence was sufficient to support jury's implied finding that plaintiff was not contributorily negligent. School Code, § 2.801.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Margaret Lorenz against Santa Monica City High School District and others for personal injuries. From a judgment for plaintiff, defendants appeal. Affirmed.

Tripp, Penney & Callaway, of Los Angeles, for appellants.

Keane & Collins and Betts & Garrison, all of Los Angeles, for respondent.

YORK, Presiding Justice.

Respondent brought the instant action for damages on account of personal injuries sustained by her when she slipped and fell on the floor of a foyer leading to a school auditorium where she went to attend the second of a series of educational lectures being conducted by appellant school districts under the sponsorship of the Santa Monica Council of Parent-Teachers.

This appeal is prosecuted from the judgment entered pursuant to the verdict of the jury in favor of respondent, upon the following grounds:

1. The evidence fails to establish any negligence on the part of appellants;
2. There is a fatal variance between the claim filed with the appellants, the allegations of the complaint and the evidence adduced at the trial;
3. The court erred in refusing to give certain instructions requested by appellants.
4. The court erred in denying appellants' motion for nonsuit.

On the evening of September 26, 1939, the respondent, a woman sixty-six years of age, entered the foyer of the auditorium of the Lincoln Junior High School at Santa Monica on her way to attend the lecture above referred to, it being her first visit to the school auditorium. In order to gain access to the auditorium by the use of the main entrance to the building, it was necessary to pass through the double doors of said main entrance, proceed across the concrete floor of the foyer and then into the auditorium through an inner doorway. Respondent, accompanied by two other women, stepped through the main entrance into the foyer with her left foot, and as she brought her right foot forward, she slipped and fell to the floor, sustaining a broken hip, technically described as a "transverse fracture of the cervical neck of the right femur * * * comminuted fracture, impacted, jammed and fixed." Respondent testified that while lying on the floor after she fell she noticed for the first time that the floor was very "slippery"; had a very "shiny" appearance.

Mrs. Moffit, president of the Santa Monica Council of Parent-Teachers, testified she had observed the floor in the foyer a week previous to the night in question and found it to be very dull and dusty, whereas on the night of the accident it was very shiny and slick and that "I slipped slightly, but I caught myself and I slipped more than once."

Mrs. Drake, chairman of the mental and social hygiene section of the Parent-Teachers' Association, testified with respect to the condition of the floor on the night of September 26, 1939, that "it was very much cleaned up and waxed and very slick"; that other people beside respondent slipped on the floor that evening. This witness also testified that this floor was very dirty and dusty the week before and that she complained to a Mr. Graybill regarding such condition, and that it appeared to her that the floor had been waxed between the night of the first lecture and the night of the accident in question.

Mrs. Bangs, who entered the foyer just ahead of respondent, testified that she slipped when she got inside the entrance; that she did not fall, but was very badly overbalanced; that she looked at the floor and found "a film or a slippery surface—very slippery"; that she assumed the floor had been waxed, as it was very shiny and slippery.

Mrs. Burness, co-chairman with Mrs. Drake of the lecture series, testified that she was in and out of the foyer during the evening; that she did not walk across the foyer, having entered through the east door instead of the main entrance; that she was stationed just inside the door of the auditorium distributing pamphlets; that she observed the floor in the foyer and it looked "slippery" and she saw skid marks on it, a heel mark about a foot or more long; that the floor looked as though it had been polished because of its high gloss; that she had waxed floors in her home and could tell when she looked at the floor in the foyer that it had been waxed.

Mrs. McIlvaine testified she observed the floor in the foyer on the evening in question and that it was "slick and shiny"; that the floor was dusty and dirty the week before; that it did not appear to be waxed at that time because it was not slippery to her feet.

The school employees testified that a wax preparation was last applied to the floor of the foyer on September 6, 1939; the floor was first scrubbed with hot water and liquid soap, rinsed with fresh water and allowed to dry; that one part wax was mixed with two parts of water; that a mop was dipped in the mixture, squeezed dry and applied to the floor. It was stipulated that the preparation used was known as Turco X'ol, and that the floor of the foyer was a painted concrete floor.

Jacob C. Eymann, who was called as an expert, in answer to a question put to him by counsel for appellants, to wit: "I just want you to tell me what the difference in the surface would be after the wax was applied when you put it on a linoleum floor and on a concrete floor?" testified as follows: "On a linoleum floor, being it is porous, we apply the wax and burnish it into the linoleum in order not to lay on the surface. On the painted floor the surface is all sealed with paint and therefore the wax lays on the surface." This witness was asked by counsel for respondent: "What is the difference, Mr. Eymann, in the waxing of a porous floor and the waxing of a painted concrete floor? A. On a porous floor your wax naturally goes into the pores of the floor; whereas, on the painted floor it lies on top.

"Q. What is the effect of that? What happens to the wax on the concrete floor? A. It makes it slippery on a painted floor.

"Q. How do you explain that? What actually happens to the wax itself? A. The wax lays on top of a painted floor, on the surface of it, and just creates a film there, or lies there in a film and just makes it slippery." Said witness was then asked: "In your opinion is it an improper practice to wax a painted concrete floor?" to which he replied: "Definitely so." However, such answer was stricken and the court sustained appellants' objection thereto on the ground that it was not "a subject for expert testimony at best."

Philip Perrault, also called as an expert, testified: "And the difference with concrete painted, the concrete wax floor compared with other floors is the concrete being painted and sealed, the wax stays on the surface. The floor will look just as nice as a waxed and polished linoleum floor, but the difference is that the wax remains on the surface and causes the floor to be slippery and that is why I do not recommend it. * * *

"Q. What we want to know is what is the practical effect of applying wax on the one hand to concrete floors and on the other hand to linoleum and hardwood. Just tell us what happens to the wax and why? A. Well, the hardwood and concrete, the wax does not penetrate as it does on linoleum, especially if both the concrete and the wood has a varnish or painted finish * * *

"Q. (On cross-examination.) So actually there is just as much adherence to the surface of the floor in painted concrete as there is in linoleum or hardwood, is there not? A. No, there is not. Linoleum is softer where concrete is hard and brittle. * * *

"Q. I understood you on your direct testimony to say that the reason for the fact that the painted concrete surface was less abrasive than the hardwood or the linoleum, was because of the fact that the wax went down into the pores and hence adhered more to such a surface, is that right? A. Yes, that is true." On redirect examination, this witness was asked: "What is the nature of the surface, Mr. Perrault, of concrete, as compared with linoleum?" His reply follows: "Well, the difference is that the wax remains on the surface, whereas on linoleum there would be such a small amount of film on the surface that you would not get the wear that you would on the harder surface * * *. On the concrete or other sealed or hard surfaced floors, you would not get as much traction as you would on linoleum."

It is shown by the testimony of the superintendent of maintenance for the school that the said foyer floor had been waxed for a period of six or seven years prior to the accident; that he had never heard of anyone slipping on said floor during this time. This witness also testified that from the 11th of September to the date of the accident, he estimated that at least 15,000 children passed up and down the foyer on their way to the auditorium. However, this witness also testified that the school children passing through the foyer did not use the main entrance (just inside of which the accident here occurred), but used the east door, and that the main entrance was kept locked during the week. In answer to the question "When children come in the side entrance and walk into the auditorium through these doors (referring to the side entrance) they have no occasion to walk over here in front of this door (the main entrance) do they?" this witness replied: "Not directly through it, but in passing they crowd close to the door when they walk through there, but they do not walk through the door."

In connection with their contention that the evidence (of which the above recital is a brief résumé) fails to establish any negligence on their part, appellants present for determination the question, "Is it negligence merely to wax a floor" using a properly prepared and applied wax mixture? and cite many cases from foreign jurisdictions, among which appear the cases of Bonawitt v. Sisters of Charity of St. Vincent's Hospital, 43 Ohio App. 347, 182 N.E. 661, and Smith v. Union & New Haven Trust Co., 121 Conn. 369, 185 A. 81. Respondent counters with the statement: "The principal issue in the instant case was whether or not it was proper to apply wax of any kind to the particular type of floor in question."

Appellants' contention is apparently disposed of by the following language appearing in the case of Nicola v. Pacific G. & E. Co., 50 Cal.App.2d 612, 123 P.2d 529, 530, recently decided by Second District, Division Three of this court:

"Appellants' argument goes further to assail the finding that the floor was maintained by defendants in a negligent manner, and they rely upon a rule, which has been followed by some courts in other jurisdictions, that the duty of an owner to exercise ordinary care is not violated by merely oiling or waxing and polishing a floor in the usual way although the floor is rendered slippery thereby. Bonawitt v. Sisters of Charity of St. Vincent's Hospital, 1932, 43 Ohio App. 347, 182 N.E. 661; Smith v. Union & New Haven Trust Co., 1936, 121 Conn. 369, 185 A. 81. This is contrary to the settled law as announced by our own courts.

[1-3] "In Rothschild v. Fourth and Market St. R. Co., 1934, 139 Cal.App. 625, 628, 34 P.2d 734, it was held that evidence that a floor of a hallway maintained by the owner of a building for use by invitees of tenants of the building had been rendered slippery by the application of wax was sufficient to support a finding of negligence. This decision was in accord with those in Williamson v. Hardy, 1920, 47 Cal.App. 377, 190 P. 646; Lamb v. Purity Stores, Inc., 1932, 119 Cal.App. 690, 7 P.2d 197; Brinkworth v. Sam Seelig Co., 1921, 51 Cal. App. 668, 197 P. 427; and Brown v. Holzwasser, Inc., 1930, 108 Cal.App. 483, 291 P. 661. It has been followed in principle in Winsby v. Kertell, 1935, 10 Cal.App.2d 61, 50 P.2d 1075; De Verdi v. Weiss, 1936, 16 Cal.App.2d 439, 60 P.2d 879; Tuttle v. Crawford, 1936, 8 Cal.2d 126, 63 P.2d 1128, and Stoddard v. Roberts Public Markets, Inc., 1938, 27 Cal.App.2d 166, 80 P.2d 519. The right of a proprietor of a place of business to wax a floor which the customers are expected to use is not one which upon any reasonable theory can be held to be superior to his duty to use ordinary prudence and caution to avoid injury to those who come to his premises by invitation. If wax or, as in the present case, both wax and soft soap, are applied to the floor, it must be in such manner as to afford reasonably safe conditions for the proprietor's

invitees, and if such compounds cannot be used on a particular type of floor material without violation of the duty to exercise ordinary care for the safety of invitees, by reason of the dangerous conditions they create, they should not be used at all. Of course slipperiness is an elastic term. From the fact that a floor is slippery it does not necessarily result that it is dangerous to walk upon. It is the degree of slipperiness that determines whether the condition is reasonably safe. This is a question of fact. The trial judge could well have believed from the evidence that the surface of the floor was sufficiently hard and smooth to become unsafe with the application of wax or soft soap and water as they were used by appellants. In fact, if full credence was given to the testimony of plaintiff and her witnesses, and if it was believed that they had slipped and in some instances had fallen while walking across the floor in a careful manner, the trial judge could scarcely have believed that the floor was maintained in a wholly safe condition. And if the condition was as described by these witnesses it was for the trial judge to determine, as a fact, whether the condition was one which afforded reasonable safety to defendants' patrons or, in other words, whether defendants had exercised ordinary care with respect to the condition of the floor. Perhaps it would have been an entirely justifiable conclusion that the floor, although slippery, was reasonably safe for public use or that defendants used ordinary care with respect to its condition, but those questions of fact have been decided to the contrary upon substantial evidence, and we could not, even if we were so inclined, substitute our judgment for that of the trial judge. (See cases cited above.)" See, also, Hatfield v. Levy Bros., 18 Cal.2d 798, 117 P.2d 841.

[4] Likewise in the instant case, the jury decided these questions of fact against appellants' contentions upon substantial evidence.

As to appellants' claim that there was a fatal variance between the claim, the allegations of the complaint and the evidence, respondent's action is based upon section 2.801 of the School Code fixing liability of school boards for injuries arising out of the negligence of their officers or employees, providing that claim for damages shall have been presented within ninety days after the accident occurred specifying the "name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received."

The claim (a copy of which is attached to the complaint, made a part thereof and "marked 'Exhibit A' with the same force and effect as if fully set forth herein") was filed with the proper officer on account of personal injuries sustained by respondent through the claimed negligence of appellants "in negligently and carelessly failing to properly inspect, and negligently and carelessly owning, maintaining and permitting to exist a dangerous and defective condition in said auditorium, in that the floor at the main entrance thereof was so highly waxed and polished as to cause the claimant, immediately upon entering said auditorium to slip and fall," etc.

The complaint alleged that appellants "owned, operated and maintained the auditorium of the said Lincoln Junior High School in such a careless and negligent manner that they carelessly and negligently caused or carelessly and negligently permitted the concrete floor in the main entrance of said auditorium to be so highly waxed and polished that it was, at said time and place, extremely slippery; that by reason of the extremely slippery condition of said floor, plaintiff, immediately upon entering the said auditorium and stepping upon said floor, slipped and fell thereon receiving serious personal injuries."

The evidence produced tended not only to prove that the floor was so highly waxed and polished as to render it slippery, but that said floor was maintained in so dangerous and defective a condition that appellants' failure to properly inspect it could very readily be inferred therefrom.

[5, 6] The fact that a copy of the claim was attached to the complaint and admitted in appellants' answer, as well as appellants' failure to object to the introduction of evidence at the trial upon the stated ground of variance, point to the conclusion that appellants were not misled, and "a variance to be fatal must have misled or served to mislead the adverse party." Short v. Orland Oil Syndicate, 29 Cal.App.2d 326, 329, 84 P.2d 324, 325, citing Holden v. Mensinger, 175 Cal. 300, 165 P. 950. Further, the fact that appellants introduced evidence controverting the claims of respondent, in part at least, and succeeded in obtaining a judgment substantially less than claimed is sufficient to show that appellants were not taken unawares.

Appellants complain of error committed by the trial court's refusal to give five instructions requested by them. The first three of these are disposed of by the discussion in this opinion of appellants' question: "Is it negligence merely to wax a floor" using properly prepared and applied wax mixture?

The fourth instruction which the court refused to give reads as follows: "The owner of premises cannot be guilty of negligence where he does not know of any unreasonably dangerous condition thereon, and if he is not charged with such knowledge as an ordinary reasonable person. Unless you find by a preponderance of the evidence, therefore, not only that there was here such a dangerous condition as to create an unreasonable danger of bodily injury, but also that the defendant actually knew or as an ordinary reasonable person should have known that there was an unreasonable danger to persons using due care for their own safety, then you must find in favor of the defendants and against the plaintiff."

[7-9] There was no dispute that the slippery condition of the floor had been created by appellants or their employees, acting within the scope of their employment. This being so, knowledge of the condition was imputed to the appellants as a matter of law. This rule of law is set out in the recent case of Hatfield v. Levy Bros., supra, 18 Cal.2d at page 806, 117 P.2d at page 845 in the following words: "Where the dangerous or defective condition of the property which causes the injury has been created by reason of the negligence of the owner of the property or his employee acting within the scope of the employment, the owner of the property cannot be permitted to assert that he had no notice or knowledge of the defective or dangerous condition in an action by an invitee for injuries suffered by reason of the dangerous condition. Under such circumstances knowledge thereof is imputed to him. Saunders v. A. M. Williams & Co., 155 Or. 1, 62 P.2d 260. Where the dangerous condition is brought about by natural wear and tear, or third persons, or acts of God or by other causes which are not due to the negligence of the owner, or his employees, then to impose liability the owner must have either actual or constructive knowledge of the dangerous condition or have been able by the exercise of ordinary care to discover the condition, which if known to him, he should realize as involving an unreasonable risk to invitees on his premises. His negligence in such cases is founded upon his failure to exercise ordinary care in remedying the defect after he has discovered it or as a man of ordinary prudence should have discovered it."

[10] The fifth instruction refused by the court involved the issue of contributory negligence. In addition to several special instructions, the court gave a general instruction defining the meaning of "contributory negligence" and explaining the rule applicable thereto. An examination of the instructions given by the court reveals that the jury was fully and impartially instructed on all questions of law appertaining to the issues presented by the evidence and the pleadings in the instant cause, and that no error was committed by the trial court in refusing to give the requested instructions hereinbefore referred to.

[11] The court did not err in denying appellants' motion for a nonsuit. There is sufficient substantial evidence in the record to support the jury's finding of negligence on the part of appellants, as well as its implied finding that there was no contributory negligence on the part of respondent.

For the reasons stated, the judgment appealed from is affirmed.

DORAN, and WHITE, JJ., concurred.

51 Cal.App.2d 403

CALLISON v. DONDERO.

Civ. 6751.

District Court of Appeal, Third District, California.

April 24, 1942.

1. Automobiles 🔑244(14, 36)

In action for damage to plaintiff's truck which ran into rear of defendant's truck parked on paved portion of highway on dark and rainy night without the placing of flame-pots, near sharp turn which obscured the view from approaching vehicles, and near place where highway was blocked by a slide, evidence sustained judgment for plaintiff on ground that defendant was guilty of negligence which "proximately caused" the accident. Vehicle Code, §§ 582, 583, St.1935, p. 190.

See Words and Phrases, Permanent Edition, for all other definitions of "Proximate Cause".

2. Automobiles 🔑246(13)

In action for damage to plaintiff's truck which ran into rear of defendant's truck parked on paved portion of highway where highway was blocked by a slide, leaving only five feet between defendant's truck and an automobile subsequently parked beside defendant's truck, jury was properly instructed pursuant to statute that driver of a vehicle which is not disabled shall not park it on paved portion of highway, and leave it unattended, when it is practicable to drive it off paved portion, and that driver of disabled vehicle shall not leave it standing unattended on highway unless at least 15 feet of paved portion is left unobstructed for free passage of other vehicles. Vehicle Code, §§ 582, 583, St.1935, p. 190.

3. Automobiles 🔑242(3)

Where plaintiff showed that defendant parked his truck on paved portion of highway, and left it unattended for a period of time, contrary to statutes, burden was on defendant, in action for damage to plaintiff's truck when it struck defendant's truck, to show that it was not practicable to drive defendant's truck off highway onto shoulder, and that defendant was not otherwise guilty of negligence in violating statutes. Vehicle Code, §§ 582, 583, St.1935, p. 190.

4. Automobiles 🔑173(5)

The fact that defendant was supplied with flame-pots and knew that plaintiff's truck was likely to arrive at any moment and collide with defendant's parked truck, and that defendant failed to use the flame-pots or otherwise warn driver of plaintiff's truck, might properly be considered in determining whether defendant was guilty of a failure to exercise ordinary care, though defendant may not have violated statute by failing to place flame-pots or other warning signals on highway after he parked truck on highway, for the technical reason that his truck was not actually disabled. Vehicle Code, § 590, St.1937, p. 620.

5. Negligence 🔑4

One may become liable for damages for failure to exercise ordinary care without actually violating the explicit provisions of a statute.

6. Negligence 🔑134(9)

The violation of a statute merely furnishes "prima facie proof" of negligence per se, which requires some evidence of rebuttal.

See Words and Phrases, Permanent Edition, for all other definitions of "Prima Facie Proof".

7. Automobiles 🔑245(83)

In action for damage to plaintiff's truck when it ran into rear of defendant's truck parked at night on paved portion of highway near sharp turn in highway which obscured view, whether plaintiff's driver was guilty of contributory negligence was for jury.

8. Appeal and error 🔑999(3)

Where the District Court of Appeals could not say as a matter of law that truck driver was guilty of contributory negligence, it was bound by jury's implied finding in that regard.

9. Automobiles 🔑200, 201(8)

If defendant's conduct in parking truck on highway was a proximate cause of plaintiff's truck running into rear of defendant's truck, defendant could be held liable, either jointly with or separately from motorist whose parked automobile was blocking the other side of the highway, though the motorist's negligence may also have contributed to accident.

10. Automobiles 🔑244(14, 36)

In action for damage to plaintiff's truck which ran into rear of defendant's truck parked on highway beside automobile which blocked other side of highway, evidence was sufficient to show concurrent negligence of both defendant and motorist, proximately contributing to accident.

11. Appeal and error ⟹1064(1)

In action for damage to plaintiff's truck which struck defendant's truck parked on paved portion of highway near place where highway was blocked by slide, without display of flares or lanterns, it was not reversible error for court to instruct jury in language of statute that a disabled truck may not park on paved portion of highway without displaying flares or red lanterns, though defendant's truck was not disabled within meaning of the statute. Vehicle Code, § 590, St.1937, p. 620.

12. Automobiles ⟹173(7)

The word "disabled" as used in statute providing that a disabled truck, weighing 4,000 pounds or more may not park on paved portion of highway, outside of limits of a city or town, without displaying flares or red lanterns, means that a truck is mechanically defective and in a condition which prevents it from being operated or makes it difficult to operate on its own power. Vehicle Code, § 590, St. 1937, p. 620.

See Words and Phrases, Permanent Edition, for all other definitions of "Disabled".

13. Automobiles ⟹173(7), 245(17)

A truck driver who parked truck on highway near place where highway was blocked by slide, was not guilty of "negligence per se" because he failed to place flares on highway as required by statute when a truck is disabled, but he might nevertheless be guilty of lack of ordinary care in failing to do so. Vehicle Code, § 590, St. 1937, p. 620.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence Per Se".

◆

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by Veryl Callison against Charles Dondero, D. K. Adams, and the B. F. Goodrich Company for damages arising out of automobile collision. A nonsuit was granted with respect to the B. F. Goodrich Company. From a judgment against Charles Dondero and D. K. Adams, Charles Dondero appeals.

Judgment affirmed.

Nelson & Ricks and Howard P. Noyes, all of Eureka, for appellant.

Edward J. Jose, of San Francisco, and Ronald Drew, of Arcata, for respondent.

THOMPSON, Acting Presiding Justice.

The defendant, Charles Dondero, has appealed from a judgment of $1,981, which was rendered pursuant to the verdict of a jury, jointly against him and his codefendant, D. K. Adams, as damages resulting from an automobile casualty. No appeal was perfected in behalf of the defendant, Adams.

It is contended the verdict and judgment are not supported by the evidence; that the appellant was free from negligence; that the plaintiff's driver of the truck which was involved in the accident was guilty of contributory negligence; that the conduct of Adams, who was the driver of a third automobile which was involved in the accident, was the intervening proximate cause of the collision, and that the court erred in giving to the jury an instruction based on the provisions of Section 590 of the Vehicle Code, St.1937, p. 620, since the appellant's truck was not disabled, and the placing of warning signals on the highway, as therein provided, has no application to the circumstances of this case.

At five o'clock on the morning of February 27, 1940, a string of four trucks with attached trailers were traveling northerly along the Redwood Highway about five miles south of Garberville. It was dark and raining. The highway was practically level at that point. The paved portion was eighteen feet in width with an eight-foot shoulder on either side. On the western border of the highway there is a sharp descent to the South Fork of the Eel River, which parallels the highway in that vicinity. On the easterly side of the highway there is a steep bank which rises abruptly from the outer edge of the shoulder of the road. This bank is timbered. At the foot of this easterly bank there is a shallow ditch which is maintained to drain the highway. From much rain the outer edge of the eastern shoulder is somewhat soft. There was no danger of running off the highway on the easterly side at this point on account of the presence of the high bank. At a distance of about 350 feet south of the place where the accident occurred, there is a sharp turn of the road toward the east, which completely obscures the view from approaching vehicles in that direction. Wallace Brown was driving the truck and trailer owned by the plaintiff, Veryl Callison. As these four trucks left Laytonville earlier in the night, Dondero's machine led the procession. Mr. Brown followed a short distance behind. The other two trucks followed with a reasonable distance intervening between their vehicles. Dondero saw the other trucks at Laytonville and talked with the drivers. He knew they were following closely behind his machine. His truck and trailer were equipped with headlights, red tail-lights, side green-lights and a spot-light. He also carried flame-pots, as required by law, to be placed on the highway as warning signals in case of an emergency.

The defendant, D. K. Adams, was traveling northerly in a sedan automobile, ahead of Dondero's truck. As the appellant drove around the curve in the road heretofore mentioned, he suddenly came upon Adams' car parked on the right-hand side of the paved portion of the roadway. He first observed his tail-lights. Dondero brought his truck and trailer to a stop on the easterly paved portion of the highway just behind the Adams car. His westerly wheels were within about ten inches of the center line. He turned on his spot-light and saw that the entire roadway was blocked by a slide which he observed at a distance of about 150 feet ahead of the Adams machine. Dondero knew the other trucks were following closely behind his machine. He had just turned the sharp angle in the roadway and knew it would obstruct the view of his parked car from a position beyond that turn of the road. He made no examination of the shoulder of the road to ascertain whether it was practicable for him to park his truck off the paved portion. He left his truck standing on the highway "within about 250 or 300 feet" from the acute angle in the road, and taking a flash-light he went forward to examine the slide and to talk with Adams. After some conversation, they decided to turn Adams' car about and return to get a crew of workmen to clear the highway. They maneuvered the car about and Mr. Adams drove it southerly on the westerly side of the highway until he reached a point opposite the front of Dondero's truck, where he stopped the machine. His headlights were left burning. There was a space of less than five feet between the cars. While Dondero and Adams were talking at that point, the plaintiff's truck and trailer, driven by Brown, suddenly appeared around the bend in the road. It was traveling 25 or 30 miles an hour. Dondero claims that when he saw the glare of Brown's lights he ran down the highway, waving his flash-light. There is evidence that Dondero left his truck parked on the highway for about twenty minutes before Brown's truck appeared. Mr. Callison testified that Dondero told him "We hadn't been there over twenty minutes" before Brown's truck appeared.

Mr. Brown testified that when he came around the turn in the road he saw the headlights of Adams' car, but supposed it was a machine driving southerly on its proper side of the highway. He was at first blinded by those lights. Brown arrived at a point about 100 feet from the rear end of Dondero's trailer before he first discovered the parked truck and trailer ahead of his machine. About the same time he concluded that the machine which was facing him on the westerly side of the highway was stationary. He promptly applied his brakes, and turned slightly to his left, thinking he might pass between the vehicles. He immediately saw that was impossible and he then pulled sharply to his right to attempt to pass the parked truck on that side. It was impossible to stop his heavily-loaded truck in time to avoid the collision. His truck jack-knifed and struck the right rear portion of Dondero's trailer and it plunged off the highway on the shoulder and collided with the bank and an overhanging tree. The plaintiff's truck was badly damaged. Fortunately no one was seriously injured. Knowing that the other trucks would soon arrive, Dondero ran down the highway waving his flash-light, and Adams drove forward, honking his horn. The two rear trucks managed to stop their machines without colliding with the stalled trucks.

This suit was brought by Veryl Callison against Dondero, Adams and the B. F. Goodrich Company. At the trial a nonsuit was granted with respect to the Goodrich Company. A verdict for damages in the sum of $1,981 was returned against Dondero and Adams jointly. Judgment was rendered accordingly. From that judgment, Charles Dondero, only, has appealed.

[1] We are of the opinion the judgment is supported by the evidence. There is substantial proof that the appellant was guilty of negligence in parking his truck

on the paved portion of the highway on a dark and rainy night, at a point close to a sharp turn in the road which obscured the view from approaching vehicles, with knowledge on the part of the appellant that other machines were following closely and were likely to arrive at any moment; that he failed to examine the adjacent roadway to ascertain whether it was practicable to drive the truck on to the shoulder thereof and that he left the truck in that hazardous position for a period of about twenty minutes without taking any means of warning the approaching vehicles of the existing danger. It also appears that, under such circumstances, the appellant directed D. K. Adams, the driver of the automobile which was also parked ahead of his truck, to turn it about and return to procure a crew of workmen to help remove the obstruction from the highway, and that he spent several minutes engaging Adams in conversation while his automobile was parked, opposite the appellant's truck, with its headlights burning, so as to completely block the westerly side of the roadway. These facts furnish substantial proof upon which the jury was warranted in determining that the appellant was guilty of negligence which proximately contributed to the accident. At least, under such circumstances, we may not hold, as a matter of law, that the appellant was not guilty of negligence.

[2] The jury was properly instructed, pursuant to the provisions of sections 582 and 583 of the Vehicle Code, St.1935, p. 190, that the driver of a machine which is not disabled shall not park his vehicle on the paved portion of the highway, and leave it unattended, when it is practicable for him to drive it off the paved portion, and that, in no event, shall the driver of a disabled vehicle leave it standing unattended on the highway unless at least fifteen feet of the paved portion is left unobstructed for the free passage of other vehicles.

[3] Having shown that the appellant did park his truck on the paved portion of the highway, and leave it unattended for a period of time, contrary to the provisions of the foregoing sections of the code, the burden was on him to show that it was not practicable for him to drive his machine off the highway on the shoulder thereof, and that he was not otherwise guilty of negligence in violating the provisions of those sections of the code. Casey v. Gritsch, 1 Cal.App.2d 206, 36 P.2d 696; Scoville v. Keglor, 27 Cal.App.2d 17, 32, 80 P.2d 162; 131 A.L.R. 603, note.

[4-6] Assuming that the appellant did not violate the provisions of section 590 of the Vehicle Code by failing to place his flame-pots, or other warning signals on the highway, for the technical reason that his truck was not actually "disabled," the fact that he was supplied with such flame-pots and knew the other trucks were likely to arrive at any moment, and that he failed to use the flame-pots or otherwise warn the drivers of the approaching trucks, may, nevertheless, be properly considered in determining whether the appellant was not guilty of failure to exercise ordinary care, as distinguished from a violation of the statute. One may become liable for damages for failure to exercise ordinary care without actually violating the explicit provisions of a statute. The violation of a statute merely furnishes prima facie proof of negligence per se, which requires some evidence of rebuttal.

[7, 8] Likewise, the question regarding the alleged contributory negligence of the plaintiff was a problem for the determination of the jury under the circumstances of this case. We are of the opinion the record fails to show that the driver of respondent's truck was guilty of contributory negligence. At least, we may not say, as a matter of law, that he was guilty of contributory negligence. We are therefore bound by the implied finding of the jury in that regard.

[9] Having determined there is ample evidence to sustain the finding of the jury that the appellant was guilty of negligence which proximately contributed to the damage sustained by the respondent, Mr. Dondero may not escape liability by the fact that the act of D. K. Adams, in completely blocking the westerly side of the highway, also contributed to the cause of the accident. Even though the acts of Dondero and Adams concurred in causing the accident, if Dondero's conduct was one of the proximate causes thereof, he may be held liable, either jointly with or separately from his co-tortfeasor. This is true even though the accident would not have happened except for the negligence of the third person. Cummings v. Kendall, 34 Cal.App.2d 379, 93 P.2d 633. In 4 Blashfield's Cyclopedia of Automobile Law and Practice, Perm. Ed., § 2552, it is said in that regard:

"If the negligence of defendant is one of the proximate causes of the injury of which the plaintiff complains, he cannot escape liability by showing that the negligence of a third person also contributed to the injury, and that the accident would not have happened but for such negligence of the third person."

[10] The evidence in this case certainly does not show that the negligence of D. K. Adams was the sole cause of the accident. We are of the opinion there is an abundance of evidence to show concurrent negligence on the part of both the appellant and Adams, each of which proximately contributed to the accident. This renders the appellant liable.

[11-13] It was not reversible error for the court to instruct the jury in the language of section 590 of the Vehicle Code, that a "disabled" truck, weighing four thousand pounds or more, may not park on the paved portion of a highway, outside of the limits of a city or town, without displaying either flares or red lanterns at about one hundred feet in advance of and behind the parked vehicle. We are disposed to agree with the appellant that the instruction was inapplicable since the truck was not disabled. It is argued by the respondent that the appellant's truck was disabled in the sense that it was prevented from going forward because of the presence of the slide which completely blocked the highway. We are of the opinion the word "disabled" is used, in section 590 of the Vehicle Code, to mean that a truck is mechanically defective when it is in a condition which prevents it from being operated on its own power, or when it is difficult to do so on that account. We assume a machine is not disabled merely because its progress is blocked by some obstruction of the highway. We concede the appellant was not guilty of negligence per se, for violating section 590 of the Vehicle Code merely because he failed to place the flares on the highway as a warning of danger. The court did not so instruct the jury. But he might, nevertheless, be guilty of a lack of ordinary care in failing to do so, under the circumstances of this case. And he might also be guilty of negligence per se in failing to drive his machine off the paved portion on to the shoulder of the highway, or in neglecting to leave fifteen feet of the highway unobstructed. It was the province of the jury to determine whether it was practicable or possible for him to do so.

Assuming that the challenged instruction was inapplicable, we conclude that it was not reversible error for the reason that it does not appear there was a miscarriage of justice in the present case.

The judgment is affirmed.

TUTTLE, J., concurred.

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51 Cal.App.2d 372

TOMKINS et al. v. TAYLOR et al.

Civ. 6626.

District Court of Appeal, Third District, California.

April 22, 1942.

1. Associations 🔑1
Partnership 🔑47

Where there was no evidence as to terms of oral agreement to form an organization for developing realty, whether organization was a partnership or a voluntary association was determinable from admissions in pleadings, evidence of contents of by-laws and minutes of organization, and conduct of members. Civ.Code, § 2432.

2. Appeal and error 🔑1177(6)

Whether organization for developing realty was a partnership or voluntary association should be decided positively in first instance by trial court.

3. Appeal and error 🔑1176(1)

Where plaintiffs' right to dissolution of organization for developing realty depended on whether organization was a partnership and trial court's findings with respect to nature of organization were inconsistent and in conflict with conclusions of law, judgment against plaintiffs on defendant's cross-complaint was reversed with directions to enter new findings and a judgment.

◆

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge Assigned.

Action by Laura B. Tomkins and others against Walter J. Taylor and others for a dissolution of an organization on theory that it was a partnership at will, wherein defendants filed a cross-complaint. From an adverse judgment, plaintiffs appeal.

Reversed with directions.

Jay Maurice, of Oakland, for appellants.

H. L. Richardson, of Oakland, for respondents.

HAWKINS, Justice pro tem.

This is an appeal from a judgment entered against appellants upon the amended cross-complaint of respondents, which judgment provides for the expulsion of appellants from membership in an organization know as the Angus Club, and further provides as follows: "That defendants are entitled to continue the business of the said co-partnership provided they secure the payment by bond approved by the court, or pay to plaintiffs who have caused the dissolution of said alleged partnership wrongfully, the value of their interest in said alleged partnership less any damages recoverable by defendants under clause (2) (a) II of section 2432 of the Civil Code of the state of California, and indemnify plaintiffs against all present and future partnership liabilities."

There are other provisions in said judgment providing for the appointment of a referee to audit the accounts of the said Angus Club "for the purpose of ascertaining the interest of each of the plaintiffs in said Angus Club, and to do any and all things necessary to terminate the interest of the plaintiffs in said Angus Club, in accordance with the above judgment."

The essential facts are as follows:

On or about April 15, 1935, plaintiffs and defendants entered into an oral agreement to form an organization for the purpose of purchasing, acquiring and developing real property in the city of Berkeley, county of Alameda, state of California. Thereafter a set of by-laws was adopted, officers were elected and regular meetings held. Later dissension arose among the members and appellants brought this action for a dissolution of the organization upon the theory that it was a partnership at will.

Appellants have adhered consistently to this theory, both in their pleadings and throughout the trial. Respondents, by their pleadings, alleged that the organization was not a partnership but a voluntary association, yet the judgment rendered gave relief provided for by section 2432 of the Civil Code, which section applies to partnerships.

[1, 2] There is no evidence in the record as to the terms of the original oral organizing agreement and the question as to whether the organization was a partnership or a voluntary association has to be determined from admissions in the pleadings, evidence of the contents of the bylaws and minutes of the organization and the conduct of the members. This question should be decided positively in the first instance by the trial court, and this has not been done.

Paragraph I of the Findings of Fact recites that "all of the allegations of paragraphs two and three of plaintiffs' complaint on file herein are true." Said paragraphs read as follows:

"II. That on or about the 15th day of April, 1935, and prior to the filing of this complaint, plaintiffs and defendants entered into an oral co-partnership agreement in the city of Berkeley, county of Alameda, state of California.

"III. That at the time the plaintiffs and defendants entered into the aforesaid oral agreement there was no definite time stated for the duration and existence of said co-partnership aforesaid entered into orally by and between plaintiffs and defendants of the above entitled cause of action."

Paragraph 3 of the Findings of Fact reads in part: "That on or about the 15th day of April, 1935, plaintiffs and defendants entered into an agreement for the purpose of organizing an unincorporated association for the purpose of purchasing, acquiring, and developing real property in the city of Berkeley, county of Alameda, state of California, and elsewhere, and with the ultimate intention of incorporation of said unincorporated association, and for the facilitation of their business transactions."

These two findings are totally inconsistent and the latter finding is in conflict with the conclusions of law and judgment which variously refer to the organization as a "co-partnership," a "so-called partnership," and an "alleged partnership."

[3] There is nothing in the conclusions of law or judgment which determines definitely whether or not the organization was a partnership, and if so, whether it was a

partnership at will or one for a definite term or for a particular undertaking.

For the reason that a determination of these questions is necessary to a decision in this case, and for other reasons hereinbefore given, the judgment is reversed, with directions to the trial court to vacate the judgment and findings and to enter new findings and a judgment which will conform to the views herein expressed.

THOMPSON, Acting P. J., and TUTTLE, J., concurred.

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51 Cal.App.2d 438

CRANDALL et al. v. McGRATH.

Civ. 13442.

District Court of Appeal, Second District, Division 2, California.

April 25, 1942.

Rehearing Denied May 22, 1942.

Hearing Denied June 19, 1942.

1. New trial ⇨9

Where issues of cause are distinct and separable, trial court has power to grant new trial of one issue while refusing it as to others. Code Civ.Proc. § 657.

2. Appeal and error ⇨977(3)

A trial court's order, granting new trial on one issue only while refusing it as to other issues, will not be reversed in absence of showing of abuse of discretion. Code Civ. Proc. § 657.

3. Appeal and error ⇨977(3)

In personal injury suit, trial judge's decision in granting plaintiff new trial on single issue of damages after jury's verdict for plaintiff is exercise of discretion and should ordinarily be final. Code Civ.Proc. § 657.

4. Appeal and error ⇨977(3)

Whether issues of negligence and damages are so inseparably blended as to require that new trial be granted as to all issues, if at all, is question committed to discretion of trial court, whose decision will not be disturbed on appeal, unless such discretion was plainly abused. Code Civ.Proc. § 657.

5. Appeal and error ⇨1015(3)

In personal injury suit, if any substantial conflict exists in evidence produced by respective parties, trial judge's order granting plaintiff new trial on issue of damages only is conclusive. Code Civ.Proc. § 657.

6. New trial ⇨9

In personal injury suit, where there are not actually nine jurors convinced that defendant was guilty of negligence proximately causing plaintiff's injuries or issues of negligence and damages are so inseparably blended that one cannot be fairly tried without proof of the other, trial court should grant new trial on both issues. Code Civ. Proc. § 657.

7. Appeal and error ⇨977(3)

In personal injury suit, where proof of defendant's negligence and fact that it was proximate cause of accident is overwhelming, trial judge's decision in confining new trial granted plaintiff to issue of damages only should not be disturbed on appeal. Code Civ.Proc. § 657.

8. New trial ⇨9

In action for injuries to passengers in automobile colliding with defendant's automobile, where testimony of four witnesses, of whom three were strangers to parties and wholly disinterested, supported plaintiffs' contention that defendant was guilty of negligence proximately causing plaintiffs' injuries, while defendant's testimony on such issues was wholly unsupported, trial court properly confined new trial granted plaintiff to issue of damages only. Code Civ.Proc. § 657.

W. J. WOOD, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Harriett Crandall and another against John J. McGrath for personal injuries. Verdict for plaintiffs, and from an order granting them a new trial on the issue of damages only, defendant appeals. Affirmed.

Rehearing denied; WOOD, J., dissenting. Hearing denied; EDMONDS, J., dissenting.

James W. Hughes, of Los Angeles, for appellant.

Betts & Garrison, of Los Angeles, for respondents.

MOORE, Presiding Justice.

The question for decision on this appeal is whether the court abused its discretion in granting a new trial upon the single issue of damages only. The verdict returned was $100 less than the amount of special damages established.

Defendant appeals from the court's order, contending that because of the "irreconcilable conflict" in the evidence on the issue of liability a new trial should be granted upon all issues.

[1–3] It is provided by statute that a verdict may be vacated in whole or in part and a new trial granted on all or part of the issues. § 657, Code Civ.Proc. It has long been established that it is within the power of the trial court, where the issues of a cause are distinct and separable, to grant a new trial of one issue while refusing it as to the others. Such an order will not be reversed in the absence of a showing of an abuse of discretion. Adams v. Hildebrand, 51 Cal.App.2d 117, 124 P.2d 80. The trial judge having heard all the evidence in a personal injury action, and having been convinced, he is in a peculiar position to know that nothing could be gained by relitigating the issue of negligence though dissatisfied with the award of damages. His decision in granting a new trial on the single issue of damages is the exercise of discretion and should ordinarily be final. Tumelty v. Peerless Stages, 96 Cal.App. 530, 274 P. 430; Amore v. Di Resta, 125 Cal.App. 410, 13 P.2d 986; Robinson v. Muir, 151 Cal. 118, 90 P. 521.

[4, 5] It has likewise been established that the determination by the trial judge as to whether the issues of negligence and of damages are so inseparably blended as to require that a new trial, if granted at all, should be granted as to all of the issues, is a question also committed to the discretion of the trial court (Amore v. Di Resta, supra) whose decision will not be disturbed on appeal unless it is plainly apparent that such discretion has been abused. Adams v. Hildebrand, supra; Rigall v. Lewis, 1 Cal.App.2d 737, 37 P.2d 97. Moreover, the rule goes further in providing that if any substantial conflict exists as between the evidence produced by the respective parties, the order of the trial judge is conclusive. Ibid.

[6] In order to obviate the rule laid down by the statute and foregoing authorities, defendant insists that the conflict in the evidence of the instant case is so irreconcilable as to make this case an exception to the rules above announced. He bases his contention upon the decisions in Wallace v. Miller, 26 Cal.App.2d 55, 78 P.2d 745, and Bencich v. Market St. R. Co., 20 Cal.App.2d 518, 67 P.2d 398. A reading of those cases readily discloses that the authors of the opinions were satisfied that the verdict returned was the result of unwarranted concessions of convictions by members of the jury and that consequently it would work a grave injustice upon the defendant to limit the new trial to the issue of damages only. Under such circumstances it was deemed to be the better practice that the issue as to liability should not be forever closed against inquiry where it appeared that the verdict upon that issue was not the result of a free and unrestricted collaboration of the minds of at least nine jurors. From a study of the last two cited authorities, we deduce the rule that (1) where the record discloses that there were not actually nine jurors who were convinced of the negligence of the defendant and that his negligence was the proximate cause of the plaintiff's injuries, or (2) where the issues of negligence and damages are so inseparably blended that one cannot be fairly tried without proof of the other: in either of such events the trial court should grant a new trial upon both issues.

[7] But where the proof of defendant's negligence and the fact that it was the proximate cause of the accident is overwhelming, then the decision of the trial judge in confining the new trial to the issue of damages only should not be disturbed on appeal. Under such circumstances we should not interfere with the order. The conflict in the evidence may be irreconcilable because the witness who testified on behalf of defendant directly contradicted the witnesses who testified on behalf of plaintiffs in which event both narratives could not be true. There is no showing that any difficulty should have been experienced in establishing the liability of defendant.

[8] Proof of the events immediately preceding the collision of the two automobiles was presented by four witnesses on behalf of plaintiffs, three of whom were utter strangers to the parties and wholly disinterested. Proof offered on behalf of defendant was his own testimony.

The witness Robinson was driver of the car occupied by plaintiffs. According to his testimony, while driving east on Sixth Street and approaching Woods Avenue, his speed was about 15 miles per hour. He looked in both directions and slowed down. After the front of his car had reached a point 10 feet east of the intersection he saw McGrath's car 40 feet north of Woods Avenue going at a speed of about 40 miles per hour, which did not change prior to the collision. At the time of the impact, Robinson's car was going about 2 to 5 miles per hour. Robinson was corroborated by three students of the Garfield High School. Notwithstanding the slight variations in their respective observations, the substance of the testimony of each of them is that Robinson approached Woods Avenue at a speed of about 10 to 15 miles per hour; that McGrath's car thundered down Woods Avenue and into the intersection at a speed of 35 to 40 miles per hour; that as McGrath attempted to veer the direction of his car, near the center of the intersection, his right front fender struck the left front fender and headlights of the Robinson car which was then moving at about 5 to 10 miles per hour; that cars were parked close together along the curbs on both sides of Woods Avenue, the middle of which is about two feet higher than the surface at the curbs.

On the same issues as to whether he was negligent and whether his negligence proximately caused plaintiffs' injuries, McGrath in his own behalf was wholly unsupported.

According to his testimony he was on his way to a funeral and anxious to get to the chapel early. On approaching Garfield High School, he diminished his speed to 15 miles per hour. He saw the Robinson car while he was 15 feet north of Sixth Street and at that time it was 80 feet west of the intersection; that as he entered the intersection, Robinson was 50 feet west; that when the front of his car was at the center of Sixth Street, Robinson's car was 25 feet out of the intersection. When McGrath saw that Robinson was not slowing down, he turned to the left when Robinson crashed into the right side of his car. The impact of Robinson's car shoved the front of the McGrath car several feet to the west; Robinson did not swerve his car before the impact.

This testimony significantly pales when weighed against that of the four witnesses for the plaintiffs.

The motion for diminution is denied. The order is affirmed.

McCOMB, J., concurred.

W. J. WOOD, Justice (dissenting).

I dissent. In this action plaintiffs Harriett Crandall and Addie Robinson seek to recover damages for injuries which they suffered when an automobile driven by defendant collided with an automobile owned and driven by L. G. Robinson, in which they were riding. Defendant has appealed from an order granting plaintiffs a new trial on the single issue of the amount of damages to be awarded.

Among the injuries suffered by plaintiff Crandall as a result of the collision were three fractures of the jaw, lacerations, and an injury to her knee. Among the injuries suffered by plaintiff Robinson were a fractured cheek bone and concussion of the brain. Special damages were proved by plaintiffs in the sum of $585.67 for physicians' and nurses' services and hospitalization and medical expenses. There appears to be no conflict in the evidence as to the injuries suffered or as to the special damages incurred. The case was tried with a jury which rendered a verdict in favor of plaintiff Crandall in the sum of $435.64 and in favor of plaintiff Robinson in the sum of $50.22, the total for both parties being $485.86.

Plaintiffs presented a motion for a new trial on the issue of damages only and defendant presented a motion for a new trial on all issues. The court denied defendant's motion but granted plaintiffs' motion and thereby limited the new trial to the single issue of the amount of damages.

Defendant contends that, since the evidence on the issue of defendant's alleged negligence is conflicting and since the jury awarded a sum less than the undisputed special damages, the trial court erred in limiting the new trial to the single issue of damages. In my opinion the decision in Wallace v. Miller, 26 Cal.App.2d 55, 78 P.2d 745, 746, is determinative of the question. In that case the plaintiff suffered damages in the sum of $120.25 for medical bills and $203.64 for repairs to his automobile. The jury returned a verdict for the plaintiff in the sum of $120.25. On motion of the plaintiff the trial court granted a new trial on the question of damages only. The reviewing court reversed this order, pointing out that the evidence was of about equal strength on the question of liability and that the plaintiff, if entitled to recover, should have been awarded all of his special damages and an amount sufficient to compensate him for his personal injuries. The court held that "the primarily important question, namely, the negligence of defendant, was not determined by the jury" and that the court's failure to grant a new trial on all issues was "an arbitrary refusal to exercise a reasonable discretion." The court relied upon Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 175 P. 26, 177 P. 845, and upon Bencich v. Market St. R. Co., 20 Cal.App.2d 518, 67 P.2d 398, 403, where it is said: "The verdict of the jury which found, in effect, that defendants were guilty of negligence and that plaintiff was free from contributory negligence and yet allowed damages which were grossly inadequate, furnishes convincing proof as said in the Donnatin case, supra, page 11 of 38 Cal.App., 175 P. 26, 177 P. 845, 'that in order to reach an agreement the verdict was the result of unwarranted concessions of convictions made by each of two opposing factions of the jury, one of which conscientiously believed that defendant should prevail in the action, and the other equally conscientious in the opinion that plaintiff should recover damages commensurate with the injuries sustained.' * * * In view of this uncertainty and the fact that clearly something other than the evidence on the question of damages must have actuated the jury, or some of them in arriving at such a low verdict, substantial justice requires that (as said in the Donnatin case, supra, 38 Cal.App. 8, at page 11, 175 P. 26, 27, 177 P. 845), '* * * what is a just compensation the plaintiff should receive, if he is entitled to recover at all, can best be determined by trying the whole case before one judge and one jury instead of "splitting it up" between different judges and different juries. * * *'"

The facts in the case now before us bear a striking similarity to the facts in the case of Wallace v. Miller, supra. The testimony of the drivers of the two automobiles was in sharp conflict, the statement of each if believed by the jury being sufficient to excuse him from liability. I cannot agree with the statement contained in the majority opinion that the proof of defendant's negligence is "overwhelming." Nor was the testimony of defendant without support in the evidence. Defendant introduced in evidence three photographs of the automobiles involved in the collision and now properly argues that they give strength to his contentions. A deputy sheriff, called as a witness by defendant, testified that both headlights on the Robinson car were broken and that he found glass and debris 10 feet east of the west curb of Woods Avenue, thus, according to counsel's argument giving corroboration to defendant's testimony that the Robinson car was only partially in the intersection at the time of the impact. The fact that the testimony of three schoolboys, which contained discrepancies, was favorable to the contentions of defendant does not, in my opinion, justify a holding by the reviewing court that as a matter of law the evidence was overwhelming in favor of either party. The only distinction that can be made between the Wallace v. Miller case and the case now before us is that in the Wallace v. Miller case the reviewing court stated that the evidence of the parties was "of about equal strength." The true rule to be derived from the decision in Wallace v. Miller and the cases therein relied upon is that where the evidence is conflicting and sufficient to support a verdict in favor of either party and the jury returns a verdict for less than the uncontroverted special damages a new trial should be granted on all of the issues.

51 Cal.App.2d 390

SPANFELNER v. MEYER.

Civ. 12105.

District Court of Appeal, First District, Division 2, California.
April 24, 1942.

1. Estoppel ⇐32(1)

On appeal in suit to quiet title to land, defendant could not claim that there was no evidence of title in plaintiff where there was a stipulation in transcript of a deed to plaintiff's brother signed by defendant and his wife and of a subsequent deed from the brother to plaintiff, and both deeds described the land.

2. Husband and wife ⇐270(5)

Where grantor acquired title to land before effective date of statute respecting interests in community property, grantor's wife was not a "necessary party defendant" in remote grantee's suit against grantor to quiet title to land, notwithstanding that wife was named as a grantor in deed to grantee's predecessor. Civ.Code, § 161a.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party Defendant".

3. Husband and wife ⇐265, 267(7)

A wife has no "vested interest" in community property acquired before effective date of statute respecting interests in community property, and, as to community property acquired previous to 1927, her joinder in a deed thereof is in legal effect but an expression of her assent to the transfer by husband. Civ.Code, § 161a.

See Words and Phrases, Permanent Edition, for all other definitions of "Vested Interest".

4. Appeal and error ⇐205

Where trial judge's refusal to admit a contract in evidence for defendant was only tentative, and left the door open for defendant to offer the contract again at a later stage of his proof, and there was no showing that defendant had subsequently offered the contract in evidence, defendant could not on appeal complain that judge refused to admit contract.

5. Trial ⇐47(2)

Where evidence is excluded when offered with statement by trial court that it may be offered later, failure again to offer it "waives" any error.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

6. Trial ⇐47(2)

Where the trial court rejects evidence temporarily or withholds a decision as to its admissibility, the party desiring to introduce the evidence should renew his offer or call the court's attention to the fact that a definite decision is desired.

◆

Appeal from Superior Court, Tehama County; Herbert S. Gans, Judge.

Suit by Fred Spanfelner against Robert Meyer to quiet title to land, wherein defendant filed a cross-complaint. From a judgment for plaintiff, defendant appeals.

Affirmed.

Pugh & Pugh, of Red Bluff, for appellant.

Curtiss E. Wetter, of Red Bluff, for respondent.

DOOLING, Justice pro tem.

Respondent had judgment quieting his title to a parcel of land of less than one acre, which was part of a larger tract conveyed to respondent's brother by deed of appellant and his wife in 1928. In this transaction it is admitted that respondent's brother was acting as agent and naked trustee for respondent and the property was subsequently conveyed to respondent by his brother. Appellant cross-complained, alleging that the parcel of land here in dispute was included in the description in the deed by mutual mistake of the parties and praying for a reformation of the deed in that particular.

[1] Appellant in his opening brief made the claim that there was no evidence of title in respondent. Respondent in his brief points to a stipulation in the transcript of the deed to respondent's brother in 1928 signed by appellant and his wife, and of a deed from the brother to respondent in 1933, both describing the property in suit. In view of this stipulation there is nothing in this claim of appellant.

[2, 3] Appellant further urges that his wife was a necessary party defendant. This point was not made in the trial court, but it is appellant's position here that she was a necessary party because she was one of the grantors in the deed to respondent's brother and it is claimed that it must be

presumed that she had a community property interest in the land conveyed. It does not affirmatively appear in the record that this land was community property, but assuming it to have been it does affirmatively appear that appellant acquired his title before July 29, 1927, the effective date of section 161a of the Civil Code. Whatever may be the law since the adoption of that code section it is settled that a wife has no vested interest in community property acquired before that date (3 Cal.Jur.Supp., p. 592; McKay v. Lauriston, 204 Cal. 557, 269 P. 519) and that "as to community property acquired previous to 1927 her joinder in a deed thereof is in legal effect but an expression of her assent to the transfer by the husband." Riley v. Gordon, 137 Cal.App. 311, 315, 30 P.2d 617, 619.

The main ground urged for a reversal is the alleged refusal of the trial court to admit into evidence a prior contract between appellant and two vendees named Ovelman for the sale and purchase of the tract later conveyed to respondent, in which contract the land here in dispute was expressly excluded from the land to be conveyed. At the time the offer of this document was made, which was almost at the opening of appellant's case, the trial judge said:

"I was about to say I would let it be marked for identification and then see if there is any evidence to tie it into this matter or not. It may be admitted later or may not. I will see what further is shown. If it is part of the transaction or something that occurred there that day it will probably be admitted but I will defer it for a little while and see further from the evidence. It will be marked Defendant's Exhibit A for Identification."

[4-6] This ruling not only was not final but it left the door wide open for appellant to offer the contract again at a later stage of his proof. Appellant points to no place in the transcript where the offer of this document was renewed and a reading of the transcript shows no renewal of the offer. "Where evidence is excluded when offered with the statement by the court that it may be offered later, failure again to offer it waives any error." 26 R.C.L. 1040. "Where the court rejects evidence temporarily or withholds a decision as to its admissibility, the party desiring to introduce the evidence should renew his offer, or call the court's attention to the fact that a definite decision is desired." 64 C.J. 127. See 4 C.J.S., Appeal and Error, § 291, p. 583; Risdon v. Yates, 145 Cal. 210, 216, 78 P. 641; McKissick Cattle Co. v. Anderson, 62 Cal.App. 558, 569, 570, 217 P. 779; Watkins v. Glas, 5 Cal.App. 68, 76, 89 P. 840; Rickards v. Noonan, 40 Cal.App.2d 266, 275, 104 P.2d 839; Kern County Finance Co. v. Iriart, 26 Cal.App.2d 483, 79 P.2d 763.

Appellant says at the close of his reply brief: "With said evidence (the Ovelman contract) before the Court, mutual mistake was proven, without it Meyer was powerless to overcome the legal consequences of his deed to Spanfelner."

In view of our conclusion that appellant cannot complain of the tentative refusal of the trial court to admit this contract into evidence in the absence of a showing that it was later again offered and a definite and final ruling obtained, this concession makes it unnecessary to further extend this opinion.

Judgment affirmed.

NOURSE, P. J., and STURTEVANT, J., concurred.

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51 Cal.App.2d 776

VALLERA v. VALLERA et al.

Civ. 13586.

District Court of Appeal, Second District, Division 2, California.

April 24, 1942.

Hearing Denied June 22, 1942.

Appeal and error 🔑607(1)

Where it appeared from certificate of clerk of superior court that superior court had terminated proceedings on appeal, and it further appeared that appellant had not furnished District Court of Appeal with sufficient record, appeal was dismissed.

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding by Marian Vallera against Concezio Vallera. From an adverse decision, plaintiff appeals. On defendant's motion to dismiss the appeal and on plaintiff's motion to be allowed to use portions of the record filed by defendant on defendant's appeal.

First motion granted and second motion denied.

William Ellis Lady, of Los Angeles, for plaintiff.

Zagon & Aaron, of Los Angeles, for defendant.

PER CURIAM.

It appearing from the certificate of the clerk of the superior court that on February 5, 1942, an order was made by the superior court terminating proceedings on the appeal of the plaintiff, and

It further appearing that plaintiff has not furnished this court with a sufficient record on appeal,

It is ordered that the motion of defendant to dismiss the appeal of plaintiff be, and it is hereby granted.

It follows as a matter of course that the motion of plaintiff to be allowed to use portions of the record filed by defendant on his appeal must be, and it is, hereby denied.

* * *

51 Cal.App.2d 343

PEOPLE v. DESCANT.

Cr. 1794.

District Court of Appeal, Third District, California.

April 21, 1942.

1. Criminal law 🔑78

Evidence of identity and authority of agent supported conviction of principal for uttering a check without funds or credit with intent to defraud. Pen.Code, § 476a.

2. Criminal law 🔑112(5)

Where a check was drawn in Merced county and made payable at a Merced county bank, but delivered to a merchant in Sacramento county by drawer's agent, the Sacramento county courts had jurisdiction of a prosecution against drawer for uttering a check without funds or credit with intent to defraud. Pen.Code, §§ 476a, 792.

3. Criminal law 🔑112(5)

Where a check was drawn in Merced county and made payable at a Merced county bank, but delivered to a merchant in Sacramento county by drawer's agent, venue of prosecution against drawer for uttering a check without funds or credit with intent to defraud was properly laid in Sacramento county. Pen.Code, § 476a.

4. False pretenses 🔑6

The statute providing punishment for issuing a check without sufficient funds or credit with intent to defraud provides for separate offenses of drawing, uttering, or delivering a check upon a bank where drawer has insufficient funds with intent to defraud, and the word "utter" meaning to put in circulation as money or currency, to cause to pass in trade, and "utterance" meaning, as putting in circulation, as false coin or forged notes. Pen.Code, § 476a.

See Words and Phrases, Permanent Edition, for all other definitions of "Utter" and "Utterance".

5. False pretenses 🔑23

Under statute providing that all persons concerned in the commission of a felony, though not present, shall be punished as principals, an accused uttering or passing checks on a closed account through the agency of an accessory with intent to defraud the person to whom delivered was "concerned in the commission" of the crime so as to be guilty thereof as a "principal". Pen. Code, §§ 476a, 971.

See Words and Phrases, Permanent Edition, for all other definitions of "Concerned in the Commission" and "Principal".

6. Conspiracy 🔑23

Where drawer's accessory and agent delivered a check on a closed account with intent to defraud the person to whom delivered, the drawer and agent were not required to be charged and tried for criminal conspiracy.

7. Criminal law 🔑687(1)

In prosecution for uttering a check without funds or credit, with intent to defraud, where check had been previously referred to by the prosecution and accused called no witnesses in his behalf, accused was not prejudiced by reopening of case after prosecution announced that evidence was closed to permit identification of checks relied on to show intent with which one involved was uttered. Pen.Code, §§ 476a, 1094.

8. Criminal law ⟹686(2)

The granting or denial of a motion to reopen a case for further evidence after a party has rested, is within the sound discretion of the trial judge. Pen.Code, § 1094.

9. Criminal law ⟹695(2)

In prosecution for uttering a check without funds and credit with intent to defraud, the actual uttering allegedly having been committed by an accessory, where accused did not object to receiving in evidence a photograph of the accessory, and a later objection thereto did not state the grounds, accused "waived" any objection on ground that photograph was prejudicial because containing a prison number across the subject's chest. Pen.Code, § 476a.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

10. Criminal law ⟹858(3)

In prosecution for uttering a check without funds or credit with intent to defraud, trial court did not err in permitting jurors to take to jury room checks received in evidence as the jury was entitled to examine such checks to determine accused's purpose and intent. Pen.Code, § 476a; Code Civ. Proc. § 612.

11. Criminal law ⟹858(1)

It is not ordinarily erroneous to permit jurors to take with them to the jury room exhibits which have been received in evidence.

12. Criminal law ⟹1172(1)

In prosecution for uttering a check without funds or credit with intent to defraud, where there was no evidence that any witness had been convicted of a felony, and accused produced no witnesses, an instruction regarding the method of impeaching a witness, including statement that a witness might be deemed to have been impeached by evidence that he had been previously convicted of a felony, was harmless. Pen.Code, § 476a; Code Civ.Proc. § 2051.

◆

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Robert E. Descant, Jr., was convicted of uttering a check without funds or credit with the intent to defraud, and he appeals.

Affirmed.

George I. Lewis, of Sacramento, for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown, Deputy Atty. Gen., for respondent.

THOMPSON, Acting Presiding Justice.

The defendant was charged and convicted in Sacramento County with drawing, uttering and delivering to Louis Block a check for the sum of $35.28, upon the First National Bank of Merced, in which bank the defendant then had no funds or credit, with the intent to defraud the said Louis Block, contrary to the provisions of section 476a of the Penal Code.

The defendant contends that the Sacramento court was without jurisdiction to try the cause; that the court erred in reopening the case and receiving in evidence the testimony of an officer with respect to the identity of several other fictitious checks which were drawn and uttered by the defendant; that the court erred in receiving in evidence photographs of the payee who passed the checks to Louis Block; that the court erred in permitting the jury to take to their jury room the exhibits which were received in evidence, and that the court erred in giving to the jury an instruction regarding the methods of impeaching witnesses.

The evidence satisfactorily shows that the defendant and E. R. Bartlett, the payee named in the check which was passed to Louis Block, co-operated in fraudulently issuing and passing numerous similar fictitious checks at about the same time, with the purpose of defrauding different merchants. Both men were arrested. The defendant was separately charged with this offense. Neither of them took the witness stand at the trial of this case.

On May 19, 1941, the defendant, as manager of the so-called Pacific West Coast Company, opened an account in the First National Bank of Merced, by depositing therein the sum of $117. That fund was exhausted, and the account was finally closed August 15, 1941. No deposit was thereafter made in that account, nor did the defendant negotiate for further credit with the bank. Upon opening his account the defendant was furnished a pad of blank checks, upon each of which there was printed his business card. The checks were consecutively numbered. On September 20, 1941, more than a month after his account had been closed, the defendant drew upon the Merced bank, in his own hand writing, and signed, six different checks, each for the sum of $35.28, which bore the same date and were made payable to E. R. Bartlett. Each check was endorsed by Bartlett and fraudulently passed to different merchants in Sacramento, in payment for goods which he purchased. A portion of the checks were paid to Bartlett in cash. One of these checks, numbered 204, was delivered to Louis Block, the manager of the Dundee Clothing Store in Sacramento, on September 26, 1941, in payment for an overcoat. He also received $10 in cash from that check. The defendant was not then present. This last mentioned check was deposited for collection in the Capital National Bank of Sacramento, on September 29, 1941, and promptly forwarded to the Merced bank for payment. The Merced bank refused payment of the check and returned it with the endorsement stamped thereon, "Account Closed." The other checks, which were exactly like the last mentioned one in date and amount and in every other respect except their serial numbers, were likewise passed by Bartlett to other merchants in Sacramento from whom he purchased goods on or about the same date. They were deposited for collection and forwarded to the Merced bank for payment. Payment on each check was refused, and they were returned with the same endorsement, that the account was closed. Several of these merchants took the witness stand and testified to the respective transactions.

After the arrest of the defendant there was found in his possession the unused portion of the pad of blank checks with stubs corresponding to the previously mentioned checks, and eight other checks which had been filled out and signed by the defendant, for the sum of $20 and $25. These checks were also dated September 20, 1941. The name of the payee was left blank in these eight checks. It was evidently the purpose of the defendant to also fraudulently pass these checks.

The six fictitious checks which were passed to different merchants aggregated the sum of $211.68, which is nearly twice the amount of the entire deposit in the Merced bank. The eight checks which had not been passed aggregated the sum of $180. The similarity of dates, amounts, name of payee of all the negotiated checks, the fact that they were passed by the same man to different merchants in Sacramento on or about the same date in similar transactions furnishes satisfactory evidence of a concerted plan between the defendant and Bartlett to fraudulently procure from various merchants money and goods by means of circulating these fictitious checks.

[1] The judgment is adequately supported by the evidence. To identify the man who passed the check numbered 204, which is the one involved in this action, Mr. Block was asked if the defendant, who sat in the courtroom, was the man. He looked at him, and said "No." He was then shown a card upon which there appeared two bust-photographs of Bartlett in different profiles, across the breast of one of which there appeared a number containing several figures, in the manner in which the pictures of convicts are usually identified. He promptly identified the photographs as pictures of the man who passed the fictitious check to him. An officer afterwards testified that the defendant admitted those photographs were pictures of Bartlett to whom he drew and delivered the six checks. The photographs were received in evidence without objection. Later defendant's attorney objected to them, but failed to assign the reason that one of them was prejudicial because it contained a prison number.

[2-6] The defendant's motions for a directed verdict, for a new trial, and for an arrest of judgment on the ground that the Sacramento court lacked jurisdiction to try the cause, because the checks were asserted to have been drawn in Merced and payable at a bank situated in Merced county, were properly denied. The Sacramento court had jurisdiction of this offense. The venue was properly laid in Sacramento county. The gist of the offense was the uttering or passing of the check in question "with intent to defraud," not the bank, but the merchant to whom the fictitious check was delivered in pretended payment for the overcoat and the ten dollars in change. Section 476a provides for separate offenses of "drawing," or "uttering," or "delivering" a check upon a bank where the maker has insufficient funds with which to pay it, with the intent to defraud another person. Webster's New International Dictionary, at page 2809, defines the word "utter" as it is here used, as "to put in circulation, as

money or currency; to cause to pass in trade." The same authority defines the word "utterance" as "putting in circulation, as false coin or forged notes." In the present case the evidence satisfactorily shows that the defendant uttered or passed the fictitious check in question to Louis Block in Sacramento, through the agency of his accessory, E. R. Bartlett, with the intent to defraud the merchant to whom it was delivered. It is true that the defendant was not present when the check was passed. But it was not necessary that the defendant should be actually present when the crime was consummated, provided he was "concerned * * * in its commission," to render him guilty thereof as a principal. § 971, Pen. Code. The evidence in this case certainly shows, without a doubt, that the defendant was concerned in defrauding the several merchants in Sacramento to whom the fictitious checks were passed as genuine. Nor was it necessary that the participants in that crime should be charged and tried for the offense of criminal conspiracy.

Since the defendant was guilty of the offense of uttering a fictitious check in Sacramento county, through the agency of Bartlett, although the defendant was not then present, the jurisdiction of the crime was located in Sacramento county, where the case was properly tried. § 792, Pen. Code. The section last cited provides in that regard: "The jurisdiction of a criminal action against a principal in the commission of a public offense, when such principal is not present at the commission of the principal offense, is in the same county it would be under this code if he were so present and aiding and abetting therein."

[7, 8] The defendant was not prejudiced by the reopening of the cause after the prosecution announced that its evidence was closed, for the purpose of permitting an officer to identify certain checks which were relied upon to show the purpose or intent with which the particular one which is involved in this case was uttered and passed. The granting or denial of a motion to reopen a case for further evidence after a party has rested, is within the sound discretion of the trial judge. There was no abuse of discretion in the present case. § 1094, Pen. Code; People v. Berryman, 6 Cal.2d 331, 338, 57 P.2d 136; 8 Cal.Jur. 239, § 307. All of those checks had been previously referred to by the prosecution in the course of the trial, and witnesses had been examined in regard to them. The defendant was advised from the outset that the prosecution relied upon the uttering and passing of other similar fictitious checks at about the same time to establish the purpose and intent with which the particular check which is involved in this case was passed to the merchant. The defendant was not taken by surprise. He called no witness in his own behalf. Evidently he did not intend to do so. He submitted his case upon the testimony adduced by the prosecution.

[9] The court did not err in receiving in evidence the photographs of the accessory, Bartlett. It was received without objection. When the defendant did not later object to it, he failed to object on the ground that one of them was prejudicial because it contained the impression of a prison number across the chest. That objection was waived by failure to call the court's attention to it.

[10, 11] The court did not err in permitting the jurors to take with them to the juryroom the checks which were received in evidence. One of the jurors requested that they be permitted to take the exhibits with them to the juryroom. It is ordinarily not erroneous to permit jurors to take with them to the juryroom exhibits which have been received in evidence. There appears to have been no abuse of discretion in that regard in the present case. The jury had a right to examine the various checks to determine whether they were all in the same handwriting of the defendant, whether they bore the same date, and whether they contained other evidence from which the purpose and intent of the defendant might be determined. § 612, Code Civ. Proc.; 24 Cal.Jur. 755, § 36; 114 A.L.R. 1519 note.

[12] Nor did the court err in giving to the jury an instruction regarding the method of impeaching a witness. The challenged instruction is couched in the language which is usually given to the jury regarding that subject in appropriate cases. It contained the usual clause that a witness might be deemed to have been impeached by evidence that he had been previously convicted of a felony. § 2051, Code Civ. Proc. There was no evidence that any witness in the case had been convicted of a felony. That instruction was harmless. It

could not prejudice the defendant, for he produced no witnesses at the trial to whom he might apply.

Clearly there was no miscarriage of justice in the conviction of the defendant.

The judgment and the order are affirmed.

TUTTLE, J., concurs.

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51 Cal.App.2d 431

VUCINICH et al. v. GORDON.

Civ. 13417.

District Court of Appeal, Second District, Division 2, California.
April 25, 1942.

1. Landlord and tenant 🔑**119(2)**

Tenant who continued to hold over after expiration of lease became a "tenant by sufferance".

See Words and Phrases, Permanent Edition, for all other definitions of "Tenant by Sufferance".

2. Landlord and tenant 🔑**199½**

A deed of an undivided one-third interest in the realty by one of three landlords to tenant had no effect on the relationship of landlord and tenant which had existed prior thereto between the other two landlords and the tenant, and did not extinguish tenant's liability to those two landlords for rent under the lease, though it did extinguish rent due under lease to that landlord who conveyed the one-third undivided interest.

3. Tenancy in common 🔑**33**

Where relation of landlord and tenant is created between the owners of the fee as tenants in common, he who holds the exclusive possession of the realty after the term of the lease, whether his possession was gained by his attornment to his co-owner or by an assignment of the leasehold to him by another, occupies the land as a tenant, and the same rules apply as in case of any other tenant holding over.

4. Landlord and tenant 🔑**90(1)**

An express agreement by a tenant to pay rental during holdover after expiration of lease, is unnecessary to continue him as a tenant.

5. Tenancy in common 🔑**33**

Where relation of landlord and tenant is created between the owners of the fee as tenants in common, and the one holding as tenant holds over after expiration of lease, he occupies the premises as a tenant and not as co-owner.

6. Tenancy in common 🔑**33**

The same rules governing the relationship between an owner of realty and a stranger to the title apply to tenants in common when one of them enters into occupancy of the realty as the tenant of the other.

7. Landlord and tenant 🔑**90(1)**

Tenant who held over after expiration of term of lease was presumed to have held over under the provisions of the lease providing for such holding over.

8. Landlord and tenant 🔑**96, 199½**

Where tenant acquired one-third undivided interest of one of three landlords, the tenant's interest as tenant was "merged" with his interest as one of the three owners as tenants in common and tenant was obliged to pay the other two landlords only two thirds of the rental provided for by the lease. Civ.Code, § 1933.

See Words and Phrases, Permanent Edition, for all other definitions of "Merge".

9. Damages 🔑**79(5)**

The statutes making a provision in a contract fixing amount of damage for breach of an obligation thereby created void unless, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage, did not render void as a "penalty" a provision in lease for payment of certain monthly rental in event tenant should exercise his privilege to hold over after expiration of lease. Civ.Code, §§ 1670, 1671.

See Words and Phrases, Permanent Edition, for all other definitions of "Penalty".

10. Landlord and tenant 🔑**200(3)**

Landlords and tenant had the right to include in the lease a provision concerning the amount of monthly rental to be paid

by tenant for use of the premises after expiration of the term of the lease.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Voislav Vucinich and another against Joseph H. Gordon to recover rentals due under a lease. From a judgment in favor of the plaintiffs, the defendant appeals.

Judgment affirmed.

Gordon P. Shallenberger, of Wilmington, for appellant.

Marion Vecki, of San Francisco, and Lester E. Hardy, of Los Angeles, for respondents.

MOORE, Presiding Justice.

The question for determination on this appeal is whether the acquisition by a tenant of a one-third interest of a tenant in common terminated the lease and the obligation of such tenant under the lease.

March 25, 1935, plaintiffs who were then minors, through their guardian, and with the approval of the court, leased their undivided two-thirds interest in certain real property to defendant. They were joined in the lease by their sister, Desanka Vucinich, owner of the other one-third, whereby defendant obtained a leasehold interest on the entirety of the property which was situate in the city of Wilmington. The term of the lease was for five years, to wit, from January 1, 1935, to December 31, 1939, and was for a graduated rental whereby for the years of 1938 and 1939 the monthly rental was fixed at $100. The lease further provided that, on the last day of its term, the lessee shall peaceably and quietly surrender and yield up the premises to the lessor; that if the lessee should hold over after the expiration of the lease, then and in that event the holding over shall be deemed to be a tenancy only from month to month and the said lessee shall pay the sum of $500 for each and every month that he continues in possession of the property.

Three months before the expiration of the lease, to wit, on September 28, 1939, Desanka conveyed to defendant her undivided one-third interest in the property by a grant deed. Such deed was recorded January 26, 1940, whereupon defendant instituted his action for a partition of the property, the possession of which he continued to hold until the 30th of August, 1940, when plaintiffs filed this action to recover the rentals due them under the lease. Defendant contends that he ceased to be a tenant of the plaintiff after the expiration of the lease. This contention has no support in the law.

[1, 2] Upon the expiration of the lease, defendant became a tenant by sufferance. Hull v. Laugharn, 3 Cal.App.2d 310, 39 P.2d 478; Kaye v. M'Divani, 6 Cal.App.2d 132, 44 P.2d 371; Odell v. Buttrick, 126 Cal. 551, 59 P. 133. The deed from Desanka to defendant had no effect upon the relationship of landlord and tenant which had existed prior thereto between plaintiffs and defendant. Inasmuch as defendant became the owner of Desanka's one-third interest, his obligation to pay one-third of the rental due under the lease was thereby extinguished. Higgins v. California Petroleum & Asphalt Co., 109 Cal. 304, 308, 41 P. 1087.

[3] When the relation of landlord and tenant is created between the owners of the fee as tenants in common, he who holds the exclusive possession of the property after the term of the lease, whether his possession was gained by his attornment to his co-owner or by an assignment of the leasehold to him by another, he occupies the land as a tenant. Then the same rules apply as in the case of any other tenant holding over. Schmidt v. Constans, 82 Minn. 347, 85 N.W. 173, 83 Am.St.Rep. 437.

[4-8] An express agreement on the part of the tenant to pay rental during the hold-over is wholly unnecessary to continue the occupant as tenant. Under such circumstances he occupies the premises as a tenant and not in his capacity as co-owner. There is nothing mystical about the relationship of landlord and tenant. The same rules governing that relationship between an owner and a stranger to the title apply to tenants in common when one of them enters into the occupancy of the land as tenant of the other. The relationship between plaintiff and defendant was established by the lease itself. Upon the expiration of its term, defendant, having continued his occupancy, is presumed to have held over under the provisions of the lease providing for such holdover. Carson v. Broady, 56 Neb. 648, 77 N.W. 80, 71 Am.St.Rep. 691. He could not by merely

continuing in possession extinguish his obligation as a tenant which he had carefully fixed by entering into a written lease providing for the holdover. By that instrument, he agreed to pay $500 monthly for the use of the premises after the expiration of his term. However, having acquired the one-third interest of Desanka, his interest as tenant was merged with his interest as one of the three owners as tenants in common. Civ.Code, § 1933; Higgins v. California Petroleum & Asphalt Co., supra; Landis Bros. v. Lawrence, 104 Cal.App. 499, 503, 286 P. 177; Erving v. James H. Goodman & Co., 171 Cal. 559, 153 P. 945. From that time forward he was obligated to pay plaintiffs only two-thirds of the rental provided to be paid by the lease.

The court found that defendant was indebted to plaintiffs in the sum of $3,416.74, which is two-thirds of the total rentals which would have been due from defendant if he had not acquired Desanka's one-third interest, as tenant, in the land. For the reasons given such finding was justified.

[9] Defendant makes the further contention that the provision for the payment of the monthly rental of $500 in the event he should exercise his privilege to hold over after the expiration of the time is a penalty and therefore is void under sections 1670, 1671, Civil Code. By those statutes a provision in the contract fixing the amount of damage for a breach of an obligation thereby created is void unless from the nature of the case it would be impracticable or extremely difficult to fix the actual damage. Neither the question of penalty nor of liquidated damages is involved in this action.

[10] Upon the expiration of the lease defendant had no further right to remain upon the property except as he might choose to do so as a tenant and under the terms to which he had subscribed. At the time of executing that instrument, both parties were free from obligation to each other. They dealt at arm's length. Deliberately and free from coercion, they made the provision for the rental to be paid for the use of the premises after the expiration of the definite term. This they had the right to do. It is universal practice to include such covenants whereby the tenant may determine the extent of his liability. Farley v. Knight Light & Soda Fountain Co., 223 Ill.App. 317. Its presence in defendant's lease suggests no reason for holding that the rental fixed for the season of the holdover provided for a penalty. If the tenant deem such terms oppressive, he is at liberty to leave. He cannot enjoy the benefits of his continued user and at the same time escape from the obligation which he voluntarily undertook under the claim that such obligation is a penalty. There is no reason why the courts should adjudicate that which the parties have determined by their free, solemn and voluntary act.

Judgment is affirmed.

W. J. WOOD, and McCOMB, JJ., concurred.

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51 Cal.App.2d 415

MENCHES et al. v. INGLEWOOD HUMANE SOC. et al.

Civ. 13233.

District Court of Appeal, Second District, Division 2, California.

April 25, 1942.

1. Animals ⚷72

Liability for bite of dog may attach not only to owner without reference to knowledge, but to keeper, also, if keeper has knowledge of dog's viciousness. Gen.Laws 1937, Act 384a.

2. Animals ⚷72

Plaintiffs who accepted delivery of impounded dog at their home by humane society and paid impounding fee acquired title to dog, and hence could not recover from society and its servant for bite inflicted on one plaintiff ten minutes after servant, who delivered dog, had departed under statute making owner of dog liable for damages from bite. Gen.Laws 1937, Acts 384, 384a; Civ.Code, §§ 1865, 1870; St.1933, pp. 124–128, and p. 126, §§ 391–416, and § 396.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Elaine Menches and another against the Inglewood Humane Society and another for injuries and damage from the bite of a dog. From an order granting plaintiffs a new trial, defendants appeal.

Reversed.

Sidney A. Moss, of Los Angeles, for appellants.

Don Lake and Edgar Mulvihill, both of Los Angeles, for respondents.

MOORE, Presiding Justice.

This action is for damages resulting from the bite of an unruly dog which had been impounded and for a time kept by defendants before its sale and delivery by them to plaintiffs. The question for determination is whether, after payment of the impoundage and the acceptance of the animal by plaintiffs at their home, defendants are liable under the dog bite statute which imposes liability upon the owner of a vicious dog when it bites another.

Plaintiffs' ground for recovery was stated in two causes of action: by the first they alleged that the defendants knowing it to be vicious and accustomed to bite mankind did negligently harbor a vicious dog and suffer it to go at large without being properly guarded or confined; that by reason of such carelessness of defendants in permitting the animal to run at large, and with knowledge of its ferocity, plaintiff Elaine was attacked and bitten by the dog to her damage. In the second count, it is alleged that plaintiffs agreed to purchase a dog from defendants; that it was vicious and accustomed to bite mankind, which facts were known to defendants and unknown to plaintiffs; that when defendants brought the animal to plaintiffs' home, they negligently failed to inform plaintiffs of such cruel and furious temper of the beast and allowed it to run at large without proper restraint; that by reason of such negligence Elaine received great bodily injury to her damage in the sum of $25,000.

At the conclusion of the trial, the court peremptorily instructed the jury to return a verdict for defendants. Thereafter a motion for new trial upon the statutory grounds was granted because "the court erred in taking certain questions from the jury."

In order to warrant a judgment in favor of plaintiffs, it was necessary for the court to find in accordance with the allegations of either or both of the two counts. While there was an attempt in the second count to allege a different ground for recovery, in substance it is identical with the first in that both of them charge defendants with negligence in permitting a vicious dog to run at large unattended.

In the first count the allegation of the untamed qualities of the dog are accompanied by the statement that such propensities were within the knowledge of defendants; in the second count it is charged that defendants negligently failed to advise plaintiffs that the dog was vicious.

The facts in proof are that the defendant society, pursuant to its contract with the board of supervisors, was keeping the police dog when plaintiff Anthony called at the pound of the society on a Saturday, inspected the dog, entered the cage where he was kept and was told by defendants that the dog was friendly, "very nice" and a good watch dog with a "husky bark." He had been harbored for about two weeks by defendants. On the following Monday morning in a telephonic conversation, Anthony was told that Brown would arrive at the home of the plaintiffs within thirty minutes with the dog. After his arrival, Brown advised plaintiffs to buy a long chain with which to keep the dog in restraint and to step on his toes if he caused annoyance by jumping upon them. The dog was then turned loose and ran about the yard as Brown wrote a receipt for $1.50 "a general charge that he had to make." Thereupon Anthony Menches paid Brown $1.50. While the dog was running arount, Elaine fed him pieces of steak from her hand. After ten minutes as Brown was departing the dog leaped upon Mrs. Menches, sank his fangs into her mouth and caused her the injuries of which she complained.

Under the state of the pleadings as presented at the trial, the basis of plaintiffs' right to recover must be founded upon the dog bite statute of 1931 (Deering's Gen. Laws, Act 384a), which read as follows: "The owner of any dog which shall bite any person while such person is on or in a public place, or lawfully on or in a private place, including the property of the owner of such dog, shall be liable for such damages as may be suffered by the person bitten, regardless of the former viciousness of such dog or the owner's knowledge of such viciousness."

[1] Much of the discussion presented by respondents' brief is to the effect that the society was the owner of the animal and

therefore itself and its servant are liable, while appellants contend that the society was merely a keeper and had no title or ownership of the dog or knowledge of its vicious tendencies. It may here be observed that liability for the bite of a dog may attach not only to the owner without reference to knowledge but to a keeper also as well if the latter have knowledge of the viciousness of the animal. Smith v. Royer, 181 Cal. 165, 183 P. 660; Hensley v. McBride, 112 Cal. App. 50, 296 P. 316.

[2] The evidence discloses beyond a peradventure that the plaintiffs dealt with the defendants for the purpose of procuring the ownership of the dog. That ownership became absolute upon delivery of the animal to plaintiffs and the payment by them of the impounding fee requested by Brown. The fact that the ownership had been vested in plaintiffs only ten minutes does not minimize or alter the significance of the acts of the acceptance of the dog and the payment of the impounding fee. Their title to the dog became vested in plaintiffs just as conclusively as though they had housed him for more than three years and had asserted adverse title to him. Title was transferred by virtue of the following facts: (1) That an instrumentality of the state, pursuant to statutory authority (Act 384, Deering's Gen. Laws, 1937) had taken the animal into its custody; (2) the former owner having abandoned his pet; (3) acceptance of the animal, and (4) payment of the poundage. If the title to the animal was not vested in plaintiffs by their acceptance of the dog and the payment of the impounding fee, then all statutory provisions regulating the care and disposition of estray animals (Agricultural Code, §§ 391–416, St.1933, pp. 124–128, and Acts 384 and 384a, Deering's Gen.Laws, 1937) are ineffectual for the purpose of governing their treatment and for the purpose of enforcing the payment of liens upon such animals. See Agricultural Code, § 396. Upon payment of the charge made by the society, the ownership of the dog was vested in plaintiffs to the same extent as the purchaser of a thing at a finder's sale becomes its owner. Civ.Code, §§ 1865, 1869, 1870. The dog which caused the suffering of Mrs. Menches was the proper subject of transfer to a stranger by defendant society which had been engaged to perform such office. The transfer was effected prior to its attack upon the unfortunate lady. Therefore, under the dog-bite statute, she has no valid claim against the defendants.

Under the facts disclosed by the record, it is conceivable that the plaintiffs might have stated a cause of action for breach of warranty or for fraud in inducing plaintiff to purchase the dog by making statements as to its qualities without having sufficient knowledge to warrant the declarations with reference thereto. The pleadings before us are not based upon any such claims.

The record is barren of evidence tending to show that defendants were aware of any facts indicating that the dog was vicious. It is therefore unnecessary to pass upon the question whether the second count alleges facts sufficient to permit recovery on the ground of negligence.

Since plaintiff had no right to recover, the court erred in granting the motion for a new trial.

The order is reversed.

W. J. WOOD, and McCOMB, JJ., concurred.

51 Cal.App.2d 311

GEORGE v. CITY OF LOS ANGELES.

Civ. 13360.

District Court of Appeal, Second District, Division 2, California.

April 17, 1942.

Hearing Denied June 16, 1942.

1. Appeal and error 🔑1099(6)

The holding of Supreme Court on prior appeal that allegations of complaint were sufficient to state cause of action, was "law of case" on subsequent appeal from judgment entered on sustaining of demurrer to amended complaint alleging substantially the same facts.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of Case".

2. Appeal and error 🔑1097(2), 1195(1)

A principle or rule of law stated by appellate court and necessary to decision is "law of case" to be thereafter followed in case in trial court and on subsequent appeal, even though appellate court on subsequent appeal might think former decision erroneous.

3. Municipal corporations 🔑821(16)
Whether dangerous condition of street has existed sufficiently long for city to have constructive notice thereof, and whether city has had reasonable time to remedy condition, are "questions of fact" for jury.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact".

4. Municipal corporations 🔑819(6)
Evidence that alleged defective condition of street was created and accepted by city, and that accident in which plaintiff was injured occurred more than four years thereafter, warranted jury's finding that city had "notice" of defect.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice".

5. Negligence 🔑125
In case involving accident due to alleged dangerous condition of premises, evidence of earlier accidents at same place is admissible to prove dangerous condition and that accident resulted therefrom, where circumstances were similar and physical condition of premises was substantially the same.

6. Automobiles 🔑305(6)
In action against city for damages in automobile accident allegedly caused by street defect, admission of testimony of earlier accidents at same place under similar conditions was not error.

7. Trial 🔑412
A litigant withdrawing motion to strike testimony "waives" any error in admission of testimony.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

8. Appeal and error 🔑1170(7)
In action against city for damages allegedly resulting from street defect, refusal to permit city engineer to testify whether plan and design of street conformed to good engineering standards was error, but such error would be disregarded where not prejudicial to city. Const. art. 6, § 4½.

9. Municipal corporations 🔑788(1)
To establish city's liability under Public Liability Act, city must have knowledge of dangerous character of condition causing injury. St.1923, p. 675.

10. Trial 🔑228(3)
In action against city for damages allegedly resulting from street defect, instruction relating to city's knowledge of defect need not use any specific words, providing that the proper conception is conveyed to the jury. St.1923, p. 675.

11. Municipal corporations 🔑822(3)
In action against city for damages allegedly resulting from street defect, instruction that city must have had knowledge or notice of dangerous condition of street, sufficiently advised jury that city must have had knowledge of dangerous character of condition causing injury. St.1923, p. 675.

12. Appeal and error 🔑882(12)
A party cannot complain of error in instructions given at request of adversary, where instruction requested by party urging error contained the same vice.

13. Appeal and error 🔑882(12)
A city sued for damages allegedly resulting from street defect could not complain that instruction was erroneous as imposing liability under general doctrine of negligence, where defendant asked and the trial court gave an instruction substantially the same.

14. New trial 🔑143(1)
The verdict of juror cannot be impeached by testimony or affidavits of juror except where affidavits show that verdict was reached by resort to determination of chance. Code Civ.Proc. § 657, subd. 2.

15. New trial 🔑143(2)
The striking of testimony of juror testifying on motion for new trial in negligence action, that he had visited scene of accident during trial, was proper, in absence of showing that verdict was reached by resort to determination of chance. Code Civ.Proc. § 657, subd. 2.

16. New trial 🔑44(1)
In action against city for damages allegedly resulting from street defect, juror's failure to disclose that prior to trial he had driven over street where accident occurred, was not "misconduct" warranting new trial, where he was not asked on voir dire exam-

ination whether he had traveled on such street.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

17. New trial ⚿56

In accident case, juror's statement on voir dire examination that neither she nor husband had been in accident involving personal injuries, whereas husband had been in such accidents, did not warrant new trial, where juror understood question related solely to her, and appellant was not prejudiced.

18. New trial ⚿44(1), 56

A new trial motion on ground of juror's incorrect answers on voir dire examination will not be granted, in absence of prejudice to appellant or dishonest motive of juror in giving willfully false answers.

◆

Appeal from Superior Court, Los Angeles County; Lewis Howell Smith, Judge.

Action by Walter George against the City of Los Angeles and another for damages received in automobile accident alleged to have been caused by defective condition of street. From a judgment for the plaintiff, the named defendant appeals.

Affirmed.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Leonard Husar and Bourke Jones, Deputies City Atty., all of Los Angeles, for appellant.

Bradner & Weil and Jerold E. Weil, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before a jury in an action to recover damages received in an automobile accident alleged to have been caused by the defective condition of a street of defendant municipality, defendant city of Los Angeles appeals.

The essential facts are:

Plaintiff filed an original complaint charging defendant city of Los Angeles and defendant Los Angeles Gas and Electric Corporation with negligence. Thereafter the trial court sustained demurrers of both defendants to the original complaint. Plaintiff thereupon filed an amended complaint as to defendant city, to which a general demurrer was sustained. Subsequently plaintiff appealed from the judgment entered upon the sustaining of the demurrer of defendant municipality to plaintiff's amended complaint.

Our Supreme Court in George v. City of Los Angeles, 11 Cal.2d 303, 79 P.2d 723, held that the facts alleged in the pleadings just mentioned were sufficient to constitute a cause of action against defendants, and reversed the judgment of the superior court.

Plaintiff then filed an amended complaint which embraced the allegations of the original complaint and of the amended complaint. This latter pleading is the one upon which the present trial was had and the allegations therein are substantially those set forth in George v. City of Los Angeles, supra, 11 Cal.2d page 305, 79 P.2d 723.

[1, 2] Appealing defendant urges six propositions for reversal of the judgment. These will be stated and discussed hereunder seriatim.

First: The evidence failed to disclose that:

(a) A dangerous or defective condition existed on the street on which plaintiff was traveling;

(b) Appealing defendant had notice of any dangerous character of the existing physical condition of the street; and

(c) The condition of the street or catch basin therein was the proximate cause of the accident.

This proposition is untenable. There was received substantial evidence in the present case to support the jury's implied finding that substantially all of the facts existed which were alleged in the complaint as amended. This pleading alleged substantially the same facts as were before the Supreme Court on the former appeal. (See George v. City of Los Angeles, supra, 11 Cal.2d page 305, 79 P.2d 723.) In the opinion just mentioned our Supreme Court held that such facts were sufficient if proven to constitute a cause of action against defendant. Therefore, under the doctrine frequently denominated as "the law of the case," we are foreclosed from considering the foregoing proposition now urged by appealing defendant.

The doctrine of "the law of the case" is this: Where, upon an appeal an appellate court in deciding the appeal states in its opinion a principle or rule of law necessary to the decision, such principle or rule becomes the law of the case and will be adhered to throughout its subsequent progress, both in the lower court and upon a subsequent appeal, and this, although in a later appeal of the case the appellate court may be of the opinion that the former decision was erroneous. (Tally v. Ganahl, 151 Cal. 418, 421, 90 P. 1049; Balfour v. Fresno Canal, etc., Co., 123 Cal. 395, 399, 55 P. 1062.)

[3, 4] *Second: The appealing defendant had no knowledge of the defective or dangerous character or dangerous or defective condition existing in the street.*

This proposition is likewise untenable. It is conceded by the appealing defendant that the alleged defective condition was created and accepted by it in February, 1932. The present accident occurred April 11, 1936. Therefore, under the established rule that it is a question of fact for the trial jury to determine whether the dangerous condition in a public street has existed for a sufficient length of time to constitute constructive notice and also whether a reasonable time to remedy the condition has existed, we are bound by the finding of the jury that the defendant municipality had knowledge of the dangerous and defective condition which existed in the public street. (See Wise v. City of Los Angeles, 9 Cal. App.2d 364, 366, 49 P.2d 1122, 50 P.2d 1079; Cressey v. City of Los Angeles, 10 Cal.App.2d 745, 747, 53 P.2d 172.)

[5, 6] *Third: The trial court committed prejudicial error in permitting a witness to testify that (a) on two previous occasions he had seen automobiles run up on the curb at approximately the place where the accident in the instant case occurred, and (b) in a third case he saw an automobile upon the sidewalk at approximately the same place.*

This proposition is also without merit.

(a) The rule is established that in cases of accident due to the alleged dangerous condition of premises it is proper to receive evidence of earlier accidents occurring at the same place as tending to prove the condition to have been a dangerous one and that the accident in question may have resulted from such condition. As a basis for such testimony it should be shown that the physical condition of the premises was substantially the same at the time of each accident and that the circumstances and conditions under which the several accidents occurred were similar. (Wilkerson v. City of El Monte, 17 Cal.App.2d 615, 618, 62 P.2d 790.) However, it is not necessary that it be shown that the several accidents occurred under circumstances precisely the same. (Magnuson v. City of Stockton, 116 Cal.App. 532, 535, 3 P.2d 30. In the present case there was evidence from which it might be inferred that the first two accidents relative to which the witness testified, for all substantial purposes took place under conditions similar to the accident in question.

[7] (b) Appealing defendant moved to strike out the testimony of the witness relative to the third accident but before the judge ruled upon the motion counsel for the appealing defendant withdrew the same. By so doing he waived any error in the admission of the testimony, the law being established that, where counsel moves to strike out testimony to which he has previously objected and before the ruling on the motion to strike withdraws the motion, he thereby waives any objection he has made to the admissibility of the testimony. (D'Avanzo v. Manno, 16 Cal. App.2d 346, 348, 60 P.2d 524; Driscoll v. California Street Cable R. Co., 80 Cal.App. 208, 221, 250 P. 1062; Bronge v. Mowat & Co., 29 Cal.App. 388, 402, 155 P. 827.) In view of our conclusions relative to the admissibility of the foregoing testimony it was not error for the trial judge to instruct the jury as follows:

"Evidence has been admitted as to other accidents prior to the accident involved in this case. This evidence may be considered by you, together with other evidence in the case, in determining the following:

"Whether or not the condition of Allesandro street at the time and at the scene of the accident involved in this case was or was not dangerous;

"What caused the accident involved in this case and in what manner the accident involved in this case occurred;

"Whether or not the defendant city knew or should have known of the dangerous condition, if you find there was such condition."

[8] *Fourth: It was prejudicial error for the trial court to sustain objections to the following question asked an assistant engineer of defendant municipality:*

(a) "Q. By Mr. Husar: *Now, Mr. Swan, have you examined the profiles, the*

plans and design and have you made a further examination of plaintiff's map up here on the board, plaintiff's exhibit number one with reference to the physical condition of Allesandro Street at and near the intersection of Rosebud Avenue, from about a hundred feet southerly of that intersection of Allesandro Street and Rosebud Avenue to a point approximately one hundred and fifty feet north of said intersection? A. Yes, I have.

"Q. Now having both that and the physical facts in mind, can you state whether or not such design and construction, and the physical conditions of Allesandro Street and as described in the previous question in said locality, on the night of April 10th and in the early morning of April 11th, 1936, as it existed on the late night of April 10th and early morning of April 11th, of 1936, were in accordance with and in compliance with good engineering practise and standards in this community? A. They were.

"Mr. Weil: *I move the answer be stricken out for the purpose of an objection.*

"The Court: *You may make your objection and it may be deemed to proceed the answer.*

"Mr. Weil: *We make the objection on the ground that it is incompetent, irrelevant and immaterial and whether it is in accordance with good engineering plans or not, is not a matter that is within the issues of this case and we object to it on all of those grounds.*

"The Court: *The objection will be sustained and the answer may go out, and the Jury will disregard it."*

(b) "Q. By Mr. Husar: *Now Mr. Swan, having the physical facts in mind, did the contours of such intersecting streets, namely Rosebud Avenue and Allesandro Street, so constructed, conform to the customary standards of design and construction for the disposal of surface waters on streets—may I add to that—I think it is proper to add to that—customary standards of design and construction in this community—for the disposal of surface waters on the streets?*

"Mr. Weil: *Now to which, your Honor, we object on the ground that it is incompetent, irrelevant and immaterial and not within the issues of this case.*

"Mr. Husar: *As authority for that, your Honor, I cite to your Honor the case of Wilkerson vs. The City of El Monte.*

"Mr. Weil: *Well, if the Court please:* —

"The Court: *The objection will be sustained."*

(c) "Q. By Mr. Husar: *Now, Mr. Swan, in designing the construction of the catch basin—I will withdraw that and put it this way. In designing and constructing a catch basin in a street with a grade like that in Allesandro Street, with a five per cent grade, how are they constructed with reference to the street surface?*

* * * * *

"The Court: *The objection will be sustained to that question."*

In view of the decisions in Long v. John Breuner Co., 36 Cal.App. 630, 636, 172 P. 1132; Martin v. Angel City Baseball Assn., 3 Cal.App.2d 586, 589, 40 P.2d 287, and McStay v. Citizens National Trust & Savings Bank, 5 Cal.App.2d 595, 601, 43 P.2d 560, it was error to sustain objections to the foregoing questions. However, from an examination of the record we are of the opinion that the error was not prejudicial to defendant municipality and that therefore we must disregard it, pursuant to the mandate of article VI, section 4½ of the Constitution of the state of California.

Fifth: The trial court committed prejudicial error in instructing the jury as follows:

(a) "If you find that at the time of the accident involved in this case that Allesandro Street, at the scene of the accident, was in a dangerous condition, as that term is defined to you hereinafter, and, if you find that the defendant city had knowledge or notice of the dangerous condition (if you find such condition existed) for such length of time prior to said accident as to give the defendant city a reasonable time after acquiring such knowledge or notice, and prior to said accident, to remedy such condition or to take such action as might be reasonably necessary to protect the public against such condition and that the defendant city failed or neglected for such reasonable time to remedy such condition or to take such action, and, if you find that the plaintiff, while lawfully and in the exercise of ordinary care driving his automobile on said street, suffered personal injuries or property damage resulting from such dan-

gerous condition, or in other words proximately caused by such dangerous condition, if any, then your verdict must be for the plaintiff."

(b) "It was the duty of the defendant city of Los Angeles to exercise ordinary care to maintain Allesandro Street in a reasonably safe condition for its use in a proper manner, and if a dangerous condition existed on Allesandro Street at the time and place of the accident, it is not necessary, in order that the city of Los Angeles be liable, that such condition be due to any defect created in the street after its construction, but the city would be liable if such dangerous condition arose from the construction of the street in the first instance; provided, of course, the other elements necessary to impose liability and explained to you elsewhere in these instructions exist. In other words, even if a dangerous condition is inherent in the very nature of an improvement constructed, the city would be liable for injuries resulting from a dangerous condition so created or arising, as it would be for injuries resulting from a dangerous or defective condition arising from disrepair, or deterioration."

This proposition is without merit.

[9-11] (a) It is the unquestioned law in California that to establish liability of a defendant municipality under the provisions of the 1923 Public Liability Act (Stats.1923, p. 675, Act 5619, Vol. 2, Deering's Gen.Laws (1937) 2630), it is necessary that the defendant city have knowledge of the dangerous character of the condition which causes the injury. (Nicholson v. City of Los Angeles, 5 Cal.2d 361, 363, 54 P.2d 725; Whiting v. City of National City, 9 Cal.2d 163, 165, 69 P.2d 990; Beckley v. Vezu, 23 Cal.App.2d 371, 377, 73 P.2d 296.) We are of the opinion that the instruction set forth in paragraph (a), supra, fully meets the requirement of this rule. It is not essential that any specific words be used providing that the proper conception is conveyed to the jury. It is our view that the words, "If you find that the defendant city had knowledge or notice of the dangerous condition," as used in the questioned instruction, is equivalent to advising them that they must find that defendant city had knowledge of the "dangerous character of the condition which caused the injury."

[12, 13] (b) Appealing defendants' contention that the instruction set forth in paragraph (b), supra, was erroneous because it in effect instructed the jury that defendant municipality would be liable under the general doctrine of negligence, may not be urged by said defendant, for the reason that the law is established that a party may not complain of error in instructions given at the request of his adversary, where an instruction requested by the party urging error contained the same vice. (Jesse v. Giguiere, 24 Cal.App.2d 160, 163, 74 P.2d 310; Miller v. Dollar Steamship Lines, Inc., 19 Cal.App.2d 206, 212, 64 P.2d 1163.) In the present case appealing defendant asked and the court gave an instruction substantially the same as the one set forth in paragraph (b) above. It read as follows:

"The defendant, City of Los Angeles, is not an insurer of the safety of travelers on its streets, but is required only to exercise ordinary care to construct and maintain its streets in a reasonably safe condition for those using them in a lawful manner with ordinary care for their own safety."

Sixth: The trial court committed prejudicial error in not granting appealing defendants' motion for a new trial on the ground of misconduct of:

(a) Juror George A. Long who at the hearing on defendants' motion for a new trial testified that during the course of the trial he visited the scene of the accident;

(b) Juror James V. Garland, who failed to disclose on his voir dire examination that on various occasions prior to the trial he had driven over the street where the accident occurred; and

(c) Juror Pauline Gates, who stated on voir dire examination, contrary to the fact, that neither she nor her husband had been involved in an accident in which personal injuries were suffered.

The foregoing proposition is untenable.

[14, 15] (a) After permitting, over objection, Juror Long to testify that during the course of the trial he had visited the scene of the accident, the trial judge granted plaintiff's motion to strike his testimony from the record. This ruling was correct, since the law is established in this jurisdiction that the verdict of a juror may not be impeached by the testimony or affidavits of a juror except where the affidavits show that the verdict was reached by a resort to the determination of chance within the meaning of subdivision 2 of section 657 of

the Code of Civil Procedure. (Phipps v. Patterson, 27 Cal.App.2d 545, 546, 81 P.2d 437.) Therefore, there was no testimony before the trial court lending support to the alleged misconduct of Juror Long.

[16] (b) Juror Garland was not asked upon his voir dire examination whether he had ever traveled upon the street where the accident occurred, and in the counter affidavits filed on the motion for a new trial he stated that had he been asked such a question he would have answered it in the affirmative. There is, therefore, no showing that this juror wilfully concealed any fact from the court.

[17, 18] (c) Juror Gates on her voir dire examination when asked whether she or her husband had been involved in an accident in which personal injuries were suffered, replied, "No." However, it developed on the motion for a new trial that her husband two years before she had met him had received an injury to his hand in an automobile accident and also slight injuries in an automobile accident thirteen years before the present trial. Juror Gates in her counter affidavit, used on the motion for a new trial, said that she understood the question to relate to her solely. We are of the opinion that from the foregoing facts appealing defendant was not in any way prejudiced by the juror's failure to understand the question and properly answer it. Therefore, since it is established that a motion for a new trial will not be granted upon the ground that a juror upon voir dire examination has incorrectly answered questions, in the absence of a showing that (1) prejudice has resulted to the appealing party, or (2) there were wilfully false and untruthful answers given by the juror which would lead to the inference that the juror was animated by a dishonest motive in qualifying, the trial judge properly denied the appealing defendant's motion for a new trial predicated upon the alleged misconduct of Juror Gates (Mast v. Claxton, 107 Cal.App. 59, 67, 290 P. 48.)

The record is free from error. It discloses zealous and sincere effort of the patient, kindly, industrious judge who, since the filing of this appeal, has passed to his final reward.

For the foregoing reasons, the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concurred.

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51 Cal.App.2d 327

HEDLUND v. SUTTER MEDICAL SERVICE CO. et al.

Civ. 11917.

District Court of Appeal, First District, Division 2, California.

April 20, 1942.

Rehearing Denied May 20, 1942.

Hearing Denied June 18, 1942.

1. Hospitals 🔑7

Where plaintiff went to a hospital having the name over the door for an examination and the hospital's receptionist sent plaintiff after she had paid the cashier to a physician with offices in the building where plaintiff received an examination and was sent to a technician in the building for an allergy test and the physician later admitted her to the hospital for treatment of her injuries without reference to the hospital, hospital was "estopped" to deny that technician was an "employee", and hence was liable for technician's negligence.

See Words and Phrases, Permanent Edition, for all other definitions of "Employee" and "Estop".

2. Principal and agent 🔑25(1)

Where the duty, the violation of which constitutes the tort sued for, springs from no contract with or relation to the principal, the party may not be "estopped" from denying the wrongdoer was his agent, even though he had held him out as such, but whenever the tort consists of a violation of a duty springing from the contract between the parties, the ostensible principal is liable to the same extent in an action ex delicto as in one ex contractu.

3. Estoppel 🔑115

Where issue that defendant was estopped was first raised by defendant's answer, facts constituting estoppel could be proved without pleading them in complaint.

4. Hospitals 🔑.

Where a hospital corporation either contracted or led plaintiff to believe that it was contracting with her for medical services, the hospital was not relieved from liability for its technician's negligence resulting in plaintiff's injuries, on the ground that hospital could not lawfully practice medicine, as the restriction was for the benefit of the public, and the parties were not in "pari delicto".

See Words and Phrases, Permanent Edition, for all other definitions of "Pari Delicto".

5. Hospitals 🔑7

Hospitals are liable for tortious acts of their physicians where the hospital had contracted to furnish medical services.

6. Contracts 🔑138(1)

If refusal to enforce or rescind an illegal bargain would produce a harmful effect on parties for whose protection the law making the bargain illegal exists, enforcement or rescission, whichever is appropriate, is allowed.

7. Master and servant 🔑333

In action against a hospital corporation and attending physician for personal injuries resulting from a negligently conducted allergy test, where attending physician and technician giving the test testified that technician was physician's employee and hospital was estopped to deny that technician was its employee, a verdict for attending physician was not fatally inconsistent with a verdict against the hospital, since the defendants were independently liable, if at all, under the doctrine of "respondeat superior".

See Words and Phrases, Permanent Edition, for all other definitions of "Respondeat Superior".

8. Judgment 🔑630

A judgment in favor of one joint tortfeasor is not evidence in favor of or a bar to an action against another, except where the liability of the latter is purely derivative or he is entitled to indemnity from the other.

9. Appeal and error 🔑880(3)

One joint tort-feasor against whom a judgment was rendered cannot complain that the other was erroneously exonerated in the same action, since the liability of joint tort-feasors is joint and several, and neither has a right of contribution from the other.

10. Master and servant 🔑333

Where master's liability was solely by reason of servant's conduct, if the master directed servant's tortious act and is thus independently liable, the master may be held although the servant is exonerated.

11. Appeal and error 🔑880(3)
Hospitals 🔑7

In action against hospital corporation and attending physician for injuries resulting from a negligently conducted allergy test, where hospital was estopped from denying that technician conducting the test was its employee, hospital was equally "estopped" to assert that attending physician was technician's employer, and hence could not take advantage of judgment in favor of the attending physician on appeal.

12. Hospitals 🔑8

In action against hospital corporation for personal injuries resulting from a negligently conducted allergy test, evidence supported verdict for plaintiff on issues of negligence.

13. Hospitals 🔑8

In action against hospital corporation for personal injuries resulting from a negligently conducted allergy test, whether plaintiff was injured from the application of a harmful solution to her arm or from an unusual, but natural reaction to a properly applied test was for jury.

14. Appeal and error 🔑1050(1)

In action for injuries allegedly resulting from a negligently conducted allergy test, where defendant's medical expert testified that the reaction suffered by plaintiff could have been caused by a proper allergy test, that plaintiff's expert was permitted to testify that he had never seen anything like the condition of plaintiff's arm as a result of such test was not prejudicial.

15. Appeal and error 🔑1053(3)

In action for injuries from a negligently conducted allergy test, where plaintiff's expert testified fully on the proper manner of giving allergy skin tests and effects to be expected from tests properly and improperly given, and defendant's expert testified that the usual solution used in such test caused no painful sensation, and jury found that the usual solution was not used, plaintiff's expert's evidence that when he saw plaintiff's arm he concluded that something was wrong was cured by an instruction that jury should weigh the reasons given by one expert against those of another and the reasons for each opinion.

16. Trial 🔑296(3)

In action for injuries resulting from a negligently conducted allergy test, instruction that it was the duty of defendant hospital to exercise ordinary care to furnish suitable supplies for care of a patient was required to be taken in connection with other instructions, to apply only if jury found plaintiff was a patient, as the hospital was estopped to deny otherwise and that the liq-

uid supplied for use on her as a patient was harmful, and as so limited, was proper.

17. Pleading ⚷406(1)

In action against hospital for personal injuries resulting from a negligently conducted allergy test, where defendant tried the issue of liability without objection to the complaint, any defect in complaint was "waived".

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

18. Damages ⚷132(8)

An award of $3,750 to a waitress for injuries from a negligently conducted allergy test resulting in small scars on plaintiff's left arm was not excessive.

19. Costs ⚷90

The statute requiring the trial court to award costs to such of defendants not united in interest and making separate defenses by separate answers as have judgment in their favor is "mandatory". Code Civ.Proc. § 1032(b).

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory".

20. Costs ⚷90

Where physician and president of a hospital corporation sought to be held liable for negligence of a technician were represented by the same attorney and filed separate answers they were not "united in interest" within the statute relating to imposition of costs, since each could be held liable only on the theory he was bound by the technician's tortious conduct, and the relation of each to the technician was different, and hence where plaintiff recovered judgment against defendant hospital but did not recover against the president and physician, the latter defendants were entitled to their costs. Code Civ.Proc. § 1032(b).

See Words and Phrases, Permanent Edition, for all other definitions of "United in Interest".

◆

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Emma Hedlund against Sutter Medical Service Company and others for personal injuries from alleged negligent treatment. From an adverse judgment, named defendant appeals and remaining defendants appeal from an order striking their cost bill.

Judgment affirmed. Order reversed with directions.

Hadsell, Sweet, Ingalls & Lamb and Hadsell, Sweet, Ingalls & Carroll, all of San Francisco, for appellants.

A. D. Ericksen, of Oakland, and Johnson & Harmon and Wm. H. Henderson, all of San Francisco, for respondent.

DOOLING, Justice, pro tem.

This is an appeal by Sutter Medical Service Company from a judgment against it and in favor of plaintiff entered following the verdict of a jury. The appellant is the owner and operator of the Sutter Hospital in San Francisco. The defendant S. Nicholas Jacobs is a licensed physician and the president of appellant company. The evidence shows that a group of doctors known as "Sutter Hospital Group of Doctors" have their offices on the first floor of the building occupied by the Sutter Hospital. The hospital and the group of doctors have a common bank account and a common bookkeeping system, but it is appellant's contention that they operate entirely independently, the doctors belonging to the group being all employed by Dr. Jacobs as president of the group, paying rent to the appellant company for the office space occupied by them in the hospital building, and being paid for their services from the receipts of the group by checks on the common bank account. The testimony of Dr. John E. Morgan, another defendant who was actually in charge of plaintiff's treatment, was sufficient to cast grave doubt upon appellant's claim that this was the actual arrangement. Dr. Morgan testified that he was employed at a monthly salary by Dr. Jacobs "as a resident physician at the Sutter Hospital," that at the time of his employment Dr. Jacobs said nothing to him about the group of doctors and spoke only of his taking a position as resident physician, and that he knew very little about the group of doctors until the day that he was called to the witness stand. However, we do not find it necessary to inquire further into the intricacies of the relationship between the appellant and the Sutter Hospital Group of Doctors for the reason that we are satisfied that the verdict and judgment against appellant can well be rested upon the doctrine of estoppel.

Plaintiff, who is a waitress belonging to the Waitresses' Union in Oakland, had long been a sufferer from asthma. On September 28, 1939, she went to the Sutter Hospital. Over the door of the building she saw the words "Sutter Hospital." She had no particular doctor in mind. She went to the desk in the reception room and the lady at the desk asked her what she wanted. She told her: "I was troubled with asthma and I wanted a general examination." The receptionist took her history and she told the receptionist that "I was troubled with asthma and I was advised to come to the Sutter Hospital because, my sister advised me to go there and have an examination and see if they could find anything that would help me. So she ordered me in to Dr. Morgan." Plaintiff had never met Dr. Morgan before and did not ask to see him or any particular doctor. Before she was taken to Dr. Morgan's office the receptionist gave her a bill for $26.50 and she went to the office and paid that amount to the cashier. Dr. Morgan after an examination of the plaintiff and the taking of an X-ray sent her to Miss Lockwood, a technician in the hospital building, for an allergy test. It was as a result of this test that she suffered the injury to her arm for which the jury awarded her a verdict against appellant. Even after her arm became seriously swollen and inflamed nothing was said to her about the Sutter Hospital Group of Doctors, and on the day following her examination Dr. Jacobs admitted her to the Sutter Hospital as a bed patient for free treatment of her injured arm.

[1, 2] The trial judge gave an instruction on estoppel as against appellant. The facts above recited would justify a finding by the jury that appellant was estopped to deny that Miss Lockwood in giving the allergy test was its employee. Donnelly v. San Francisco Bridge Co., 117 Cal. 417, 49 P. 559; Lowmiller v. Monroe, Lyon & Miller, Inc., 101 Cal.App. 147, 281 P. 433, 282 P. 537; Hannon v. Siegel-Cooper Co., 167 N.Y. 244, 60 N.E. 597, 52 L.R.A. 429; Adelphia Hotel Co. v. Providence Stock Co., 3 Cir., 277 F. 905; Standard Oil Co. v. Gentry, 241 Ala. 62, 1 So.2d 29; Augusta Friedman's Shop v. Yeates, 216 Ala. 434, 113 So. 299; Manning v. Leavitt Co., 90 N.H. 167, 5 A.2d 667, 122 A.L.R. 249; Fields, Inc., v. Evans, 36 Ohio App. 153, 172 N.E. 702; Christiansen v. Fantle Bros., Inc., 56 S.D. 350, 228 N.W. 407; Maloney Tank Mfg. Co. v. Mid-Continent Petroleum Corp., 10 Cir., 49 F.2d 146; Rhone v. Try Me Cab Co., 62 App.D.C. 201, 65 F.2d 834. The basis of the rule in tort cases is well stated in Hannon v. Siegel-Cooper Co., supra [167 N.Y. 244, 60 N.E. 598, 52 L.R.A. 429]: "It may very well be that where the duty, the violation of which constitutes the tort sued for, springs from no contract with, nor relation to, the principal, a party could not be estopped from denying that the wrongdoer was his agent, even though he had held him out as such. In such a case the representation of the principal would be no factor in producing the injury complained of. But, whenever the tort consists of a violation of a duty which springs from the contract between the parties, the ostensible principal should be liable to the same extent in an action ex delicto as in one ex contractu." We cannot agree with appellant that under the facts the jury was not entitled to find that plaintiff, relying upon appearances for which appellant was responsible, believed that she was contracting for medical services with the appellant.

[3] The facts constituting the estoppel could be proved without pleading them in the complaint, since the issue was first raised by the answer of appellant. Wilson v. Grey, 49 Cal.App.2d 228, 121 P.2d 514, and cases there cited.

[4] It is true that appellant could not lawfully practice medicine, but this fact should not avail it in an action of this character. It either did contract, or led appellant to believe that it was contracting, with her for medical services. The same question was disposed of in Hannon v. Cooper-Siegel Co., supra, where the court said:

> "The public health law, by section 164, makes it a misdemeanor for any person to practice, or to hold himself out to the public as practicing dentistry * * * without being licensed to practice as such * * * and it would seem that the action of the defendant, in assuming to carry on the business of dentistry, was illegal and ultra vires. But, though it was beyond the corporate powers of the defendant to engage in the business, this does not relieve it from the torts of its servants committed therein (Bissell v. [Michigan, etc.], Railroad Co., 22 N.Y. 258), and the unanimous affirmance of the appellate division is conclusive to the effect that it either practiced

dentistry or held itself out as practicing dentistry."

[5] The case of Pilger v. City of Paris Dry Goods Co., 86 Cal.App. 277, 261 P. 328, announcing a contrary rule, was expressly disapproved in Inderbitzen v. Lane Hospital, 124 Cal.App. 462, 12 P.2d 744, 13 P.2d 905, and as pointed out in that case both before and since the decision of the Pilger case hospitals have been held liable in this state for tortious acts of physicians where the hospital had contracted to furnish medical services. Brown v. La Societe Francaise, 138 Cal. 475, 71 P. 516; Bowman v. Southern Pacific Co., 55 Cal.App. 734, 204 P. 403; Bellandi v. Park Sanitarium Ass'n, 214 Cal. 472, 6 P.2d 508; Criss v. Angelus Hospital Ass'n, 13 Cal.App.2d 412, 56 P.2d 1274. Many cases to like effect from other jurisdictions are collected in the Inderbitzen case at page 466 of 124 Cal.App., 12 P.2d 744, 13 P.2d 905 and to these cases may be added the following since decided: Edwards v. West Texas Hospital, Tex.Civ.App., 89 S.W.2d 801; Giusti v. C. H. Weston Co., 165 Or. 525, 108 P.2d 1010; Hansch v. Hackett, 190 Wash. 97, 66 P.2d 1129.

[6] The useful legal fiction by which everyone is presumed to know the law, relied upon by the court in Iterman v. Baker, 214 Ind. 308, 15 N.E.2d 365, to reach a different conclusion, becomes a medium of injustice when applied in a case of this character. The maxim "No one can take advantage of his own wrong" (Civ.Code, § 3517) would seem to be more applicable. The restriction upon the practice of medicine is for the protection of the public, including plaintiff in this case, and not at all for the protection of one who wrongfully engages in its practice. The parties are in no sense in pari delicto. The rule properly to be applied in such cases is couched in the following language in the Restatement of the Law of Contracts, volume II, section 601:

"If refusal to enforce or rescind an illegal bargain would produce a harmful effect on parties for whose protection the law making the bargain illegal exists, enforcement or rescission, whichever is appropriate, is allowed."

Rescission would not afford plaintiff adequate relief for the injury done her. The return of her $26.50 paid for the examination would be a poor substitute for the $3,750 damages allowed her in this case for her injuries. The rule above quoted from the Restatement has more than once found application in the decisions of our courts. Eberhard v. Pacific Southwest Loan & Mortgage Corp., 215 Cal. 226, 228, 9 P.2d 302; Bliss v. California Co-operative Producers, 23 Cal.App.2d 245, 72 P.2d 885; Western Oil, etc., Co. v. Venago Oil Corp., 218 Cal. 733, 745, 24 P.2d 971, 88 A.L.R. 1271; Rossi v. Jedlick, 115 Cal.App. 230, 235, 1 P.2d 1065; Savings Bank v. Burns, 104 Cal. 473, 480, 38 P. 102. To refuse to apply it in this case would permit one who would otherwise be bound by a tort liability to escape that liability on the sole ground that in the commission of the tort it was violating a law enacted not for its, but for plaintiff's protection.

[7] Appellant suggests, without citation of any authority, that, if the appellant hospital is held on the theory of estoppel to deny that Miss Lockwood was its employee, the verdict in favor of Dr. Jacobs is fatally inconsistent with the verdict against the hospital in view of Dr. Jacobs' and Miss Lockwood's testimony that she was Dr. Jacobs' employee. Appellant doubtless has in mind the principle enunciated in Bradley v. Rosenthal, 154 Cal. 420, 97 P. 875, 129 Am.St.Rep. 171, that where master and servant are jointly sued for the alleged negligence of the servant alone, which the master did not direct and in which he did not participate, a verdict in favor of the servant "ex propria vigore relieves the principal of responsibility and may be availed of by the principal for that purpose." This case does not fall into that pattern. Here the act of negligence was Miss Lockwood's not Dr. Jacobs', and if Dr. Jacobs and appellant hospital were liable they were both liable under the doctrine of respondeat superior. The hospital's liability was in no sense dependent upon any act of Dr. Jacobs and vice versa. Miss Lockwood was not a party defendant and was not exonerated by the jury. The rule applying to joint tort feasors generally is that judgment in favor of one joint tort feasor is not a bar to a recovery against the other.

[8] "Neither is a judgment in favor of one joint tort-feasor, evidence in favor of or a bar to an action against another, except where the liability of the latter is purely derivative or he is entitled to indemnity from the other." Freeman on Judgments, 5th Ed., vol. 2, p. 1213.

The question was elaborately discussed by the Supreme Court of the United States in Bigelow v. Old Dominion Copper M. & S. Co., 225 U.S. 111, 32 S.Ct. 641, 642, 56 L.Ed. 1009, Ann.Cas.1913E., 875, and the rule declared that a judgment in favor of one joint tort feasor is not a bar to a recovery against the other except "where the liability of the defendant is altogether dependent upon the culpability of one exonerated in a prior suit, upon the same facts, when sued by the same plaintiff. * * * The unilateral character of the estoppel of an adjudication in such cases is justified by the injustice which would result in allowing a recovery against a defendant for conduct of another, when that other has been exonerated in a direct suit. The cases in which it has been enforced are cases where the relation between the defendants in the two suits has been that of principal and agent, master and servant, or indemnitor and indemnitee."

[9, 10] The quotation from Freeman and the Bigelow case deal with the effect of a judgment in favor of one joint tort feasor when the other is later sued in a separate action, but it has been held in California that the principle is no different where the two are joined in one action. Since the liability of joint tort feasors is joint and several, and since neither has a right of contribution from the other, it is settled that one joint tort feasor against whom a judgment was rendered cannot complain that the other was erroneously exonerated in the same action. "The appellant, however, cannot take advantage of an error in favor of his codefendants. The liability is joint and several, and, if the defendant is liable, he cannot complain of the verdict in favor of his codefendants, who are equally liable." Talcott Land Co. v. Hershiser, 184 Cal. 748, 756, 195 P. 653, 656. Even in the case of master and servant, where the liability arises solely by reason of the servant's conduct, if the master directed the servant's tortious act and is thus independently liable, he may be held although the servant is exonerated. Benson v. Southern Pacific Co., 177 Cal. 777, 171 P. 948. We recognize that in the Benson case no verdict was returned for or against the servant, but the case was treated by the court as one in which the failure to return a verdict was tantamount to a verdict in the servant's favor. It was cited to this effect in Blackwell v. American Film Co., 189 Cal. 689, 698, 209 P. 999.

We conclude that the judgment in favor of Dr. Jacobs cannot be taken advantage of by the appellant on this appeal. Ohlson v. Frazier, 2 Cal.App.2d 708, 715, 39 P.2d 429; Jennings v. Day, 7 Cal.App.2d 555, 557, 46 P.2d 193; Bezera v. Associated Oil Co., 117 Cal.App. 139, 142, 3 P.2d 622; Blackwell v. American Film Co., supra; Talcott Land Co. v. Hershiser, supra.

[11] The same result can be as well reached in this case in another fashion. If appellant hospital is estopped to deny that Miss Lockwood was its employee in administering the tests to plaintiff in this action, it would seem to be equally estopped to assert against the plaintiff that Dr. Jacobs was Miss Lockwood's employer.

[12] The verdict finds support in the evidence. Plaintiff testified that Miss Lockwood, after scraping her left arm in twenty-four places, dropped a solution onto each abrasion from a dropper. As soon as the liquid touched the arm it commenced to have a burning sensation. Plaintiff said: "Oh, my God, nurse, it is burning. What are you doing, putting acid in or something, it is burning something terrible." It was a sharp burning, just as if you put your hand in a stove. Plaintiff complained of the burning sensation when the first drop was applied but Miss Lockwood continued to apply the solution, although plaintiff continued to complain, until it had been applied to all twenty-four abrasions. After the liquid had been applied to all twenty-four scratches a different powder, for separate food tests, was put on each scratch. The arm swelled up and became very red and painful. Miss Lockwood then proceeded to scrape the right arm and applied different liquids, each from a small phial, to the abrasions on that arm. There was no sensation of burning in the right arm and no untoward developments in that arm from the application of the liquids. Plaintiff demanded that something be done for the left arm to prevent possible infection from her coat sleeve and Dr. Morgan was called in and directed Miss Lockwood to bandage the arm. The arm was so painful that night that plaintiff got little sleep and it was still burning, uncomfortable, red and very swollen the next morning. The abrasions were all "kind of greenish and pus in these openings." The plaintiff

returned to the hospital the next day and Dr. Morgan and Dr. Jacobs examined her arm. Dr. Jacobs said: "If anything does happen to your arm and you are not in the hospital, we are not responsible, but we will admit you to the hospital free of charge." They put her to bed in the hospital immediately. After two or three days in the hospital the swelling and pain in the arm subsided but the abrasions "were red and yellow and green." She asked Dr. Morgan while she was in the hospital what had happened to her arm and Dr. Morgan said that he did not know. As a result of the injury to her arm there are small scars where the abrasions were made which become red when plaintiff gets warm or when she is not feeling well. Since waitresses are required to work in short-sleeved uniforms this has resulted in its being impossible for her to get any but casual employment at her trade.

Miss Lockwood testified that the liquid applied to the abrasions on the left arm was tenth-normal sodium hydroxid which is admittedly standard for such tests. Dr. Twain, an expert produced by plaintiff, testified that such a solution is not harmful to the human body, but that sodium hydroxid is a caustic and in stronger solution will destroy the tissues. He further testified that you seldom get a reaction from an allergy test in less than an hour and very seldom get any severe reactions from the skin-scratch tests of the kind made upon plaintiff's left arm, and that in the performance of the test you might get a very slight burning, but definitely would not get an intense burning. Dr. Tainter, testifying for appellant, stated that if a strong solution of sodium hydroxid was placed on a scratch pain would be manifest in "ten seconds at the most, maybe before," but that there would be no pain from a tenth-normal solution.

This evidence is ample, if believed by the jury to support a finding that some corrosive liquid was applied to plaintiff's left arm resulting in the injuries which she suffered.

[13] Dr. Twain on cross-examination testified that you might in an extreme case get a reaction from food tests which would result in an arm condition such as plaintiff suffered. This admission would not prevent the jury from finding for plaintiff. Plaintiff testified that the extreme burning sensation commenced with the application of the first drop of the solution and before any powders were applied. Her arm became painful and inflamed immediately. By the time the powders were put on "I don't really know the reaction because everything was burning"; and when asked if the burning increased when the powder was put on she replied: "I don't know. I think it remained the same." It was for the jury to decide whether plaintiff suffered her injuries from the application of a harmful solution, or from an unusual but natural reaction to a properly applied test.

[14] Appellant complains that Dr. Twain was permitted to testify that he had never seen anything like the condition of plaintiff's arm as a result of allergy tests. Assuming that it was error to allow this testimony we cannot find on the record that prejudice resulted. Dr. Tainter, appellant's expert, when asked if the reaction suffered by plaintiff in her left arm could have been caused by a proper allergy test answered: "Yes, that sort of reaction is caused by an occasional—fortunately uncommon, not very usual, allergy reaction."

[15] Dr. Twain was also allowed to testify that when he saw plaintiff's arm. "I naturally came to the conclusion that something was not proper * * * that something was wrong, something had gone wrong." While this testimony may have gone beyond the limits allowed to an expert witness (Hurwit v. Prudential Insurance Co., 45 Cal.App.2d 74, 113 P.2d 691) Dr. Twain testified fully on the proper manner of giving skin tests for allergy generally and the effects to be expected from tests properly and improperly given. The only question of negligence submitted to the jury was whether the "condition resulted from the application of too strong a solution of sodium hydroxid or some other corrosive substance to plaintiff's arm." The court in this respect also instructed the jury: "If you find from the evidence that Miss Lockwood * * * used the fluid that she testified that she used—that is, one-tenth normal sodium hydroxid, then your verdict must be against plaintiff and in favor of defendants." It thus appears that the jury must have found that Miss Lockwood used some corrosive and harmful liquid instead of one-tenth normal sodium hydroxid. In arriving at this conclusion they must have believed plaintiff's testimony that her arm started to burn violently when the liquid was first applied as well as the testimony given both by ap-

pellant's expert, Dr. Tainter, and Dr. Twain, that there would be no painful sensation from the use of a one-tenth normal solution of sodium hydroxid. This was the ultimate question decided by the jury and in deciding it they were instructed that they must weigh "the reasons given by one (expert) against those of another" and "should consider such expert opinion and should weigh the reasons, if any, given for it." A similar instruction was held to cure the error in the admission of expert testimony in Hurwit v. Prudential Insurance Co., supra.

Appellant complains of several instructions:

1. The instruction on estoppel. This has been sufficiently covered and we conclude that the giving of the instruction was proper.

[16] 2. An instruction that "it is the duty of a hospital to exercise ordinary care to furnish to the attendants of a patient suitable supplies, equipment and facilities commensurate with the requirements of the case. * * *" The instruction was technically correct. Payne v. Santa Barbara Cottage Hospital, 2 Cal.App.2d 270, 37 P.2d 1061. Taken in connection with the other instructions the jury must have understood this instruction only to be applicable if they found first that plaintiff was a patient of the hospital, or that the hospital was estopped to deny that fact, and second that the liquid supplied for use on her as patient was harmful and not innocuous. So limited the instruction was proper.

3. An instruction on the factors to be considered by the jury in determining whether the doctors and nurses in charge of plaintiff were employees of the hospital, we find no error therein.

[17] It is claimed that the complaint did not state a cause of action against appellant. Any defect in the complaint, if such existed, was cured by the conduct of appellant at the trial. Counsel by trying the issue of liability of appellant without objection waived any defect in the complaint. Reed v. Parra, 203 Cal. 430, 264 P. 757; Say v. Barber, 202 Cal. 679, 262 P. 312; Pasquale v. Pasquale, 219 Cal. 408, 27 P.2d 76; Slaughter v. Goldberg, Bowen & Co., 26 Cal.App. 318, 147 P. 90.

[18] The trial judge on motion for new trial reduced the judgment from $5,000 to $3,750. This amount is patently not excessive.

Defendants Morgan and Jacobs have appealed from an order striking out their cost bill. Subdivision (b) of section 1032, Code of Civil Procedure, provides: "When there are several defendants in any action mentioned in subdivision (a) of this section, not united in interest, and making separate defenses by separate answers, and plaintiff fails to recover judgment against all, the court must award costs to such of the defendants as have judgment in their favor." While all defendants were represented by the same attorneys, they filed separate answers; and they were not united in interest since the liability of each depended on the claimed negligence of Miss Lockwood, each could only be held liable on the theory that he was bound by Miss Lockwood's tortious conduct and the relation of each to Miss Lockwood was distinct and different from the others.

[19, 20] The language of the section is mandatory and we conclude that appellants Morgan and Jacobs are entitled to their costs. The case of Naify v. Pacific Indemnity Co., 11 Cal.2d 5, 13, 76 P.2d 663, 115 A.L.R. 476, dealt with the question of costs on appeal, not trial costs, and did not purport to construe the effect of the code section above quoted.

The judgment is affirmed with costs to respondent Hedlund.

The order striking the cost bill is reversed and the trial court is directed to tax the costs pursuant to plaintiff's motion on file; appellants Morgan and Jacobs to have their costs on appeal excluding therefrom any portion of the cost of procuring the reporter's transcript.

NOURSE, P. J., and SPENCE, J., concurred.

51 Cal.App.2d 362

HUGHES et al. v. SCHWATZ.

Civ. 11802.

District Court of Appeal, First District,
Division 1, California.

April 22, 1942.

Hearing Denied June 19, 1942.

1. Appeal and error ⚷979(5)

The trial court exercises a broad discretion in granting a new trial on ground of inadequacy of damages awarded, and its order granting a new trial on that ground will not be disturbed in absence of a showing of abuse of discretion. Code Civ.Proc. § 657.

2. Appeal and error ⚷977(2)

Under statute authorizing a trial court in a proper case to grant a new trial on the sole issue of damages, its order so limiting the new trial when predicated on insufficiency of the verdict is subject to attack solely on ground of abuse of discretion. Code Civ.Proc. § 657.

3. New trial ⚷9

Where no award at all is made for general damages in a negligence action, the only possible explanation is that jurors compromised issue of liability, and it is error to limit new trial to issue of damages alone; but, where a substantial but inadequate award of general damages is made, question whether new trial should be limited rests within trial judge's discretion. Code Civ. Proc. § 657.

4. Appeal and error ⚷930(4)

Jury's verdict in favor of plaintiffs in automobile negligence death action implied findings adverse to defendant on issues of negligence and alleged contributory negligence, and, in absence of appeal or request for a new trial by defendant, those implied findings, if fairly made, were a final determination of the issues as fully as though defendant, after filing his answer, had stipulated to the facts so found.

5. Appeal and error ⚷977(1)

On defendant's appeal from order granting plaintiffs' motion for new trial on issue of damages alone in death action, correctness of jury's conclusions on issues presented could not be challenged on ground that three prior juries had disagreed.

6. Trial ⚷314(1)

The trial judge has a wide discretion in determining the length of time that a jury may deliberate before discharging the jury.

7. Appeal and error ⚷1015(5)

On defendant's appeal from order granting plaintiffs' motion for a new trial on issue of damages alone in death action, evidence was insufficient to show that verdict was the result of coercion on part of trial judge.

8. New trial ⚷9

On defendant's appeal from order granting plaintiffs' motion for new trial on issue of damages alone in death action on ground that verdict of $1,250 for general damages only was inadequate, record did not show as a matter of law that verdict was the result of compromise among jurors on issue of liability, and hence it was within trial judge's discretion to limit new trial to issue of damages alone. Code Civ.Proc. § 657.

◆

Appeal from Superior Court, Contra Costa County; Thomas D. Johnston, Judge.

Action by Grace Hughes and others against Alfred Schwartz for the death of Fay Edward Hughes. There was a verdict for plaintiffs for $1,250, and, from an order granting plaintiffs' motion for a new trial on the issue of damages alone, defendant appeals.

Affirmed.

Hearing denied; EDMONDS, J., dissenting.

Bronson, Bronson & McKinnon, of San Francisco, for appellant.

Nichols & Richard, of Oakland, James F. Hoey, of Martinez, and Leonard J. Dieden, of Oakland, for respondents.

PETERS, Presiding Justice.

Plaintiffs, who are the widow and children of Fay Edward Hughes who was killed by an automobile driven by defendant, brought this action for his wrongful death. The trial resulted in a unanimous jury verdict in favor of plaintiffs in the sum of $1,250. Plaintiffs moved for a new trial on the issue of damages alone. Defendant made no motion for a new trial. The trial court granted a new trial on the issue of damages alone, the order reciting that: "The amount of the award being grossly inadequate, the court finds that said new trial [on the issue of damages] shall be granted upon the ground of the insufficiency of evidence to justify the verdict." From this order defendant prosecutes this appeal.

Appellant concedes that on the issue of liability the evidence was conflicting, and that the evidence supports the implied findings that defendant was negligent and that the deceased was free from contributory negligence. It is further conceded that the verdict was inadequate. The sole point urged is that the record shows, as a matter of law, that the verdict was the result of a compromise among the jurors on the issue of liability, and that in such a situation the granting of a new trial on the issue of damages alone is erroneous. Stated another way, appellant urges that the only possible explanation of the inadequate verdict is that less than the required nine jurors agreed on the issue of liability, but, finally, compromised with the other jurors the issue of liability by awarding grossly inadequate damages.

[1, 2] The law is well-settled that the trial court exercises a broad discretion in granting a new trial on the ground of inadequacy of the damages awarded, and that its order granting a new trial on that ground will not be disturbed in the absence of a showing of abuse of discretion. Minor v. Foote, 100 Cal.App. 441, 280 P. 197; Cunha v. Lewis, 31 Cal.App.2d 1, 76 P.2d 1198; Peri v. Culley, 119 Cal.App. 117, 6 P.2d 86. By section 657 of the Code of Civil Procedure the trial court, in a proper case, is empowered to grant a new trial on the sole issue of damages, and its order so limiting the new trial, when predicated on the insufficiency of the verdict, is subject to attack solely on the ground of abuse of discretion. Sanford v. Wilcox, 13 Cal.App.2d 193, 56 P.2d 548; Cox v. Tyrone Power Enterprises, Inc., 49 Cal.App.2d 383, 121 P.2d 829. These principles are not challenged by appellant. He urges, however, that if it appears that the verdict was the result of a compromise on the issue of liability, it is an abuse of discretion to limit the new trial to the issue of damages. In this connection he places his main reliance on Donnatin v. Union Hardware & Metal Co., 38 Cal.App. 8, 175 P. 26, 177 P. 845; Bencich v. Market St. Ry. Co., 20 Cal.App.2d 518, 67 P.2d 398, and Wallace v. Miller, 26 Cal.App.2d 55, 78 P.2d 745.

In the Donnatin case, supra, the verdict in a personal injury action was for plaintiff in the sum of one dollar. Plaintiff moved for a new trial on the issue of damages, which was denied. On appeal it was contended that the cause should be reversed for a new trial on the issue of damages. The appellate court upheld the action of the trial court in denying the limited motion for a new trial on the ground that the only reasonable explanation of the one dollar verdict was that such verdict was the result of a compromise. In so holding the court stated, at page 11 of 38 Cal.App., at page 27 of 175 P.: "In the instant case the amount of $1 awarded plaintiff as damages for the injuries sustained, if the facts were such as to render defendant legally liable therefor, is, upon the evidence presented, so grossly absurd that it furnishes convincing proof that in order to reach an agreement the verdict was the result of unwarranted concessions of convictions made by each of two opposing factions of the jury, one of which conscientiously believed that defendant should prevail in the action, and the other equally conscientious in the opinion that plaintiff should recover damages commensurate with the injuries sustained. It is apparent, we think, that those jurors entertaining the opinion that defendant was not guilty of the negligence charged nevertheless agreed to surrender their views in consideration of other jurors consenting to the trifling award made." It was held that under such circumstances it would have been error to have limited a new trial to the issue of damages alone.

The Bencich case, supra, also involved an action for personal injuries. The jury brought in a verdict for $5,000. Plaintiff moved for a new trial, which motion was denied. On this appeal he contended that the damages were inadequate and that the case should be reversed for a new trial on the issue of damages alone. The appellate court held that the judgment had to be reversed because of the inadequacy of damages, but also held that under the facts and in the exercise of its discretion it would not limit the new trial. In so holding the court pointed out that in addition to very serious personal injuries, the plaintiff had paid out for nursing, X-rays, laboratory and physicians' fees $2,423.37 and had lost compensation of $3,441.72. Thus, the special damages, plus loss of compensation, exceeded the amount of the award. The court predicated its conclusion that the new trial should not be limited partly on the reasoning of the Donnatin case, supra, and partly on the fact that certain confusing instructions had been given, and concluded as follows, at page 529 of 20 Cal.App.2d, at page 404 of 67 P.2d: "In view of this uncertainty and the fact that clearly something other than the evidence on the question of damages must have actuated the jury, or some of them in arriving at such a low verdict, substantial justice requires that (as said in the Donnatin case, supra, 38 Cal.App. 8, at page 11, 175 P. 26, 27, 177 P. 845), '* * * what is a just compensation the plaintiff should receive, if he is entitled to recover at all, can best be determined by trying the whole case before one judge and one jury instead of "splitting it up" between different judges and different juries.'"

Wallace v. Miller, supra, was an action for personal injuries where the special damages amounted to $323.89 and the jury awarded the plaintiff the sum of $120.25. The plaintiff moved for a new trial on all issues. The trial court ordered a new trial on the issue of damages alone. It was held that under the facts it was an abuse of discretion to have limited the new trial to the sole issue of damages, and a new trial was ordered on all issues. In so holding the appellate court recognized that the trial judge has a wide discretion in granting new trials on the ground of insufficiency. It then discussed the limitation on that rule as follows, at page 57 of 26 Cal.App.2d, at page 746 of 78 P.2d: "Another situation is presented when it affirmatively appears from the record that nine of the jurors could not have agreed that the defendant was guilty of negligence which proximately caused the accident; that those jurors who conscientiously believed that defendant was not negligent departed from their beliefs while they entertained them and agreed to bring in a verdict for the plaintiff in a small and inadequate amount merely for the purpose of closing the case. Under such circumstances, the primarily important question, namely, the negligence of defendant, was not determined by the jury. It has been held that under such circumstances the trial judge should grant a new trial on all issues and that his failure to do so is an arbitrary refusal to exercise a reasonable discretion." After quoting from the Bencich case, supra, and citing the Donnatin case, supra, the court applied the rule as follows, at page 59 of 26 Cal.App.2d, at page 747 of 78 P.2d: "When we apply the rules which have heretofore been announced to the facts before us the conclusion is inevitable that nine jurors did not agree on the most important questions of defendant's negligence and its proximate cause of the collision. There is no other explanation for the inadequate verdict, unjust to plaintiff, had there been an agreement on defendant's liability. If the jurors had agreed on defendant's liability, their verdict should have included $120.25 expended by plaintiff for care of his injuries. The correctness of this amount was not disputed. It should also have included $203.64 spent for the repair of his car, the correctness of which amount was stipulated. In addition to these amounts the verdict should have included an award of general damages, for plaintiff was injured in the accident. From these facts 'it is apparent, we think, that those jurors entertaining the opinion that defendant was not guilty of the negligence charged nevertheless agreed to surrender their views in consideration of other jurors consenting to the trifling award made.' Donnatin v. Union Hardware & Metal Co., supra. It follows that, as the question of the liability of defendant was not determined by the jury, a general order granting a new trial should have been made. The case should be retried on all issues."

[3] It will be observed that in the Donnatin case the jury, in effect, awarded no damages. The action of the trial court in refusing to grant a limited new trial was affirmed. In the Bencich case the damages awarded were less than the special damages and loss of compensation suffered by plaintiff. The appellate court reversed the court's action in refusing to grant a new trial, but, in the exercise of its discretion, refused to limit the new trial. In the Wallace case the award was less than the amount of special damages. These cases undoubtedly impose a limitation on the discretionary power of the trial court to grant a limited new trial. But the extent of that limitation is simply that where no award at all is made for general damages the only possible explanation is that the jurors compromised the issue of liability, and it is error to limit the new trial to the issue of damages alone. But where, as in the instant case, a substantial but inadequate award of general damages is made, the question as to whether the new trial should be limited rests within the discretion of the trial judge. The cases hereafter discussed so hold.

Sassano v. Roullard, 27 Cal.App.2d 372, 81 P.2d 213, was decided by the same court and the decision was written by the same judge that had written the Wallace case, supra. In discussing the proper rule the court stated, at page 376 of 27 Cal.App.2d, at page 215 of 81 P.2d: "Since the decision of Bencich v. Market St. Ry. Co. [20 Cal. App.2d 518, 67 P.2d 398], supra, it has been frequently argued that verdicts were the results of compromises on the part of jurors. We have had occasion to observe that where, as in the Bencich case, special damages proved were admittedly in excess of the amount of the verdict rendered, there was strong evidence of a compromise on the part of certain jurors who did not believe that any verdict should have been returned in favor of plaintiff. Wallace v. Miller [26 Cal.App.2d 55], 78 P.2d 745. On the other hand, where the general damages awarded were small, but to a certain extent compensatory, no such conclusions follow. Tripcevich v. Compton [25 Cal.App.2d 188], 77 P.2d 286; Zeller v. Reid [26 Cal.App.2d 421], 79 P.2d 449. It may be very generally stated that where general damages alone are involved an appellate court should be slow to conclude that a verdict is a result of a compromise simply because the amount of the award is small. Instead, it should generally govern its actions by those rules we have already set forth concerning grossly excessive or grossly inadequate verdicts." See, also, Gates v. Wendling Nathan Co., 27 Cal.App. 2d 307, 81 P.2d 173, where the same court discussed the proper rule in substantially similar language.

The identical problem with that involved in the instant case was recently considered by the Second Appellate District, Division Three, in Cox v. Tyrone Power Enterprises, Inc., supra, hearing denied by the Supreme Court March 27, 1942. The action was for serious personal injuries alleged to have been caused by the negligence of defendant. The jury brought in a verdict of $1,250. The plaintiff had incurred special damages of $811. Thus, the award of general damages was $439. Both plaintiff and defendants moved for a new trial, plaintiff's motion being limited to the issue of damages alone. The trial court denied defendants' motion and granted the limited motion of plaintiff. Defendants urged that under the rule of the Donnatin, Bencich and Wallace cases, supra, the totally inadequate award had to be conclusively presumed to have been the result of a compromise, and that therefore it was an abuse of discretion to have granted a limited new trial. In disposing of this contention Presiding Justice Schauer stated, at page 390 of 49 Cal.App.2d, at page 833 of 121 P.2d:

"While the evidence amply supports the conclusion that the damages awarded were inadequate, we do not find that it is such as to justify us in concluding, contrary to the trial judge, that the jury compromised the question of negligence by its inadequate award of damages. Such a conclusion on this record would be more speculative than inferential. The verdict here was for $1,250 in response to plaintiff's claim for $450 doctors' bills, $361 hospital bill, and general damages. The items for the doctors and the hospital were not disputed, but the extent of the injuries was seriously contested. The verdict not only awards recovery for all the special damages but includes $439 for general damages. That the general damage award is disproportionately small seems obvious and its inadequacy is the basis for the new trial order. But that merely because we regard the award as too low we must also infer that jurors stultified themselves by bargaining inadequate damages for unjustified liability is a non sequitur.

"If such a conclusion is to be reached it must be supported by further circumstances.

* * *

"The conclusion which appears most reasonable to us from consideration of the entire record is that the jury correctly determined the issues of negligence and contributory negligence and that the granting of plaintiff's motion for a new trial solely on the issue of damages was within the discretion of the trial judge, who, as well as the jury, heard the evidence. Defendants suggest that (as asserted in the case of Zeller v. Reid, 1938, 26 Cal.App.2d 421, 425, 426, 79 P.2d 449) the cases of Donnatin v. Union Hardware & Metal Co., 1918 [38 Cal.App. 8, 175 P. 26, 177 P. 845], supra; Bencich v. Market Street Railway Co., 1937, 20 Cal.App.2d 518, 67 P.2d 398, and Wallace v. Miller, 1938, 26 Cal.App.2d 55, 78 P.2d 745, are not necessarily inconsistent with Tripcevich v. Compton, 1938, supra. Regardless of any question of harmony among those decisions, we believe that the case before us is more akin to the case last cited and to Zeller v. Reid, supra, than to the others. Certainly we find no factual basis impelling us to hold that the order as made constituted an abuse of discretion, and we do not interpret any of the cited cases as requiring such a holding on the record before us."

This holding seems to us conclusive in the present case. In the instant case plaintiffs proved no special damages at all. The verdict was for $1,250 general damages. Although obviously inadequate, such award is by no means nominal. We cannot say, as a matter of law, that such verdict, simply because of inadequacy, was the result of a compromise.

[4] Appellant urges, however, that there are other circumstances in addition to the inadequacy of the verdict that tend to show that the verdict must have been the result of a compromise. It is pointed out, first, that the question of liability was contested, second, that three prior juries had disagreed, and third, that the record shows that the verdict was the result of coercion on the part of the trial judge. It is urged that when these contentions are considered with the admitted inadequacy of the verdict, the conclusion is inevitable that such verdict was the result of a compromise. This contention is without merit. So far as the first point urged is concerned, although it is true that on the issue of liability the evidence is conflicting, and that that issue was hotly contested, it is admitted that the evidence supports the implied findings adverse to appellant. Appellant did not move for a new trial. Under such circumstances the proper rule is stated in the Donnatin case, supra, as follows, at page 10 of 38 Cal.App., at page 26 of 175 P.: "The verdict of the jury in favor of plaintiff implied findings adverse to the defendant upon the issue as to its own negligence and plaintiff's alleged contributory negligence. By its failure to appeal or ask for a new trial, these implied findings, if fairly made, must be deemed a final determination of such issues as fully as though defendant, after filing its answer, had stipulated to the facts so found."

[5] The second point urged is equally without merit. Although it appears that three prior juries had disagreed, the point is that the present jury unanimously agreed on the issues presented to it. The correctness of its conclusions cannot be challenged because of what other juries may have done. What prior juries may have done is entirely immaterial on this appeal. This point could have been, and undoubtedly was, urged when the motion for a new trial was argued. The trial judge knew the facts, and his determination that this factor was immaterial cannot be disturbed on appeal.

[6, 7] The third point urged requires but scant mention. Appellant points out that the record shows that the jury received the case at 3:10 p. m.; that at 11:00 p. m. they advised the court that "innumerable ballots" had been taken but that they could not agree; that the court then ascertained that they stood eight to four; that the court then sent them back for further deliberations; that at 12:15 a. m. coffee and sandwiches were sent in; that at 1:00 a. m. the jury was locked up for the night. The verdict was rendered at 10:35 a. m. that morning and was unanimous. The court, counsel and the jurors engaged in some jocularity which appellant now seeks to distort into impatience, importunity and coercion on the part of the court. The trial court has a wide discretion in determining the length of time that a jury may deliberate before discharging them. There was no abuse of discretion in the instant case.

[8] We, therefore, conclude that, taken singly or collectively, the various factors urged by appellant do not, as a matter of law, demonstrate that the verdict was the result of a compromise. It is equally tenable to infer that the jury misapplied or misinterpreted the instructions on damages, and that the long disagreement was on this issue. We cannot infer that some of the members of the jury stultified themselves by improperly compromising the issue of liability by agreeing to an inadequate award. Under such circumstances it was within the discretion of the trial judge to limit the trial to the issue of damages alone.

The order appealed from is affirmed.

WARD, J., and E. P. MURPHY, Justice pro tem., concurred.

51 Cal.App.2d 382

PLUM v. STATE BOARD OF CONTROL et al.

Civ. 6661.

District Court of Appeal, Third District, California.

April 22, 1942.

Rehearing Denied May 21, 1942.

1. Mandamus 🔑101

Where one who was erroneously convicted and imprisoned for a crime filed a claim against the state for $5,000, and the legislature passed a bill appropriating to him $2,000, and he accepted the $2,000, he was not entitled to compel State Board of Control by writ of mandate to approve and recommend to the legislature that his claim for $5,000 be paid, notwithstanding that the sum of $2,000 was allegedly placed in the legislative bill tentatively, with the intention to insert a larger sum thereafter, but through inadvertence the bill was passed without making the correction. Gen.Laws 1937, Act 1681, §§ 1, 5.

2. Constitutional law 🔑70(1)
Statutes 🔑216

Courts must take a law as it is passed, and cannot go behind the law, inquire the motives which prompted the law, or interpret the law as those who voted it believed it to be.

3. Constitutional law 🔑70(1)
Statutes 🔑248

When a bill has been passed by the legislature and signed by the Governor, it becomes a "law" and no evidence nor the judgment of any court can be allowed to modify or change its terms or effect, or prevent or impair its complete operative force.

See Words and Phrases, Permanent Edition, for all other definitions of "Law".

4. Accord and satisfaction 🔑10(1)
Compromise and settlement 🔑5(2)

If a person having a disputed claim against a state, county, or municipality accepts part payment thereof with knowledge that the claim has not been allowed in full, payment amounts to a "satisfaction" of the claim.

See Words and Phrases, Permanent Edition, for all other definitions of "Satisfaction".

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceeding for a writ of mandate by C. D. Plum against the State Board of Control of the State of California and others to compel the board to approve and recommend to the legislature that the petitioner's claim against the state be paid in accordance with statute. From a judgment of dismissal after demurrer to petition was sustained, the petitioner appeals.

Judgment affirmed.

C. D. Plum in pro. per. for appellant.

Earl Warren, Atty. Gen., and J. Q. Brown and Thos. J. MacBride, Deputy Attys. Gen., for respondents.

TUTTLE, Justice.

This is an appeal from a judgment of dismissal entered after a demurrer to a petition for a writ of mandate had been sustained, without leave to amend. Petitioner seeks to compel respondent board of control to "approve and recommend to this legislature that your petitioner's claim for $5,000 against the State of California be paid in accordance with the provisions of the aforesaid Act." Stats.1913, p. 245, and amendments thereto, made by Stats.1931, p. 1615; Deering's Gen.Laws 1937, Act 1681.

The action is based upon the statute mentioned above, sections 1 and 5 of which read as follows:

"§ 1. Claim of persons erroneously convicted. Any person who, having been convicted of any crime against the state of California amounting to a felony, and having been imprisoned therefor in a state prison of this state shall hereafter be granted a pardon by the governor of this state for the reason that the crime with which he was charged was either not committed at all or, if committed, was not committed by him, or who, being *innocent of the crime with which he was charged for either of the foregoing reasons, shall have served the term or any part thereof for which he was imprisoned,* may, under the conditions hereinafter provided, present a claim against the state to the state board of control for the *pecuniary injury sustained by him through such erroneous conviction and imprisonment.*" (Italics added.)

"§ 5. Board to report facts and conclusions to legislature. *If the evidence shows that the crime with which the claimant was charged was either not committed at all,* *or, if committed, was not committed by the claimant, and that the claimant did not, by any act or omission either intentionally or negligently, contribute to the bringing about of his arrest or conviction, and that the claimant has sustained pecuniary injury through his erroneous conviction and imprisonment, the board of control shall report the facts of the case and its conclusions to the next legislature of this state, with a recommendation that an appropriation be made by the legislature for the purpose of indemnifying the claimant for such pecuniary injury; but the amount of the appropriation so recommended shall not exceed in any case, the sum of five thousand dollars."* (Italics added.)

Plaintiff alleges in his petition the following facts as the gist of his cause of action:

"That under and by virtue of the said act of the legislature as aforesaid, and within the time prescribed by said law, your petitioner filed a claim against the state of California for five thousand dollars ($5,000) for pecuniary injury suffered by your petitioner by reason of his erroneous conviction and imprisonment in a state prison of this state.

"That at said hearing your petitioner presented to the state board of control conclusive and competent evidence showing that he had been convicted of a crime never committed; part of *such evidence being a certified final Superior Court Judgment* of Sacramento County, California, holding that the lumber your petitioner was convicted and imprisoned for stealing was, at the time of said conviction, always had been, and still was, the property of your petitioner, and further ordered that the said alleged stolen lumber or its value thereof be returned to your petitioner.

"That at said hearing your petitioner also presented conclusive, competent, and sufficient evidence showing that he had suffered pecuniary injury far in excess of five thousand dollars by reason of his erroneous conviction and imprisonment.

"That at said hearing the attorney general, represented and present in the person of the assistant attorney general of the state of California, presented no evidence whatsoever at said hearing in opposition to your petitioner's claim, or any part thereof, on behalf of the State, and by said act of acquiescence conceded that your petitioner's claim against the state of California was just and should be paid."

It is further alleged that the board of control disallowed said claim, after a hearing upon the merits thereof. Petitioner then alleges that a bill was introduced in the legislature appropriating to him the sum of $2,000, but that said amount was "tentative," and that the legislature, "in passing your petitioner's claim bill for two thousand dollars ($2,000) inadvertently neglected to amend said bill to the amount specified in the aforesaid law."

[1-3] It is the contention of petitioner that the board of control had no discretion in disposing of the claim, and that mandamus will therefore lie to compel it to approve the same. The state's contention is that the action of the board was final and binding upon the courts, it being an administrative agency committed by the statute to decide the facts in question, the chief one being whether or not petitioner was erroneously convicted. We do not deem it necessary to pass upon that question, as we are satisfied that the trial judge correctly disposed of the controversy in the following language found in his opinion:

"It will be observed that the appropriation was to pay *the claim,* not part of the claim. When plaintiff collected this sum, his claim was satisfied and extinguished. Plaintiff contends that the sum of $2,000 was placed in the bill tentatively, the intention being to insert a larger sum thereafter, but that through inadvertence the bill was passed without making this correction. That may be, and that contention might be made in a new application to the legislature. It seems to have been successfully made to a later session which attempted to appropriate an additional $3,000 to plaintiff. But no court can entertain such a contention. When the legislature enacts a law, the courts must take it as it is passed. They cannot go behind it, inquire the motives which prompted it, or interpret it as those who voted it believed it to be. When a bill has been passed by the legislature and signed by the Governor, it becomes a law and 'no evidence, nor the judgment of any court, can be allowed to modify or change its terms or effect, or prevent or impair its complete operative force.' Lukens v. Nye, 156 Cal. 498, 105 P. 593, 595, 36 L.R.A.,N.S., 244, 20 Ann.Cas. 158."

[4] The rule governing the situation is thus expressed in 1 Am.Jur., pages 234-5, section 36:

"It has been held frequently that if a person having a disputed claim against a state, county, or municipality accepts part payment thereof with knowledge that the claim has not been allowed in full, the payment amounts to a satisfaction of the claim. Accordingly, where it appeared that a person injured by a defect in a sidewalk presented a claim to the common council, which awarded him a certain sum, the court held that when the amount allowed was accepted, it would be presumed that the payment was in full satisfaction of the entire claim."

The allegations of the petitioner bring it directly within the scope of the foregoing rule. As pointed out by the trial judge, the allegations that the amount of $2,000 was merely tentative, and that the legislature's act was an inadvertence, cannot operate to place the case without the rule and permit the courts to go behind the legislative act. As clearly pointed out in the Lukens case, supra, a collateral attack of this character, made upon a statute duly and legally passed, will not be permitted.

The judgment is affirmed.

THOMPSON, Acting P. J., concurred.

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51 Cal.App.2d 350

SIEMON et al. v. LYON.

Civ. 2695.

District Court of Appeal, Fourth District, California.

April 21, 1942.

1. Mines and minerals ⇨78(7)

Evidence that drilling of oil well on leased land was completed and that pumping equipment was installed and production commenced warranted conclusion that well was a "completed well" within gas lease provisions requiring lessee to commence drilling operations for a second well within three months after completion of the first well if it did not produce in paying quantities, notwithstanding that difficulties developed after production commenced and that well did not continue to produce in paying quantities. St.1939, p. 1122, § 3217.

See Words and Phrases, Permanent Edition, for all other definitions of "Completed Well".

2. Evidence ⇨20(1)

It is common knowledge that some oil wells are brought in which never produce in paying quantities.

Appeal from Superior Court, Kern County; William L. Bradshaw, Judge.

Suit by Fred Siemon and others against William E. Lyon. From a judgment quieting the title of plaintiffs against defendant as to rights claimed by defendant under an oil and gas lease, defendant appeals.

Affirmed.

Wm. G. Condron, of Los Angeles, for appellant.

Alfred Siemon and Bennett Siemon, both of Bakersfield, for respondents.

SCHOTTKY, Justice pro tem.

This is an appeal from a judgment quieting the title of respondents against appellant as to rights claimed by appellant under an oil and gas lease.

The complaint alleged in substance that appellant, as lessee, was required to commence the drilling of a second well on the leased land within three months following the completion of the first well; that the lease further provided that in the event any of the conditions of said lease were violated and lessee should fail to remedy same within thirty days after written notice so to do, then, at the option of the lessor, the lease should forthwith terminate as to all of said land except ten acres surrounding such producing well; that appellant lessee violated the terms of said lease in failing to commence a second well upon said premises as required by said lease within three months after completion of the first well; and that the required thirty-day notice was given.

The answer denied any breach and alleged that the first well was not yet completed but was still being worked on in an attempt to place it on steady production.

The covenants of the lease as to the drilling of the second well are expressed in paragraphs 7 and 8 of the lease as follows:

"7. If the Lessee shall elect to drill on said land as aforesaid, and oil or gas shall not be obtained in paying quantities in first well drilled, the Lessee shall, within three (3) months after the completion or abandonment of the first well, commence on said land drilling operations for a second well, and shall prosecute the same with reasonable diligence until oil or gas is found in paying quantities, or until the well is drilled to a depth at which further drilling would, in the judgment of the Lessee, be unprofitable; and the Lessee shall in like manner continue its operations until oil or gas in paying quantities is found, but subject always to the terms and conditions hereof and with the rights and privileges to the Lessee herein given.

"8. If oil or gas is found in paying quantities in any well so drilled by the Lessee on said land, the Lessee, subject to the provisions hereof and to the suspension privileges hereinafter set forth, shall continue to drill additional wells on said land as rapidly as one string of tools working with reasonable diligence can complete the same, until there shall have been completed on said land as many wells as shall equal the total acreage then held under this lease divided by ten; whereupon the Lessee shall hold all of the land free of further drilling obligations; provided, that the Lessee may defer the commencement of drilling operations for the second or any subsequent well for a period not to exceed three (3) months from the date of completion of the well last preceding it."

It was stipulated by counsel in open court that there was no issue in the case except the fact of whether the Metro No. 2 well had been completed, and that respondents were entitled to judgment in the event that it was found that said well had been completed.

The trial court found in accordance with the allegations of the complaint and appellant contends that the judgment should be reversed upon the ground that the evidence does not support the finding that said well was completed.

There is little dispute as to the facts but the parties are in sharp disagreement as to what constitutes a completed well.

The evidence shows that the well in question was cemented about September 18, 1939; that drilling thereon ceased about September 3, 1939; that pumping equipment was installed and actual pumping commenced in October, 1939; and that the well actually produced over 500 barrels of oil in each of the months of November, December and January, and over 450 barrels in the month of March, 1940, and a small quantity in August, 1940. Two witnesses called by appellant testified that the well produced for a short time and then made 50 to 75 per cent mud; that it would produce for six or seven days at a time and then fill up with mud and sand, and that they were, at the time of the commencement of the action, still working on the well and pump trying to get it to produce more oil; and that in their opinion the well was not completed.

Section 3217 of the Public Resources Code, St.1939, p. 1122, which is based upon a statute enacted in 1915, Stats.1915, chap. 718, p. 1404, provides:

"A well is completed, for the purposes of this chapter, thirty days after it has commenced to produce oil, water, or gas, unless drilling operations are resumed before the end of the thirty-day period."

[1, 2] It seems clear to us that the trial court was fully justified in finding that the well was completed. The drilling thereof was completed, the pumping equipment was installed and production commenced, and drilling operations on said well were never resumed. It is true that difficulties developed after production commenced and that it was necessary to clean the pump and the well, and it is likewise true that the well did not continue to produce in paying quantities. But there is nothing in the lease itself, or in the law, which requires that for a well to be a completed well, it must be a well that produces in paying quantities. It is a matter of common knowledge that some oil wells are brought in which never produce in paying quantities. The plain terms of the lease here involved required that appellant commence the drilling of a second well within three months after the first well was completed, and the appellant having failed to do so, and the required thirty-day notice having been given, the court below properly concluded that appellant's rights under the lease were terminated.

The judgment is affirmed.

BARNARD, P. J., and MARKS, J., concurred.

51 Cal.App.2d 353

In re CHASE'S ESTATE.

CHASE et al. v. UNION TITLE INSURANCE & TRUST CO. et al. (CHASE et al., Interveners).

Civ. 3022.

District Court of Appeal, Fourth District, California.

April 21, 1942.

Hearing Denied June 18, 1942.

1. Wills 🔑108

The formalities which the legislature has prescribed for the execution of a will are essential to its validity and cannot be disregarded. Probate Code, § 50(1).

2. Wills 🔑111(2)

The statutory requirement that a will must be subscribed at the "end" thereof, requires that testator's name be written at the termination of the testamentary provisions. Probate Code, § 50(1).

See Words and Phrases, Permanent Edition, for all other definitions of "End".

3. Wills 🔑111(2)

The "will" at whose end the testator's name is required to be subscribed is not the sheet of paper or other material on which testamentary provisions are written, but it is the declaration which testator has written down for testamentary disposition, and the "end" is not the foot or physical end of the sheet of paper on which the will is written, but is the physical termination of the testamentary provisions constituting the will. Probate Code, § 50(1).

See Words and Phrases, Permanent Edition, for all other definitions of "Will".

4. Wills 🔑111(2)

Under statute requiring testator's name to be subscribed at end of will, an instrument offered for probate must be scanned to learn where the end of the instrument is as a completed whole, and testator's name must be subscribed at the end thus found. Probate Code, § 50(1).

5. Wills 🔑111(2)

Where testatrix wrote out provisions of her will on a printed form sheet and on three other blank pages and signed will on back of printed form sheet following appointment of executor, attestation clause stating that instrument consisted of four pages "including this one" followed, and will read coherently and consecutively from page to page, will was signed at the "end" thereof as required by statute. Probate Code, § 50(1).

6. Wills 🔑111(2)

The statute relating to the execution of wills and requiring a will to be subscribed at the end thereof by the testator does not require that form be raised above substance. Probate Code, § 50(1).

Appeal from Superior Court, San Diego County; Robert B. Burch, Judge.

Proceeding in the matter of the estate of Josephine L. Chase, deceased, wherein Louis Chase and others filed a petition to revoke and set aside the probate of the will of the decedent, opposed by the Union Title Insurance & Trust Company and others, and wherein Gertrude Chase and others intervened. From a judgment denying their petition, petitioners appeal.

Affirmed.

Lindley & Higgins, J. F. DuPaul, and Higgs, Fletcher & Glen, all of San Diego, for appellants.

Luce, Forward, Lee & Kunzel, of San Diego, for respondents.

SCHOTTKY, Justice pro tem.

This is an appeal from a judgment denying the petition of appellants to revoke and set aside the probate of the will of Josephine L. Chase, deceased. We will summarize briefly the evidence so far as material upon this appeal.

In the latter part of July, 1939, Mrs. Chase had been informed that she was to have an operation, and on the 3rd day of August, 1939, while she was in Mercy Hospital in San Diego, she purported to execute her will before Mrs. William Archibald and a nurse by the name of Hope Teel. Mrs. Archibald testified that she was one of the respondents in the case, that on the evening before Mrs. Chase was to be operated upon, about 9 o'clock, and as Mrs. Archibald was about to leave the hospital, Mrs. Chase brought papers out from under her pillow and said, "Will you witness my will?"; that Miss Teel was called in and asked "How do I know you signed that will?" Mrs. Chase tore a piece of paper off a tablet and signed her name so Miss Teel could see it and asked her to compare the signatures. That Mrs.

Archibald signed first. That the will was folded and she just saw that part of the page that she signed which contained the signature of Mrs. Chase down to that of Miss Teel. That she did not see any printed matter above her name and it looked like there might have been three or four sheets with the one she signed, but she did not know how many. That they left Mrs. Chase in the room and that at that time she had paper and a pen. All she knew was when she signed the will, it was substantially the same bulk as Exhibits Proponents' "A" and Contestants' 8.

Hope Teel testified that when she signed, she signed a printed form with writing on it. That there were a number of papers with writing and Mrs. Chase handed her the form and that is what she signed. She hadn't read any part of it and she did not see anything except that she knew Mrs. Chase had already signed her name when she showed her the will and wanted her to witness it, and that she had no idea how many other papers there were with the printed form, and there were no other papers fastened to the form.

Dr. Frederick Hollander testified that some time about 6:00 or 6:30 on Wednesday, or it might have been Thursday, Mrs. Chase asked him to take charge of her will. That the document was sealed in an envelope and that he handed it to a Mrs. McMahon, credit manager at the hospital, and that it was written on the envelope that it was her last will and testament. That Mrs. Chase entered the hospital on Wednesday and was operated on Friday morning, and that she gave him the will either on Wednesday or Thursday, at least, before the operation. Mrs. McMahon testified that she received the sealed envelope and placed it in the vault at the hospital and that after the death of Mrs. Chase she handed the envelope sealed and unopened to James D. Forward, president of the Union Title Insurance and Trust Company, which company was named executor in the will. Mr. Forward testified that he brought the envelope down to his office and opened it and read the will, and that there were several sheets of paper constituting the will all in the envelope, rolled up together or pinned together, or maybe clipped together.

The instrument in controversy was written entirely in the handwriting of decedent except for some printed matter. The decedent used a printed form commonly sold and used for wills. It was headed "Last Will and Testament." On the first page in the blank below the printed matter the decedent wrote out the provisions of her will. One paragraph was designated, in printing, "Firstly." The next paragraph, in printing, "Secondly." On the back of the single sheet on the printed form of will is the attestation clause and the endorsement, which we will refer to later. The second sheet was a blank sheet and everything thereon contained was written in the handwriting of the testatrix. The paragraphs on the second sheet were numbered beginning with the figure "3," ending with the figure "11." The third sheet was likewise entirely covered with the handwriting of the testatrix and contained dispositions of her property. The paragraphs on this page were numbered in figures, the first being "12" and the last "24." The fourth sheet was likewise covered wholly with the writing of the testatrix making certain dispositions of her property but the paragraphs on that page were unnumbered. They followed in natural sequence from the third sheet. On the back of the printed form sheet were the printed words "Lastly, I hereby nominate and appoint"; then in the handwriting of the testatrix "Union Title and Trust Company of San Diego, California"; and then follows in printing "the execut (and in writing) ors" then in printing "of this my last will and testament"; then in writing: "consisting of this and three other pages expressing my desires." In the attestation clause is found the printed words, "the foregoing instrument consisting of —— page, including this one, was at the date hereof," etc. In the blank before the word "page," the testatrix had written in the figure "4" and had added the letter "s" to page.

Including the printing the writing, the above testamentary clause reads as follows:

"Lastly, I hereby nominate and appoint Union Title and Trust Company of San Diego the Executors of this my Last Will and Testament consisting of this and three other pages expressing my desires, and hereby revoke all former Wills by me made.

"In Witness Whereof, I have hereunto set my hand and seal this third day of August, in the year of our Lord nineteen hundred and thirty-nine.

"(Testator's signature.)

"Josephine L. Chase (Seal).

"The foregoing instrument, consisting of 4 pages including this one, was, at the date hereof by the said witnesses signed and sealed and published as, and declared to us to be her last Will and Testament in the presence of us, who, at her request and in her presence, and in the presence of each other, have subscribed our names as witnesses thereto.

"Mrs. W. M. Archibald
"Residing at 1252 Lincoln Ave.
"San Diego, Cal.
"Miss Hope Teel
"Residing at 4190 Monroe
"San Diego, Cal."

There were pinholes through the four sheets that indicated that they had all been pinned together. This will appear from the examination of the original Exhibit itself.

The sole question to be decided upon this appeal is: Was the will here in controversy subscribed by the testatrix at the end thereof as required by section 50 of the Probate Code, which reads as follows:

"Witnessed Wills: Subscription: Presence of witnesses: Testator's declaration: Number of witnesses, attestation. Every will, other than a nuncupative will, must be in writing and every will, other than a holographic will and a nuncupative will, must be executed and attested as follows:

"(1) Subscription. It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto * * *."

[1] Appellants argue with great earnestness and at considerable length that the trial court erred in finding that the testatrix subscribed said will at the end thereof. Appellants assert correctly that it is well settled that the formalities which the legislature has prescribed for the execution of a will are essential to its validity and cannot be disregarded.

[2-4] In Re Estate of Seaman, 146 Cal. 455, at page 461, 80 P. 700, at page 702, 106 Am.St.Rep. 53, 2 Ann.Cas. 726, our Supreme Court said: "The provision that the will must be subscribed at the end thereof requires the testator's name to be written at the termination of the testamentary provisions which he makes in the instrument. The 'will' at whose end the name is to be subscribed is not the sheet of paper or other material upon which these testamentary provisions are written, but it is the declaration which the testator has written thereon for such testamentary disposition, and the 'end thereof' is not the foot or physical end of the sheet of paper upon which the 'will' is written, but is the physical termination of the testamentary provisions which constitute the will. 'The act of authentication must take place at the termination of the testamentary disposition.' McGuire v. Kerr, 2 Bradf. [N.Y.] 244. 'To say that, where the name is, there is the end of the will, is not to observe the statute. That requires that, where the end of the will is, there shall be the name. It is to make a new law to say that, when we find the name, there is the end of the will. The instrument offered is to be scanned to learn where is the end of it, as a completed whole, and at the end thus found must the name of the testator be subscribed.' Sisters of Charity v. Kelly, 67 N.Y. 409; Matter of O'Neil's Will, 91 N.Y. [516], 522; Matter of Andrews' [Will], 162 N.Y. 1, 56 N.E. 529, 48 L.R.A. 662, 76 Am.St.Rep. 294."

There are no cases in California in which the facts are closely similar to those of the instant case. However, the question has been before the courts of the state of New York where the statute is the same as our California statute, and the rulings of the appellate tribunal of that state should be of assistance to us. A leading case on the subject is In re Field's Will, 204 N.Y. 448, 97 N.E. 881, 882, 39 L.R.A.,N.S., 1060, Ann.Cas.1913C, 842, decided by the court of appeals. It is apparent from the opinion in that case that it is quite similar to the case at bar and we will therefore quote the following from the opinion of the court:

"The surrogate refused probate, because the paper purporting to be a will was not 'subscribed by the testator at the end' thereof as required by statute, and the decree was affirmed by the Appellate Division for the same reason. As the essential facts were stipulated and the original paper itself is produced as one of the facts agreed upon, the question whether it was signed at the end is a question of law. The entire printed form was treated below as the first page, the sheets numbered from one to six as succeeding pages, and thus the conclusion was reached that the decedent did not sign at the end of the paper. When read in this way, the instrument does not read naturally or consecutively, and does not make sense. The physical position of the six sheets, the place and method of attaching them, and the closing paragraphs at the bottom of the printed form are substantially ignored. The natural order of reading the paper is subverted and an artificial order substituted, not to aid, but to overturn, the obvious intention. The natural order of reading it is to begin with the opening words on the printed blank and, continuing with form and sense reasonably connected, to read the first of the numbered sheets, and, turning it over in the usual way with legal papers, to read the other sheets in their actual order, and after the last has been read to turn that over also, when the closing paragraphs of the printed form follow, the end of the instrument is reached, and no part thereof follows the signature. Who would read it in any other way, unless he wished to destroy it as a will? Who would turn over the six sheets without reading them, read the testimonium clause, and then turn back to read the rest? In reading an ordinary card calendar with the record of the month of December printed on the card itself and descriptive matter printed above, with the records of the other months on slips attached in the usual way, that of January being on top, who would not regard December as the end, both of the calendar and the card? The slips become by the place and method of attachment virtually embodied in the card. So the six sheets of the paper in question are part of the body of the will, being physically incorporated therein, and not, as in some of the cases, wholly without the body and merely referred to therein. The essence of the paper subscribed is not the printed form alone, but the printed form with the six sheets so inserted therein as to become blended therewith at the point of insertion. Thus the physical and the literary beginning, body, and end of the instrument are the same, and the signature of the testator is found at the end.

"The position of the courts below, however, finds some support in the adjudged cases; for we have gone far to protect testators from the danger of imposition and fraud through unauthorized additions and changes in their wills. That danger does not exist when, as in this case, the will is holographic, and, while we do not regard that fact as controlling, it is worthy of remark that none of the six numbered sheets could have been changed without the co-operation of the testator himself. While the pins could be removed and other sheets substituted, that is true of many wills written on different sheets and fastened together by rivets or tape. There is no statute forbidding the use of separate sheets, or directing how they shall be joined together. Cases where wills have been altered after execution are vary rare, as the records of the courts show, while cases where the intention of the testator has been wholly defeated by a rigid construction of the statute requiring subscription at the end of the will are alarmingly frequent."

In regard to the Matter of Andrews' Will, 162 N.Y. 1, 56 N.E. 529, 48 L.R.A. 662, 76 Am.St.Rep. 294, one of the earlier New York cases relied upon by appellants, the court in the Field's case, supra, said:

"We regard the decision in the Andrews case as extreme, and as marking a boundary beyond which we should not go. The natural end of a will is where the draftsman stopped writing in the consecutive order of composition, which, in the Andrews will, preceded the third page, and in the will before us succeeded the six numbered pages. The will before us, when read consecutively as the mass of mankind would read it, has the signature at the physical and natural end thereof. We think that the will of the decedent should have been admitted to probate. We base our decision largely on the natural and consecutive method of reading, without turning backward or skipping a part and then looking forward, only to turn backward again, in order to have the sense connected and continuous. Form should not be raised above substance, in order to destroy a will, and the substantial thing in this case is a paper which reads straightforward and without interruption from the beginning to the end, and when thus read the signature is found at the end."

A more recent case decided by the Surrogate Court of Queens County is In re Golden's Estate, 165 Misc. 205, 300 N.Y.S. 737, 738. In that case the facts were even more identical with those in the case at bar because in that case the testatrix, after going on to the second and third pages and finishing the paragraphs disposing of her property, returned to the second page and filled in the testimonium clause with the date, and duly signed and published it as her will in the presence of two witnesses. The court, in upholding the will in that case, said:

"The paper writing here presented for probate is a so-called will form whereon the blanks are filled in by testator in her own handwriting and apparently without competent advice. She wrote on the first page as far as it gave her room so to do without trespassing on the printed words providing for the appointment of an executor, then manifestly, because there was not space enough to finish at the top of the second page, she continued on the third, and, finishing her dispository paragraphs, returned to the second page, filled in the testimonium clause with the date and duly signed and published it as her will in the presence of two witnesses, who signed as such. It is urged that the paper cannot be accepted as a will because is does not conform to the statute, in that it is not signed at the end. This brings up again the question, 'What is the end of a written document?' No little discussion pro and con has been had thereabout, and it seems that, in a maze of argument and attempt to construe the meaning of the words 'at the end,' the real object of section 21 of the Decedent Estate Law has been lost sight of recently. A will is not a sheet of paper, nor a number of sheets or pages; it is the words written thereon. The law affords the right of testamentary disposition; such disposition is to be gathered from language, hence the end of the language, not the paper on which it is written, is the only appropriate interpretation to be given the wording of the statute.

"It has been said, and rightly, that no will has a brother, hence no difficulty arises from such an interpretation, for each will must and can be considered as sole and distinct from every other; and where, as in the case at bar, the writing is in the hand of the testator and its words follow on in natural sequence, though the sentence be broken on one page and continued on any subsequent one, to complete the paragraph, then logically finished on and by use of an intervening space, it cannot be held otherwise than that the testator ended the will with the paragraph immediately above her signature. No quarrel is had with the contention that the statute was enacted to prevent fraud by way of insertion or addition, or otherwise, and where additional matter, complete in itself, be found below the signature, it may well be that a different conclusion as to the validity of the will should be arrived at; but as Judge Vann aptly wrote in Matter of Field's Will, 204 N.Y. 448, 455, 97 N.E. 881, 883, 39 L.R.A.,N.S., 1060, Ann. Cas.1913C, 842, 'The evil of fraudulent changes in wills is rare, while the evil of defeating wills altogether in the manner suggested is common. Hence, we think we have gone far enough in the direction of rigid construction and that the doctrine of certain authorities should not be extended, lest in the effort to prevent wrong we do more harm than good.' In the will before the court, no additions or interlineations are found; it is easily readable by following handwriting and language, i. e., 'to my' (foot of first page), 'beloved sister' etc. (top of third page), and when so read makes sense. When attempted to be read otherwise, i. e., 'to my' (foot of first page) 'In witness whereof,' etc. (top of second page), it makes nonsense. Testator wrote the will herself, where she finished her dispositive wishes is the end of this will; there it is signed and witnessed; let it be admitted to probate. Submit decree on notice."

In the instant case, it appears that the testatrix numbered the paragraphs consecutively. On the first page appears "Firstly" in quotations and "Secondly" in quotations. On the second page appears paragraphs numbered from 3 to 11. On the third page appears paragraphs numbered 12 to 24 and the clauses of page 4 are not numbered, but read consecutively with the preceding page.

Secondly, the testatrix in the attestation clause refers to "this my last Will and Testament consisting of this and three other pages expressing my desires." Also, further, in the attestation clause is this language: "The Foregoing Instrument, consisting of 4 pages including this one, was, at the date hereof."

These expressions by the testatrix entered in her own handwriting clearly establish that she filled out the attestation clause and subscribed her name after she had completed all of the rest of the will showing that she signed her name at the end of her will.

Thirdly, the will reads coherently and consecutively from page to page, showing that one followed the other in orderly sequence and that the attestation clause came last.

Fourthly, it is clear that it was the intention of the testatrix to make all of the sheets constitute one complete document. In fact, appellants, on page 13 of their closing brief said: "We concede that this is one and part of the same instrument, that the whole thing was intended by the testatrix to be her will."

[5, 6] Appellants have cited a number of earlier New York cases tending to support their position but these cases are either not in point or have been disapproved or distinguished in later cases. We believe that the trial court was fully justified in finding that the will in question was subscribed by the testatrix at the end thereof, as it is clear from the evidence that Mrs. Chase began on the front of the printed blank, then continued on through the three blank pages, then used the back of the printed blank for the closing paragraphs and then, having finished and come to the end of the will, subscribed her name thereto at the end thereof. To reach a different conclusion would, in our opinion, be unnecessarily raising form above substance to destroy a document that was undoubtedly the will of the testatrix. Such a construction is not required either by the language of section 50, nor is it supported by the authorities.

The judgment is affirmed.

BARNARD, P. J., and MARKS, J., concurred.

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51 Cal.App.2d 386

In re MOORE.

MOORE v. GRIFFITH.

Civ. 11926.

District Court of Appeal, First District, Division 2, California.

April 24, 1942.

Hearing Denied June 22, 1942.

1. Arbitration and award 🔑77

Where written dissent of dissenting arbitrator was acknowledged as provided by statute, but it was not made under oath, dissent could not be considered on motion to vacate the award. Code Civ.Proc. § 1287.

2. Arbitration and award 🔑73

Party appearing before arbitrators did not show that he was prejudiced by arbitrators' refusal to continue hearing one hour to allow party's attorney to be present, where there was no showing in affidavits of that party what occurred before attorney arrived at hearing, or what, if anything, attorney would or could have done in a presentation of evidence to arbitrators that was not done by the party, or of any prejudice suffered because of attorney's absence.

3. Arbitration and award 🔑46

Objection to award in arbitration proceeding because one arbitrator inspected building, which was the subject of arbitration, in absence of his fellow arbitrators and the parties, was "waived" where inspection was made before making of prior award which was vacated, and the party complaining of the inspection stipulated to further hearing before the same arbitrators after the prior award was vacated.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

4. Arbitration and award 🔑77

Party to arbitration who claimed that arbitrators cut short his testimony and refused to hear another witness, was required to show that competent and material evidence was excluded, if he was to obtain vacation of the award.

5. Arbitration and award 🔑33

Refusal of arbitrators to continue hearing to compel the attendance of a party to the arbitration, or the taking of his deposition, was not erroneous, where it did not appear that any showing was made before the arbitrators by affidavit or under oath of the materiality of any evidence expected to be given by such witness or of any diligence used to procure his attendance, or that any request for time to prepare or present any such affidavit was made. Code Civ.Proc. § 595.

◆

Appeal from Superior Court, City and County of San Francisco; Robert L. McWilliams, Judge.

Proceeding in the matter of John C. Moore in arbitration. From an order of the Superior Court denying the motion of John C. Moore to vacate an award made by a board of arbitration, John C. Moore, opposed by J. W. Griffith, appeals.

Order affirmed.

John C. Moore, in pro. per.

W. P. Caubu, of San Francisco, for respondent.

DOOLING, Justice pro tem.

[1] This is an appeal from an order of the Superior Court denying appellant's motion to vacate an award made by a board of arbitration consisting of three arbitrators. The motion was heard upon affidavits and counter-affidavits, and in support of the order appealed from we must, in accordance with the settled rule, accept as true the evidence which will support the order wherever there is any conflict. The award was signed by two of the arbitrators and the third filed a written dissent containing certain recitals of fact. This dissent was acknowledged as provided in section 1287, Code of Civil Procedure, but it was not made under oath. The trial court properly held that the "unverified dissenting opinion of Arbitrator Harris * * * may not be considered in the consideration of the pending motion."

Much of the argument of appellant is based upon statements found in this dissent. Since we are satisfied that it is without evidentiary value we need devote no further attention to those particular matters.

It appears from the transcript that a prior award had been vacated by the court on July 15, 1941. A further hearing before the arbitrators was held on July 16, 1941, commencing at 2:30 p. m. As to this hearing the affidavit of W. P. Caubu recites: "That the second hearing by the arbitrators in said matter was held on July 16, 1941, following a stipulation in open court between Mr. Moore and this affiant, and with the approval of A. Grant Harris, one of the arbitrators then personally present before the court, that the said date at the hour of 2:30 p. m. thereof would be a time agreeable for the hearing of any testimony to be offered by Mr. Moore * * * and the court so ordered."

The complaint that the time fixed for this hearing was unreasonably short is foreclosed by this evidence that appellant stipulated to it in open court.

[2] It appears that when the hearing opened appellant requested a continuance of one hour to allow his attorney to be present and that this request was refused. We need not decide the question whether a party appearing before arbitrators is entitled as of right to be represented by counsel, a matter on which the authorities are not in accord. 6 C.J.S., Arbitration and Award, § 58, p. 197. In stipulating absolutely on July 15, that the matter should be heard the next day at 2:30 p. m., appellant should have known whether or not his attorney could be present at that time, if he desired his presence. The affidavit of Caubu recites: "That said arbitrators met at said time and without any objection by Mr. Moore, proceeded to receive further testimony, offered by Mr. Moore; Mr. Moore conducted all of the examination of his witnesses and this to the exclusion of Mr. Harry J. Abraham (his attorney), though the latter was present during the greater part of said hearing." There is no showing in the affidavits of what occurred before Mr. Abraham arrived at the hearing, of what, if anything, Mr. Abraham would or could have done in the presentation of evidence to the arbitrators that was not done by Mr. Moore, nor of any prejudice suffered by appellant because of his attorney's absence from a portion of the hearing. On the record it is not made to appear that appellant suffered any prejudice by the refusal to continue the hearing.

[3] The arbitrator Thomas inspected the building, which was the subject of arbitration, in the absence of his fellow arbitrators and the parties. This, however, occurred before the making of the prior award which was vacated on July 15, 1941, and in stipulating to the further hearing before the same arbitrators on July 16, 1941, appellant must be held to have waived any objection on this ground.

The complaint that two arbitrators proceeded in the absence of the third is directed to the prior award which was vacated by the court. As to the award now before the court the affidavit of Caubu states: "Affiant states that all witnesses present at said hearing were heard; that all having been heard on motion of A. Grant Harris, the arbitrator appointed by Mr. Moore, the matter of the hearing be closed and in this motion the other two arbitrators agreed and unanimously ordered the matter closed and proceeded to sit together in judgment of the matter; that after deliberation the award was made. * * *"

[4] The claim that the arbitrators cut short the testimony of appellant and refused to hear another witness is contradicted by the evidence above quoted "that all witnesses present at said hearing were heard." Further there is no showing in appellant's affidavits of any fact or facts to which he or such witness would have testified. It is in-

cumbent on appellant to show that competent and material evidence was excluded. No such showing was made.

[5] Finally appellant complains of the refusal of the arbitrators to continue the hearing from July 16, 1941, for the purpose of compelling the attendance of respondent Griffith or taking his deposition. It does not appear that any showing was made before the arbitrators by affidavit or under oath of the materiality of any evidence expected to be given by this witness or of any diligence used to procure his attendance, nor that any request for time to prepare or present any such affidavit was made. "A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it." § 595, Code Civ.Proc.

The order appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concurred.

PENNSYLVANIA R. CO. v. MIDSTATE HORTICULTURAL CO., Inc.*

Civ. 2699.

District Court of Appeal, Fourth District, California.

April 16, 1942.

Rehearing Denied May 15, 1942.

Hearing Granted June 12, 1942.

1. Limitation of actions ⇨15, 175

Generally a debtor can "waive" a statute of limitations either by a sufficient writing or by failure to plead the statute as a defense to action against him.

See Words and Phrases, Permanent Edition, for all other definitions of "Waive".

2. Limitation of actions ⇨1

A statute that in itself creates a new liability, gives an action to enforce it unknown to the common law and fixes the time within which such action may be commenced, is a statute of creation rather than a "statute of limitations", and the commencement of the action within the time fixed is an inherent element of the right created no matter in what form an action to enforce the right is brought.

See Words and Phrases, Permanent Edition, for all other definitions of "Statute of Limitations".

3. Courts ⇨97(5)

The only federal decision on the construction to be given the Interstate Commerce Act as applied to the precise question presented by the case at bar and under exactly similar facts was entitled to due respect and consideration by California District Court of Appeal in determining whether shipper could by written agreement waive the limitation placed by the act on actions by carriers for recovery of their charges, even though decided by a United States District Court. Interstate Commerce Act § 16 (3) (a), 49 U.S.C.A. § 16(3) (a).

4. Common law ⇨14

General rule that there is no national common law in United States in the sense that there is a common law in the various states that have adopted it does not mean that the Federal Constitution and statutes are to be interpreted without reference to the rules of the common law.

5. Common law ⇨14

In determining the obligations assumed by a common carrier engaged in interstate commerce, the court has the right to apply the rules of the common law, unless such rules have been changed by competent legislative action.

6. Carriers ⇨26, 32(1)

Interstate Commerce Act was intended to limit the power of the common carriers to fix their rates and put an end to discrimination among and preferences to shippers and was enacted for the protection of the shipper rather than for the benefit of the carrier. Interstate Commerce Act § 1 et seq., 49 U.S.C.A. § 1 et seq.

7. Carriers ⇨196

The Interstate Commerce Act did not create in the common carrier a right of action to collect its transportation charges, where no part thereof had been paid, separate and distinct from the common law right to bring such action but merely recognized such right and limited recovery to the rates established by Interstate Commerce Commission. Interstate Commerce Act § 1 et seq., 49 U.S.C.A. § 1 et seq.

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* Subsequent opinion 131 P.2d 544.

8. Limitation of actions ⚷15

Railroad's right of action against shipper to recover transportation charges none of which had been paid was a right of action in contract given by the common law and not created by Interstate Commerce Act, and hence such right of action was not destroyed by lapse of the time limited in the act for commencement by carriers of actions for recovery of their charges, but such limitation was merely upon the remedy and might be "waived" by the carrier. Interstate Commerce Act § 1 et seq., and § 16(3) (a), 49 U.S.C.A. § 1 et seq., and § 16(3) (a).

9. Carriers ⚷35

A cause of action to recover the difference between an undercharge or an overcharge and the legal rate for transportation by interstate carriers fixed by the Interstate Commerce Commission is created by the Interstate Commerce Act and hence the limitation imposed by the act upon the time for commencing such action is a condition to maintaining the action and may not be "waived" by either carrier or shipper, since the lapse of time destroys the right of action itself. Interstate Commerce Act § 1 et seq., and § 16(3) (a), 49 U.S.C.A. § 1 et seq., and § 16(3) (a).

10. Carriers ⚷35

Under the federal rule there cannot be an "estoppel" against the collection of freight charges that will result in discriminations or preferences which will amount to rebates of legal freight charges. Interstate Commerce Act § 1 et seq., 49 U.S.C.A. § 1 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Estoppel".

SCHOTTKY, J., pro tem., dissenting.

◆

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by the Pennsylvania Railroad Company against Midstate Horticultural Company, Inc., to recover certain transportation charges. From an adverse judgment, defendant appeals.

Judgment affirmed.

Sullivan, Roche & Johnson, of San Francisco, and Kellas & Lamberson, of Fresno, for appellant.

W. H. Stammer and Galen McKnight, both of Fresno, for respondent.

MARKS, Justice.

The facts of this case are fairly and clearly stated in the opinion prepared by Mr. Justice pro tem. SCHOTTKY and need not be repeated here. He also cites the leading cases on the question presented though we believe a somewhat closer examination of some of them is advisable.

The sole question involved in this appeal is this: Can the limitation provided in sub-paragraph (a) of paragraph (3) of section 16 of the Interstate Commerce Act, vol. 49 U.S.C.A. § 16(3) (a), be waived by the shipper by a written agreement executed on sufficient consideration before the statute has run? This subsection, in effect at the time here involved, provided as follows:

"§ 16 * * * (3) Limitation of actions. (a) All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after."

[1] It is too well settled to need citation of supporting authority that, generally, a debtor can waive a statute of limitations either by a sufficient writing or by failure to plead it as a defense to the action against him.

[2] An important exception to this rule is clearly stated in 34 Am.Jur., page 16, as follows:

"A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right. Such a provision will control, no matter in what form the action is brought. The statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability. Whether an enactment is of this nature, or whether it is a statute of limitations, should be determined from a proper construction of its terms."

In Walsh v. Mayer, 111 U.S. 31, 4 S.Ct. 260, 262, 28 L.Ed. 338, it is held that where a right of action is created by statute and a limitation on the time in which to commence the action is imposed, the limitation is a condition attached to the right itself and is not a part of the law of remedy; that if the remedy "is not asserted within the permitted period, it ceases to exist, and cannot be claimed or enforced in any form." The same conclusions were reached in The Harrisburg (Lewis v. Rickards), 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358; Davis v. Mills, 194 U.S. 451, 24 S.Ct. 692, 48 L.Ed. 1067, and the same rule was announced in United States ex rel. Texas Portland Cement Co. v. McCord, 233 U.S. 157, 34 S.Ct. 550, 552, 58 L.Ed. 893, as follows:

"By this statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause of action did not exist before, and is the creature of the statute. The act does not place a limitation upon a cause of action theretofore existing, but creates a new one upon the terms named in the statute. The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well-settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself. Pollard v. Bailey, 20 Wall. 520, 526, 527, 22 L.Ed. 376, 378; Fourth Nat. Bank [of City of New York] v. Francklyn, 120 U.S. 747, 756, 7 S.Ct. 757, 30 L.Ed. 825, 829; Globe Newspaper Co. v. Walker, 210 U.S. 356, 28 S.Ct. 726, 52 L.Ed. 1096; United States to Use of Gibson Lumber Co. v. Boomer, [8 Cir.], 183 F. 726, 106 C.C.A. 164."

The cited authorities support the foregoing rule stating the exception to the general rule and it should not be necessary to review them in detail here.

It follows that the only question necessary for consideration is whether plaintiff's right of action to recover its bill for freight was created by the Interstate Commerce Act or whether it existed independent of that act.

[3] Counsel for both parties have been diligent in their search of the law and have cited a large number of cases. They agree that the case of Pennsylvania R. Co. v. Susquehanna Collieries Co., D.C., 23 F. 2d 499, is the only decided case with facts exactly paralleling those of the instant case. In no other case had the carrier and shipper signed a written contract in which the shipper expressly waived the statute of limitations set forth in the Interstate Commerce Act. While that case was decided by a United States District Court, it is entitled to due respect and consideration here as it is the only federal decision on the construction to be given the Interstate Commerce Act where the precise question is presented which confronts us and under exactly similar facts. In that case the court held that the right of action grew out of a contract and was not created by statute. Having reached that conclusion no other result could have been reached than to hold that the bar of the statute had been waived.

[4] While it is true that it is generally held that there is no national common law in the United States in the sense that there is a common law in the various states that have adopted it, this does not mean that the federal Constitution and statutes are to be interpreted without reference to the rules of the common law. Under this theory federal statutory construction has been so closely related to the rules of common law construction that in some cases it has been said that in this respect there is a national common law resting upon national authority.

[5] An instructive case on this question is Murray v. Chicago & N. W. R. Co., C.C., 62 F. 24, 42, written by a United States district judge who courageously refused to follow prior holdings of other courts on this question. That action was brought by a shipper to recover alleged discriminatory overcharges for freight shipped over a common carrier commencing in 1875 and continuing a number of years thereafter so the shipments were made before and after the adoption of the first Interstate Commerce Act on February 4, 1887. The action was commenced on August 25, 1892, and the court held all claims for

discriminatory overcharges paid prior to the statutory limitation period barred by the statute. In the course of the opinion it is said:

"In determining the obligations assumed by a common carrier engaged in interstate commerce, the court has the right to apply the rules of the common law, unless the same have been changed by competent legislative action, and therefore, in the present case, all shipments made before the adoption of the interstate commerce act are governed by the common law, and those made since the adoption of that act by the common law as modified by that act."

The opinion in the Murray case was expressly approved by the Supreme Court of the United States in Western Union Tel. Co. v. Call Publishing Co., 181 U.S. 92, 21 S.Ct. 561, 565, 45 L.Ed. 765, which was a case brought to recover discriminatory charges alleged to have been wrongfully collected by the common carrier for telegraphic services rendered. It was there said:

"But this question is not a new one in this court. In Interstate Commerce Commission v. Baltimore & O. R. Co., 145 U.S. 263, 275, 12 S.Ct. 844, 847, 36 L.Ed. 699, 704, 4 I.C.R. 92, 96, a case which involved interstate commerce, it was said by Mr. Justice Brown, speaking for the court:

"'Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act (24 Stat. at L. 379 chap. 104 [49 U.S.C.A. § 1 et seq.]), railway traffic in this country was regulated by the principles of the common law applicable to common carriers.'" See, also, Parkersburg & O. R. Transp. Co. v. Parkersburg, 107 U.S. 691, 2 S.Ct. 732, 27 L.Ed. 584; United States v. Wong Kim Ark, 169 U.S. 649, 18 S.Ct. 456, 42 L.Ed. 890; State of Kansas v. State of Colorado, 206 U.S. 46, 27 S.Ct. 655, 51 L.Ed. 956.

The conclusion follows from these cases that unless the Interstate Commerce Act created a right of action in the carrier to collect transportation charges, independent of the common law right of action to recover those charges on its written contract, if there was a bill of lading, or on an implied contract to pay for the services rendered, if there was no bill of lading, the limitation on the carrier's cause of action affected the remedy and not the right of action where, as here, the shipper had paid no part of the freight charges.

In considering this question it should not be out of place to consider the causes that led up to the enactment of the Interstate Commerce Act and the abuses it sought to correct before adverting to the provisions of the act itself. These are set forth at some length in the case of Texas & P. Ry. Co. v. Interstate Commerce Commission, 162 U.S. 197, 16 S.Ct. 666, 672, 40 L.Ed. 940. It is there said:

"While shippers of merchandise are under no legal necessity to use railroads, practically they are. The demand for speedy and prompt movement virtually forbids the employment of slow and old-fashioned methods of transportation, at least in the case of the more valuable articles of traffic. At the same time, the immense outlay of money required to build and maintain railroads, and the necessity of resorting, in securing the rights of way, to the power of eminent domain, in effect disable individual merchants and shippers from themselves providing such means of carriage. From the very nature of the case, therefore, railroads are monopolies, and the evils that usually accompany monopolies soon began to show themselves, and were the cause of loud complaints. The companies owning the railroads were charged, and sometimes truthfully, with making unjust discriminations between shippers and localities, with making secret agreements with some to the detriment of other patrons, and with making pools or combinations with each other, leading to oppression of entire communities.

"Some of these mischiefs were partially remedied by special provisions inserted in the charters of the companies, and by general enactments by the several states, such as clauses restricting the rates of toll and forbidding railroad companies from becoming concerned in the sale or production of articles carried, and from making unjust preferences. Relief, to some extent, was likewise found in the action of the courts in enforcing the principles of the common law applicable to common carriers,—particularly that one which requires uniformity of treatment in like conditions of service.

"As, however, the powers of the states were restricted to their own territories, and did not enable them to efficiently control the management of great corporations, whose roads extend through the entire country, there was a general demand that congress, in the exercise of its plenary power over the subject of foreign and interstate commerce, should deal with the evils complained of by a general enactment, and the statute in question was the result."

[6] The opinion goes on to consider the act itself and the conclusion is reached that it was intended to limit the power of the common carriers to fix their rates and to put an end to discriminations among and preferences to shippers. Thus the burden was placed on the carrier and the benefit was given to the shipper. This was recognized in Central R. Co. of New Jersey v. Anchor Line, 2 Cir., 219 F. 716, 135 C.C.A. 388, where it was held that the act was not for the benefit of the carrier but for the protection of the shipper.

[7] A study of the act leaves the conclusion that it lacks appropriate language to create in the common carrier a right of action to collect its transportation charges, where no part of them has been paid, separate and distinct from its common law right to bring such an action. Of course, such right of action is recognized, but hardly created, and recovery is limited to the rates established by the Interstate Commerce Commission.

[8] The conclusion follows that in a case such as we have here where no part of the transportation charges had been paid and the carrier brings its action to recover all of those charges based on rates established by the Interstate Commerce Commission, the cause of action is one in contract given by the common law to the carrier long before any Interstate Commerce Act was adopted and is not a right of action created by that act. Therefore the limitation in that act does not destroy the right of action by reason of lapse of time, but is merely a limitation on the remedy which may be waived by the shipper.

There is nothing in any of the cases cited to us that in any manner conflicts with this conclusion. With one exception all of those cases were either by the carrier to recover the difference between the rate paid by the shipper and the higher rate fixed by the commission or by the shipper to recover the difference between the rate paid by the shipper and the lower rate fixed by the commission. There was no such right of action known to the common law. The cause of action was created by statute.

A further ground of distinction between all of those cases and this case rests in the fact that there was no contract waiving the statute between the carrier and the shipper. The time fixed by the statute of limitations had run. The limitation was pleaded. The actions were held barred. No other results could have been expected under those circumstances. By what we have just said we do not intend to intimate that where there has been an under or over payment of the freight rates fixed by the Interstate Commerce Commission, a contract waiving the statute would be given effect. That question is not involved here.

It is at once apparent from this statement that none of those actions could have been maintained at common law. Under the common law the parties were bound by their contracts, the actions were upon those contracts and the amounts of recovery were fixed by those contracts.

The distinction here made is recognized in the case of Button v. Atchison, T. & S. F. Ry. Co., 8 Cir., 1 F.2d 709, which was an action by the carrier to recover the difference between an undercharge paid it by the shipper and rates fixed by the commission. The court said:

"It is plain upon these facts that at common law the carrier could not have recovered of the shipper any additional sum as freight. Its right to maintain the present suit is created by the Interstate Commerce Law (Comp.St. § 8563, et seq. [49 U.S.C.A. § 1 et seq.]). It arises out of the provision of that act which requires the carrier to collect, and the shipper to pay, the full charge named in the tariffs filed by the carrier with the Interstate Commerce Commission. Pittsburgh [C., C. & St. L.] R. Co. v. Fink, 250 U.S. 577, 581, 40 S.Ct. 27, 63 L.Ed. 1151; New York Central & H. R. R. Co. v. York & Whitney Co., 256 U.S. 406, 408, 41 S.Ct. 509, 65 L.Ed. 1016."

The one case cited in which it does not appear that the carrier brought the action to recover the difference between the undercharge paid by the shipper and the rate fixed by the commission is Galveston, H. & S. A. R. Co. v. Webster Co., D.C., 27 F. 2d 765. From the facts set forth in the opinion this question cannot be determined.

As the question presented here was not considered there we cannot regard that case as conflicting with the conclusions reached here.

[9] The distinction between the two lines of cases may be briefly summarized. When no part of the freight has been paid the action is on the contract and is based in the common law and is not created by statute. In those cases the effect of the statute important here is to fix the amount of recovery. When the action is to recover the difference between an undercharge or an overcharge and the legal rates fixed by the Interstate Commerce Commission, the right of action is created by the statute as no such cause of action existed at the common law. In the first case where no part of the freight had been paid the limitation is on the remedy only and does not extinguish the cause of action so it may be waived by the parties to the contract. In the second case where part of or more than the rates established by the Interstate Commerce Commission have been paid, the cause of action is created by the statute and the limitation is a condition to maintaining the action and lapse of time destroys the right of action.

To advert again to the purposes of the Interstate Commerce Act we quote from A. J. Phillips Co. v. Grand Trunk Western Railway Co., 236 U.S. 662, 35 S.Ct. 444, 446, 59 L.Ed. 774, as follows:

> "To have one period of limitation where the complaint is filed before the Commission, and the varying periods of limitations of the different states, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some, and to waive it as against others, would be to prefer some and discriminate against others, in violation of the terms of the commerce act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments, or the waiver of defenses open to the carrier."

If the purpose of the Interstate Commerce Act is to prohibit unjust discrimination by the carrier and to protect the shipper, then certainly the judgment in this case should be affirmed. To do otherwise would be to permit a carrier to give preference to a large shipper by the very procedure here followed. It would not only open the gate but would signpost the way to discriminations and preferences.

[10] Defendant in its brief virtually has conceded that there was no error in sustaining the demurrer to its fourth affirmative defense, so that question need not be considered except to say that under the federal rule governing these actions it seems to be established that there cannot be an estoppel against the collection of freight charges that will result in discriminations or preferences which will amount to rebates of legal freight charges.

The judgment is affirmed.

BARNARD, P. J., concurred.

SCHOTTKY, Justice pro tem. (dissenting).

I dissent:

Appellant shipper appeals from a judgment in favor of respondent railroad company in an action to recover transportation charges for grapes shipped by appellant during the 1932 season from points in Fresno County, California, to a consignee in the city of New York. There is little dispute as to the facts and I will summarize them briefly.

During October and November, 1932, appellant, as shipper and consignor, shipped from points in Fresno County over the various lines of connecting railroads, including those of respondent, a number of cars of fresh grapes, which were consigned to and delivered to the consignee Jerome Distributing Company (hereinafter called Jerome Company). None of the transportation charges were prepaid. At the time of the delivery of the grapes, the transportation charges were neither demanded by respondent nor paid by the Jerome Company. On November 19, 21 and 22, 1932, the Jerome Company delivered to respondent three checks covering the transportation charges involved in this action, and other items not involved here, and respondent receipted the freight bills and delivered said receipted bills to Jerome Company which, within a few days thereafter transmitted them to appellant. These checks were not paid and respondent endeavored unsuccessfully to enforce payment on them from the Jerome Company. Appellant did not learn until the summer of 1933 that the Jerome Company had failed to meet the transportation charges. Shortly before the expiration of three years after delivery to Jerome Company of the various shipments of grapes, demand was made upon appellant for the unpaid transportation charges and litigation threatened unless payment was made. In order to enable appellant to make such investigation as it deemed essential with respect to the basis of respondent's claim, and to avoid the immediate commencement of the threatened action, appellant, on October 25, 1935, signed and delivered to respondent an extension of time for the bringing of such action. This agreement recited that appellant agreed that respondent was urging against appellant a claim for certain specified transportation charges; that respondent proposed to bring suit against appellant; that appellant desired additional time to investigate and consider the claim, and requested respondent to withhold filing suit until January 1, 1936; that respondent, in the hope that appellant would conclude to pay without litigation, was willing to defer commencement of suit until January 1, 1936; and said agreement then concluded as follows:

"Now, therefore, in consideration of the forebearance of The Pennsylvania Railroad Company to bring such a suit against the Mid State Horticultural Company, Inc. prior to October 28, 1935, the said Mid State Horticultural Company, Inc. hereby agrees that if and when The Pennsylvania Railroad Company may find it necessary to bring such an action, it, the said Mid State Horticultural Company, Inc., will not plead in any such suit the defense of any general or special statute of limitations.

"This agreement is not an admission of the alleged debt by the Mid State Horticultural Company, Inc., and is made without prejudice to any other defenses which the said Mid State Horticultural Company, Inc. may have to said claim."

Appellant notified respondent prior to January 1, 1936, that it would not pay said transportation charges and the action was filed on December 31, 1935.

Appellant in its amended answer to the amended complaint set up the provisions of section 16(3) (a) of the Interstate Commerce Act, contending that the three-year lapse of time before suit was commenced destroyed the right asserted by respondent to recover the transportation charges, and deprived the court of jurisdiction, notwithstanding the agreement hereinbefore referred to; and appellant further set up in its fourth affirmative defense the facts relied upon by it to establish that respondent, by its silence respecting the Jerome Company's failure to meet the transportation charges, which silence continued during the period in which appellant ignorantly settled its account with the Jerome Company, estopped respondent to look to appellant for payment thereafter. The trial court sustained respondent's demurrer to the fourth affirmative defense and granted respondent's demurrer to strike out said defense.

Appellant's principal contention is that the trial court erred in giving effect to the extension agreement of October 25, 1935, which appellant contends, "was void and of no effect and could not and did not serve to avoid the operation of the limitation provision of the Interstate Commerce Act, which upon the expiration of the three-year period, destroyed the liability of appellant and deprived the court of jurisdiction of this action." Appellant contends further that "irrespective of how our primary contention that the action is governed by the limitation of section 16(3) (a) may be determined upon this appeal, the inconsistency between the trial court's conclusion with respect to that proposition and its exclusion of the defense of estoppel must compel a reversal of the judgment, so that if, as the trial court necessarily held, the action was not barred by limitation, the defendant and appellant may be afforded an opportunity to establish the defense of estoppel."

By the enactment of the Interstate Commerce Act, Congress assumed exclusive jurisdiction over interstate carriers and shipments. As was said by the Supreme Court of the United States in the case of Adams Express Co. v. Croninger, 226 U.S. 491, 33 S.Ct. 148, 152, 57 L.Ed. 314, 44 L.R.A.,N.S., 257:

"That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist."

And as stated by our own Supreme Court in New York Central R. Co. v. Frank H. Buck Co., 2 Cal.2d 384, 41 P.2d 547, 549: "The shipments being interstate, the rights and liabilities of the parties are governed by the acts of Congress as interpreted by the federal tribunals. Cincinnati, N. O. & T. P. R. Co. v. Rankin, 241 U.S. 319, 36 S.Ct. 555, 60 L.Ed. 1022, L.R.A.1917A, 265."

It is apparent from the act itself and from the decisions rendered since its enactment, that the principal purposes sought to be achieved by the enactment of the Interstate Commerce Act were to secure just and reasonable charges for transportation, to prohibit unjust discrimination in the rendition of like services under similar circumstances and conditions, and to prevent preferences to and discriminations among persons, firms, corporations and localities.

As was well said in the case of L. M. Kirkpatrick Co. v. I. C. R. Co., 190 Miss. 157, 195 So. 692, 693, 135 A.L.R. 607: "The outstanding purpose of the Commerce Act was to absolutely uproot and destroy all discriminations in interstate commerce regardless of how conceived or by what plan, scheme or device they may be sought to be accomplished. To that end, the carrier is without power to waive any valid provision of the contract constituting a defense."

Appellant's position is as follows: First, respondent's cause of action is one created by the Interstate Commerce Act, and as such is destroyed by the lapse of time provided in section 16, paragraph (3) (a). Therefore, it is beyond the power of the parties to waive those provisions, and the court lacked jurisdiction to enforce payment of the freight charges. Respondent's answer to this argument is that the cause of action is not one created by the Interstate Commerce Act, but is a common law action based upon a contract of shipment between the parties; that as to such a cause of action, section 16, paragraph (3) (a), is a mere statute of limitations and may be waived.

Appellant's second position is that to permit a waiver of section 16, paragraph (3) (a), invites discriminations and preferences, and therefore any such attempted waiver is illegal and void. Respondent's answer to this argument is that the agreement resulted in no discrimination; that if any preference could be said to have resulted from such waiver, it was not an undue or unreasonable preference forbidden by the act; and that to permit appellant thus to entirely avoid payment of the freight charges would result in the most exaggerated and reprehensible type of discrimination which the act seeks to prevent.

We believe it may fairly be stated that the right of a transportation company engaged in interstate commerce to collect its transportation charges existed prior to the Interstate Commerce Act, and that in that sense it was not created by the act, but it must also be stated that a transportation company engaged in interstate commerce cannot enter into a contract for transportation except upon the rates, terms and conditions set forth in the act, and that the act, and every part thereof, must be considered a part of the contract.

In the case of Chicago & N. W. Ry. Co. v. J. I. Case Plow Works, 173 Wis. 237, 180 N.W. 846, 847, the court said: "The right to private contract between shipper and carrier is wholly abrogated by the Interstate Commerce Act, and the rates fixed by law are enforceable by the carrier by force of law."

And in Chicago, I. & L. Co. v. Peterson, 168 Wis. 193, 169 N.W. 558, 559, the court said: "The relations between common carriers and shippers are no longer mere matters of contract, but are fixed by the laws and rules regulating such interstate commerce and partake of the nature of statutory obligations." (Citing cases.)

We are, therefore, unable to agree with the respondent's contention that respondent's cause of action is not one created by the Interstate Commerce Act but is a common-law action of shipment between the parties, because it is clear to us that under the authorities the cause of action as it existed and as it must necessarily be enforced, was one created by said act. But whether it is considered that the cause of action is one at common law, or is one created by the Interstate Commerce Act, we think it must be conceded that section 16(3) (a) of the act applies to this action, because it is certainly an action at law by a carrier, subject to the act, for the recovery of its charges.

One of the things that we must decide is the proper interpretation of section 16(3) (a) which reads as follows: "All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after."

If said provision is a mere statute of limitations, then, in accordance with the general rule that such a statute may be waived, it must be held in this case that appellant by said written waiver extended the time for filing the action. If, on the other hand, the section must be construed to mean that upon the expiration of three years from the delivery of the shipments involved, the right to collect charges thereon was utterly destroyed by operation of the section, and thereafter the court lacked jurisdiction to enforce the payment of such charges, then such written waiver could not confer jurisdiction upon the court, and appellant would not be estopped from relying upon such defense by reason of such waiver.

In construing and interpreting the statute, the purpose sought to be accomplished must always be kept in mind, and the various provisions of the statute should be construed and interpreted with due regard to the manifest purpose of the entire statute. In the construction of an act of Congress we must, of course, look to and be guided by the decisions of our federal courts, and we will therefore refer to a number of such decisions.

Before doing so we think it proper to state that while subdivision (a) of paragraph (3) of section 16 is the only part of said paragraph applicable to this case, it is to be noted that with respect to each type of action referred to in said paragraph (3), the same language as to limitation, namely, "within three years * * * and not after," is used except as to time, because some of the decisions that will be referred to deal with other subdivisions of the paragraph.

In the case of A. J. Phillips Co. v. Grand Trunk W. R. Co., 236 U.S. 662, 35 S.Ct. 444, 445, 59 L.Ed. 774, the Supreme Court of the United States said: "It is argued, however, that under the conformity act (Rev.Stat. § 914, Comp.Stat.1913, § 1537 [28 U.S.C.A. § 724]), the case is to be governed by the Michigan practice, which does not permit a defendant to take advantage of the statute of limitations by a general demurrer to the declaration. But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years, and not after. Under such a statute the lapse of time not only bars the remedy, but destroys the liability (Finn v. United States, 123 U.S. 227, 232, 8 S.Ct. 82, 31 L.Ed. 128, 130), whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. This will more distinctly appear by considering the requirements of uniformity which, in this, as in so many other instances, must be borne in mind in construing the commerce act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law, and to treat all shippers alike, would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period."

In the case of Kansas City Southern Ry. Co. v. Wolf, 261 U.S. 133, 43 S.Ct. 259, 261, 67 L.Ed. 571, the Supreme Court, referring to the Phillips case, supra, said:

"True it is that the claim of Phillips & Co. was based upon schedule tariff charges theretofore declared to be unreasonable by the Interstate Commerce Commission, while here the payments demanded are said to exceed the published rates when properly applied. But the doctrine of the Phillips case and the reasoning advanced to support it, we think, are applicable to the circumstances of the instant cause. The lapse of time had destroyed any liability by the carrier to the shipper or his assignee for the alleged overcharges, and the demurrer should have been sustained."

In the case of William Danzer & Co. v. Gulf & S. I. R. Co., 268 U.S. 633, 45 S.Ct. 612, 613, 69 L.Ed. 1126, it was said: "It is settled by the decisions of this court that the lapse of time not only barred the remedy, but also destroyed the liability of defendant to plaintiff. [A. J.] Phillips

Co. v. Grand Trunk W. R. Co., 236 U.S. 662, 666, 35 S.Ct. 444, 59 L.Ed. 774; [U.S. ex rel.] Louisville Cement Co. v. Interstate Commerce Commission, 246 U.S. 638, 642, 38 S.Ct. 408, 62 L.Ed. 914; Kansas City Southern Ry. v. Wolf, 261 U.S. 133, 139, 43 S.Ct. 259, 67 L.Ed. 571. On the expiration of the two-year period, it was as if liability had never existed."

The case of Galveston, H. & S. A. R. Co. v. Webster Co., D.C., 27 F.2d 765, was an action by a carrier to recover charges from a shipper and his surety, and the defendants relied upon the provisions of section 16(3) (a). The court said, at page 766 of 27 F.2d: "The single subject-matter of the suit is the recovery by the carrier of its charges for freight in interstate transport. Its right to sue is given by the Interstate Commerce Acts. The federal law governs. That statute provides something more than a limitation of the time within which suit is to be brought. By its terms, failure to sue within the time fixed absolutely destroys further right of action. There can be no saving exception accorded the surety by the local law. Principal and surety stand on the same footing in this case. The action is destroyed by the supreme law. The cause of action no longer exists against either principal or surety."

In the case of Button v. Atchison, T. & S. F. R. Co., 1 F.2d 709, at pages 711, 712, likewise an action by a carrier to recover charges from a shipper, the Circuit Court of Appeals, Eighth Circuit, said: "There is another ground upon which the case may be rested. Plaintiff's right of action is given by statute. It was not created for its enrichment but to protect the public against secret rebates and discriminations. It is not a right of contract or of property. The right, therefore, is at all times under the full control of the legislature. It may limit it in any way without impairing any constitutional right of the plaintiff. [Citing cases] * * *

"As to such a right the time limited for its enforcement is a constituent part of the right itself. The lapse of time not only bars the remedy, but destroys the liability. Theroux v. Northern P. R. Co. [8 Cir.], 64 F. 84, 12 C.C.A. 52; [A. J.] Phillips Co. v. Grand Trunk [Western] R. Co., 236 U.S. 662, 667, 35 S.Ct. 444, 59 L. Ed. 774; Kansas City S. Ry. Co. v. Wolf, 261 U.S. 133, 43 S.Ct. 259, 67 L.Ed. 571."

In the most recent case upon this subject, Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 7 Cir., 88 F.2d 459, 461, the court said:

"As to the third count, which was in the form of the consolidated common counts, the court overruled the demurrer, and the case went to trial on this count before a different judge. The facts were stipulated. Appellant again pleaded the statute of limitations, and the court held that it was estopped from setting up this defense inasmuch as it was at its own request that the question was submitted to the Commission, thereby causing the period to run while it was there pending. Judgment was thereupon rendered in favor of the carrier, and from that judgment this appeal is prosecuted by the shipper.

"Section 16(3) of the Interstate Commerce Act, 49 U.S.C.A. § 16(3), lays down certain rules as to limitations of actions, providing, inter alia, that 'All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.' 49 U.S.C.A. § 16(3) (a). The Supreme Court has in numerous cases construed these limitations as jurisdictional, and held that the lapse of time not only bars the remedy but also destroys the liability. See A. J. Phillips Co. v. Grand Trunk Western R. Co., 236 U.S. 662, 35 S.Ct. 444, 59 L.Ed. 774; Kansas City Southern R. Co. v. Wolf, 261 U.S. 133, 43 S.Ct. 259, 67 L.Ed. 571; William Danzer & Co. v. Gulf & S. I. R. Co., 268 U.S. 633, 45 S.Ct. 612, 69 L.Ed. 1126; United States ex rel. Louisville Cement Co. v. I. C. C., 246 U.S. 638, 38 S.Ct. 408, 409, 62 L.Ed. 914. In the last named case, the Court said '* * * the two-year provision of the act is not a mere statute of limitation, but is jurisdictional—is a limit set to the power of the Commission as distinguished from a rule of law for the guidance of it in reaching its conclusion.' This being true, we think that the defense of limitations was not subject to estoppel, and that it could properly be raised by demurrer or plea, and even if appellant had failed to plead it, it would not thereby have conferred jurisdiction upon the court over the claim which had already been barred at the time the action was brought. Cf. Pennsylvania R. Co. v. Carolina Portland Cement Co. [4 Cir.], 16 F.2d 760; Arkansas Fertilizer Co. v. United States, Com.Ct.

193 F. 667." See, also, Pennsylvania R. Co. v. Carolina-Portland Cement Co., 4 Cir., 16 F.2d 760; Louisville & Nashville R. Co. v. Cory, 6 Cir., 54 F.2d 8; Zang v. Railway Express Co., 130 Ohio St. 17, 196 N.E. 901.

Respondent, in reply to the foregoing authorities cited by appellant, asserts correctly that not one of such cases involves an action by a carrier to recover freight or demurrage charges in which the shipper has waived or extended the provisions of section 16, paragraph (3) (a), and respondent cites the case of Pennsylvania R. Co. v. Susquehanna Collieries Co., D.C., 23 F.2d 499, as being the only decision on the precise facts, and contends that that decision should amount to binding authority upon this court. In view of the fact that practically the entire argument of respondent is based upon this case, we will quote the brief opinion in full:

"Westenhaver, District Judge. This cause is before me on defendant's demurrer to plaintiff's petition. Plaintiff's action is to recover demurrage charges. The point urged in support of the demurrer is that paragraph 3, § 16, of the Interstate Commerce Act, as amended by Transportation Act 1920, § 424 (Comp.St. § 8584 [49 U.S.C.A. § 16(3)]), requires that all actions at law by carriers subject to that act for the recovery of their charges or any part thereof shall be begun within three years from the time the cause of action accrues and not after. Plaintiff's action was not commenced within three years. In excuse, it is pleaded that within three years, and before the cause of action was barred, plaintiff and defendant entered into an agreement to waive the defense of the statute of limitations on condition that suit should not be brought within the statutory period, and that this agreement is still open and subsisting. Plaintiff admits that under the Ohio practice the defense of the statute of limitations may be made by demurrer, if, on the allegations of the petition, the statute is applicable.

"Defendant urges that the right to recover demurrage charges is a right conferred by statute, to which is annexed as a condition that suit to recover must be brought within the statutory period, and hence that the right of action is barred, and cannot be prolonged or kept alive by an agreement such as would apply to an ordinary action.

"Upon due consideration, I am of opinion that plaintiff's action to recover demurrage charges is not a right conferred by the Interstate Commerce Act, and is not within the authorities relied on by defendant. On the contrary, I am of opinion that plaintiff's right of action grows out of contract. This is none the less true, even though demurrage charges, like tariff rates, must be prescribed in a tariff filed with the Interstate Commerce Commission, and cannot be departed from or varied by the parties, either before or after the service is performed. The cases cited, arising under other provisions of the same section, have no application. In those cases the right of action did not grow out of contract, but out of the statute. No right of action existed except until and as the Interstate Commerce Commission made a finding of certain facts.

"In view of this conclusion, it is unnecessary to consider whether a right created by statute, with a condition annexed that it shall be enforced within a limited period, as suits for wrongful death, or actions on a reparation award of the Interstate Commerce Commission, may be kept alive by a voluntary agreement of the parties. It is difficult, however, to perceive any sound reason why it may not. Certainly none of the cases cited so hold.

"The demurrer will be overruled, and an exception may be noted."

The decision just quoted was rendered by the District Court, Northern District of Ohio. No authority is cited in the opinion and there is no reference to any of the decisions of the United States Supreme Court hereinbefore cited. The author of the opinion held that the right to sue for demurrage charges was not a right conferred by the Interstate Commerce Act but was a right which accrued out of contract, and that the statute of limitations could be waived. The opinion does not discuss the object intended to be achieved by the statute and emphasized in other decisions. It is worthy of note that this case has not been cited in any subsequent case.

We are convinced from the authorities that the conclusion reached by the court in the Susquehanna case is opposed to the great weight of authority. We believe that it was the intention of Congress in fixing the limitation of "within three years * * * and not after" to guard against the circumvention of one of the chief purposes sought to be achieved by the enactment of the Interstate Commerce Act, namely, the prevention of preferences and discriminations among persons, firms, corporations and localities. We believe further that under the decisions of the United States Supreme Court and various United States circuit courts and district courts, we are compelled to hold that when Congress provided in the Interstate Commerce Act that "all actions at law by carriers subject to this chapter for recovery of their charges, * * * shall be begun within three years from the time the cause of action accrues, and not after," it meant that carriers should not grant preferences for delaying for a long period of time the enforcement of the payment of charges, and therefore intended to provide, and did provide, that unless the action was commenced within the three-year period, the carrier would lose the right to collect them by action. In construing this section we must have in mind the paramount purpose of the Interstate Commerce Act, and when we have that purpose in mind that it was an act to protect the public against rebates and discriminations, it is not difficult to understand why the federal courts have, with the single exception of the Susquehanna case, held that the period provided for the commencement of actions thereunder was different from the ordinary statute of limitations created for the benefit of the debtor, who could waive it, because it was simply a matter which concerned the parties to the action.

It may be that in some cases the waiver of the statute will not result in undue or unreasonable preference or discrimination. However, that is a question that goes to the wisdom or policy of the act, and, as was said by Mr. Justice Field, later a justice of the Supreme Court of the United States, in Ex parte Newman, 9 Cal. 502, 520, "It is not the province of the judiciary to pass upon the wisdom and policy of legislation; and when it does so, it usurps a power never conferred by the Constitution."

We conclude, therefore, that under the provisions of section 16(3) (a), upon the expiration of the period therein prescribed within which action must be taken by the carrier, the cause of action is destroyed and the court's jurisdiction over the matter is terminated; and that neither the carrier nor the shipper can legally waive the provisions of said section, nor extend the period within which an action must be instituted, and that any such waiver or agreement to forbear is contrary to the plain policy of the act and is therefore against public policy and void.

It follows that the trial court erred in giving effect to the extension agreement of October 25, 1935, and in holding that plaintiff was entitled to judgment.

In view of the fact that appellant concedes that under the authorities the trial court was correct in its view that a shipper cannot assert an estoppel against a claim for transportation charges, it is unnecessary to discuss the question as to whether or not the court erred in sustaining respondent's demurrer to appellant's fourth affirmative defense and in striking out said defense.

In view of the foregoing the judgment should be reversed.